APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-2248

Kristin Worth, et al.

Appellees

v.

Bob Jacobson, in his individual capacity and in his official capacity as Commissioner of the Minnesota Department of Public Safety

Appellant

Kyle Burton, in his individual capacity and in his official capacity as Sheriff of Mille Lacs County, Minnesota, et al.

Everytown for Gun Safety, formerly known as Everytown for Gun Safety Action Fund, et al.

Amici on Behalf of Appellant(s)

National Rifle Association of America, Inc.

Amicus on Behalf of Appellee(s)

Appeal from U.S. District Court for the District of Minnesota
(0:21-cv-01348-KMM)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

August 21, 2024

Order Entered at the Direction of the Court:
Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Maureen W. Gornik

United States Court of Appeals
For The Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

Maureen W. Gornik
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July 16, 2024

Elizabeth Catherine Kramer
ATTORNEY GENERAL'S OFFICE
Suite 1400
445 Minnesota Street
Saint Paul, MN 55101-2131

RE: 23-2248 Kristin Worth, et al v. Bob Jacobson

Dear Counsel:

The court has issued an opinion in this case. Judgment has been entered in accordance with the opinion.

Please review Federal Rules of Appellate Procedure and the Eighth Circuit Rules on post-submission procedure to ensure that any contemplated filing is timely and in compliance with the rules. Note particularly that petitions for rehearing and petitions for rehearing en banc must be received in the clerk's office within 14 days of the date of the entry of judgment. Counsel-filed petitions must be filed electronically in CM/ECF. Paper copies are not required. Except as provided by Rule 25(a)(2)(iii) of the Federal Rules of Appellate Procedure, no grace period for mailing is allowed. Any petition for rehearing or petition for rehearing en banc which is not received within the 14-day period for filing permitted by FRAP 40 may be denied as untimely.

Maureen W. Gornik
Acting Clerk of Court

HAG

Enclosure(s)

cc: William V. Bergstrom
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Veronica E. Callahan
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Clerk, U.S. District Court, District of Minnesota
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Samuel Williams
Abby Wright

District Court/Agency Case Number(s): 0:21-cv-01348-KMM

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July 16, 2024

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RE: 23-2248 Kristin Worth, et al v. Bob Jacobson

Dear Sir or Madam:

A published opinion was filed today in the above case.

Counsel who presented argument on behalf of the appellant and appeared on the brief was Elizabeth Catherine Kramer, AAG, of Saint Paul, MN. The following attorney(s) also appeared on the appellant brief; Amanda E. Prutzman, AAG, of Saint Paul, MN.

Counsel who presented argument on behalf of the appellees and appeared on the brief was Peter A. Patterson, of Washington, DC. The following attorney(s) also appeared on the appellees' brief; David H. Thompson, of Washington, DC, William V. Bergstrom, of Washington, DC, Blair W. Nelson, of Bemidji, MN.

The following attorney(s) appeared on the amicus brief of Everytown for Gun Safety on behalf of appellant; Janet R. Carter, of New York, NY, William James Taylor, Jr., of New York, NY, Kari L. Still, of New York, NY.

The following attorney(s) appeared on the amicus brief of the United States on behalf of appellant; Mark B. Stern, U.S. Dept. of Justice, of Washington, DC, Abby Wright, U.S. Dept. of Justice, of Washington, DC, Courtney Dixon, U.S. Dept. of Justice, of Washington, DC.

The following attorney(s) appeared on the amicus brief of the states of Illinois, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Maryland, Massachusetts, Michigan, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont and Washington on behalf of appellant; Sarah A. Hunger, AAG, of Chicago, IL, Alex Hemmer, AAG, of Chicago, IL.

The following attorney(s) appeared on the amicus brief of Giffords Law Center to Prevent Gun Violence on behalf of appellant; Kelly Percival, of San Francisco, CA, Sophie A. Kivett, of New York, NY, Esther Sanchez-Gomez, of San Francisco, CA, Robert A. Sacks, of New York, NY, Leonid Traps, of New York, NY, Elizabeth A. Rose, of Washington, DC, Madeline B. Jenks, of Washington, DC.

The following attorney(s) appeared on the amicus brief of March of Our Lives, Foundation on behalf of appellant; Sophie A. Kivett, of New York, NY.

The following attorney(s) appeared on the amicus brief of Brady Center to Prevent Gun Violence on behalf of appellant; Douglas Neal Letter, of Washington, DC, Sophie A. Kivett, of New York, NY, Shira Lauren Feldman, of Washington, DC.

The following attorney(s) appeared on the amicus brief of Holly Brewer on behalf of appellant: Daniel M. Meyers, of Chicago, IL, Lindsay N. H. Strong, of Chicago, IL, Naomi Biden, of Chicago, IL, Samuel Williams, of Chicago, IL, Veronica E. Callahan, of Chicago, IL.

The following attorney(s) appeared on the amicus brief of National Rifle Association of America, Inc. on behalf of appellees; Erin M. Erhardt, of Fairfax, VA, Michael Jean, of Columbus, OH.

The judge who heard the case in the district court was Honorable Katherine M. Menendez.

If you have any questions concerning this case, please call this office.

Maureen W. Gornik
Acting Clerk of Court

HAG

Enclosure(s)

cc: MO Lawyers Weekly

District Court/Agency Case Number(s): 0:21-cv-01348-KMM

United States Court of Appeals
For the Eighth Circuit

No. 23-2248

Kristin Worth; Austin Dye; Axel Anderson; Minnesota Gun Owners Caucus; Second Amendment Foundation; Firearms Policy Coalition, Inc.

Plaintiffs - Appellees

v.

Bob Jacobson, in his individual capacity and in his official capacity as Commissioner of the Minnesota Department of Public Safety

Defendant - Appellant

Kyle Burton, in his individual capacity and in his official capacity as Sheriff of Mille Lacs County, Minnesota; Dan Starry, in his individual capacity and in his official capacity as Sheriff of Washington County, Minnesota; Troy Wolbersen, in his individual capacity and in his official capacity as Sheriff of Douglas County, Minnesota

*Defendant*s

Everytown for Gun Safety, formerly known as Everytown for Gun Safety Action Fund; United States; State of Illinois; State of Arizona; State of California; State of Colorado; State of Connecticut; State of Delaware; District of Columbia; State of Hawaii; State of Maryland; State of Massachusetts; State of Michigan; State of New Jersey; State of New Mexico; State of New York; State of North Carolina; State of Oregon; State of Pennsylvania; State of Rhode Island; State of Vermont; State of Washington; Giffords Law Center to Prevent Gun Violence; March For Our Lives Foundation; Brady Center to Prevent Gun Violence; Holly Brewer

Amici on Behalf of Appellant(s)

National Rifle Association of America, Inc.

Amicus on Behalf of Appellee(s)

Appeal from United States District Court
for the District of Minnesota

Submitted: February 13, 2024
Filed: July 16, 2024

Before SMITH, Chief Judge,[1] BENTON, and STRAS, Circuit Judges.

BENTON, Circuit Judge.

Minnesota's permit-to-carry statute, among its objective criteria, requires applicants to be at least 21 years old. Three gun rights organizations—the Second Amendment Foundation, the Firearms Policy Coalition, Inc., and the Minnesota Gun Owners Caucus, through their members Kristin Worth, Austin Dye, Alex Anderson, and Joe Knudsen—challenge this age restriction for violating the Second and Fourteenth Amendments to the United States Constitution. The district court[2] granted summary judgment to the Plaintiffs, finding the Second Amendment's plain text covered their conduct and that the Government did not meet its burden to demonstrate that restricting 18 to 20-year-olds' right to bear handguns in public was consistent with this Nation's historical tradition of firearm regulation. Minnesota appeals. Having jurisdiction under 28 U.S.C. § 1291, this court affirms.

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[1]Judge Smith completed his term as chief judge of the circuit on March 10, 2024. *See* 28 U.S.C. § 45(a)(3)(A).

[2]The Honorable Katherine M. Menendez, United States District Judge for the District of Minnesota.

I.

The Minnesota Citizens' Personal Protection Act of 2003 criminalized carrying handguns by ordinary people (non-peace officers) in "a public place," unless they have a permit-to-carry. **Minn. Stat. § 624.714, subd. 1a**. To get a permit-to-carry, among other objective criteria, an applicant must be "at least 21 years old." **Id. at subd. 2(b)(2)**. State law, since 2003, therefore, bans those under 21 years old from carrying handguns in public ("the Carry Ban").

The individual plaintiffs wish to carry handguns in public. The district court found: "Except for failing to meet the age requirement," they were "otherwise eligible to receive a permit to carry a pistol in Minnesota." ***Worth v. Harrington***, 666 F. Supp. 3d 902, 908 (D. Minn. 2023). The organizational plaintiffs collectively have thousands of members in Minnesota.

The Plaintiffs sued the Commissioner of the Minnesota Department of Public Safety (the permitting scheme's state administrator) and the Sheriffs of Mille Lacs County, Douglas County, and Washington County (local adjudicators of permit applications) in their official capacities.[3] The Plaintiffs allege Minnesota's statute is unconstitutional, facially and as applied to the individual plaintiffs.

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[3]The Commissioner tries to invoke sovereign immunity. *See* ***Ex parte Young***, 209 U.S. 123, 156 (1908). If sovereign immunity applies, then this court must dismiss the claims against the Commissioner for lack of subject-matter jurisdiction. *See* ***Seminole Tribe of Fla. v. Fla.***, 517 U.S. 44, 75-76 (1996). Under *Ex Parte Young*, Eleventh Amendment sovereign immunity does not apply and "a private party can sue a state officer in his official capacity to enjoin a prospective action that would violate federal law." ***281 Care Comm. v. Arneson***, 638 F.3d 621, 632 (8th Cir. 2011). For a defendant "to be amenable for suit challenging a particular statute the [defendant] must have some connection with the enforcement of the act." ***Id.*** (internal quotations omitted); ***Calzone v. Hawley***, 866 F.3d 866, 869 (8th Cir. 2017) (same). The district court properly found the Commissioner had some connection with enforcing the statutory scheme. The Commissioner, under the Minnesota permit statute, has several duties connected with the statute's enforcement: making application forms available on the internet, providing relevant data to Sheriffs, and

Specifically, the Plaintiffs asked for the following relief:

a) Declare that Minn. Stat. § 624.714, subd. 1a and § 624.714, subd. 2(b)(2), their derivative regulations, and all related laws, policies, practices, and customs violate—facially, as applied to otherwise qualified 18–20-year-olds, or as applied to otherwise qualified 18–20-year-old women—the right of Plaintiffs and Plaintiffs' similarly situated members to keep and bear arms as guaranteed by the Second Amendment and Fourteenth Amendments to the United States Constitution; [and]

b) Enjoin Defendants, their officers, agents, servants, employees, and all persons in active concert or participation with him from enforcing, against Plaintiffs and Plaintiffs' similarly situated members Minn. Stat., § 624.714, subd. 1a and § 624.714, subd. 2(b)(2), their derivative regulations, and all related laws, policies, practices, and customs that would impede or criminalize Plaintiffs and Plaintiffs' similarly situated members' exercise of their right to keep and bear arms.

Worth, 666 F. Supp. 3d at 926-27.

The district court applied the two-part test in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1, 17 (2022): (1) a textual analysis of the Second Amendment and (2) a historical analysis of the Nation's tradition of firearm regulation. *See* ***Worth***, 666 F. Supp. 3d at 910. The district court ruled that the plain text of the Second Amendment covered the Plaintiffs' conduct because 18 to 20-

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collecting processing and renewal fees. **Minn. Stat. § 624.714, subd. 3**. The Commissioner is also required to adopt statewide standards governing the form and contents of all permit-to-carry applications. **Minn. Stat. § 624.7151**. In fact, the applications require the applicants to provide his or her date of birth, a key to enforcing the statute against those under 21 years old. Because he has some connection to enforcing the Carry Ban, the Commissioner is not entitled to state sovereign immunity.

year-olds are among "the people" and that the Second Amendment presumptively guarantees Plaintiffs "the right" to bear handguns in public for self-defense. *See* ***id***. at 912-16. It then ruled that the government did not meet its burden to demonstrate that restricting the right to bear arms for 18 to 20-year-olds, based on their age, is consistent with the Nation's history and tradition of firearm regulations. *See* ***id.*** at 916-25. It granted summary judgment to the Plaintiffs, declared the age restriction facially unconstitutional for otherwise qualified 18 to 20-year-olds, and enjoined enforcement against them. The district court stayed the injunction, pending appeal. The determination that the Carry Ban is facially unconstitutional, for otherwise qualified 18 to 20-year-olds, is on appeal.

This court reviews de novo a grant of summary judgment. ***Torgerson v. City of Rochester***, 643 F.3d 1031, 1042 (8th Cir. 2011) (en banc). As this is a facial challenge, the "individual circumstances" are not important as the Carry Ban must be "unconstitutional in *all* its applications" to 18 to 20-year-olds. ***United States v. Veasley***, 98 F.4th 906, 909 (8th Cir. 2024), *quoting* ***Bucklew v. Precythe***, 587 U.S. 119, 138 (2019).

"In effect," the Plaintiffs, by asking this court to affirm the grant of the facial challenge, are "speaking for a range of people," all those 18 to 20-year-olds who want to publicly carry a firearm for self-defense. ***Id.*** at 910. A facial challenge "requires [the challenger] to 'establish that no set of circumstances exists under which the Act would be valid.'" ***United States v. Rahimi***, 602 U.S. ___, No. 22-915, 2024 WL 3074728, at *6 (U.S. June 21, 2024), *quoting* ***United States v. Salerno***, 481 U. S. 739, 745 (1987). "To counter a facial challenge . . . all the government must do is identify constitutional applications . . . using the same text-and-historical-understanding framework." ***United States v. Veasley***, 98 F.4th at 910.

II.

All the individual plaintiffs, now over 21 years old, may now apply for a permit-to-carry. Their claims—by and through whom the organizational plaintiffs had standing—are moot. *See* ***Hawse v. Page***, 7 F.4th 685, 694 (8th Cir. 2021).

To avoid mootness of the entire case, before the last individual plaintiff turned 21, the Plaintiffs moved to supplement the record with the affidavit of Joe Knudsen—a 19-year-old Minnesotan seeking a permit-to-carry, who is a member of all three organizations—in order to continue the standing of the organizational plaintiffs.

The organizational plaintiffs assert "standing solely as the representative of its members." ***Warth v. Seldin***, 422 U.S. 490, 511 (1975). To have standing "an organization must demonstrate that '(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" ***Students for Fair Admissions, Inc. v. Pres. and Fellows of Harvard College***, 600 U.S. 181, 199 (2023), *quoting* ***Hunt v. Washington State Apple Advert. Comm'n***, 432 U.S. 333, 343 (1977); ***Summers v. Earth Island Inst.***, 555 U.S. 488, 498 (2009) ("we held that the organization lacked standing because it failed to 'submit affidavits . . . showing, through specific facts . . . that one or more of [its] members would . . . be 'directly' affected'"), *quoting* ***Lujan v. Defenders of Wildlife***, 504 U.S. 555, 563 (1992).

As for (a), since the filing of the complaint, the organizational plaintiffs have demonstrated that at least one of their members has had continuous standing. *See* ***Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.***, 528 U.S. 167, 190 (2000) ("[T]he description of mootness as 'standing set in a time frame' is not comprehensive."). *Cf.* ***Religious Sisters of Mercy v. Becerra***, 55 F.4th 583, 601-02 (8th Cir. 2022) (finding organizational plaintiff "lacks associational standing to sue

on behalf of unnamed members" when it failed to identify any members who suffered the requisite harm).

As for (b), each organizational plaintiff's purpose is to promote gun rights. The interest they seek to protect, the exercise of the individual right to bear arms, is germane to their purpose.

As for (c), Plaintiffs assert that the Carry Ban is facially unconstitutional, and the relief sought is a permanent injunction on its enforcement. Neither requires an individual plaintiff's participation in the lawsuit. *See* ***Veasley***, 98 F.4th at 909. Thus, the organizational plaintiffs still have standing in this suit through Knudsen.

Minnesota does not contend that the organizational plaintiffs fail to meet the organizational standing test. Instead, Minnesota asserts that the court should not supplement the record because the record below has no evidence about Knudsen. *See* ***Dakota Indus., Inc. v. Dakota Sportswear, Inc.***, 988 F.2d 61, 63 (8th Cir. 1993) ("Generally, an appellate court cannot consider evidence that was not contained in the record below. However, this rule is not etched in stone. When the interests of justice demand it, an appellate court may order the record of a case enlarged.") (citations omitted). *Cf.* ***Carpenters' Pension Fund of Illinois v. Neidorff***, 30 F.4th 777, 795 n.16 (8th Cir. 2022) (maintaining that the general principle of not supplementing the record on appeal is most applicable when the supplemental evidence does not impact the outcome of the present case); ***Torres v. City of St. Louis***, 39 F.4th 494, 503-04 (8th Cir. 2022) (same).

In a facial challenge, "individual circumstances" are irrelevant apart from establishing standing. ***Veasley***, 98 F.4th at 909. *See* ***Ezell v. City of Chicago***, 651 F.3d 684, 697 (7th Cir. 2011) ("In a facial constitutional challenge, individual application facts do not matter. Once standing is established, the plaintiff's personal situation becomes irrelevant."). Specific to mootness, courts "may consider any evidence bearing on whether the appeal has become moot." ***Constand v. Cosby***, 833 F.3d 405, 409 (3d Cir. 2016). *See* ***Lara v. Commr. Pennsylvania State Police***, 91

F.4th 122, 138 n.22 (3d Cir. 2024) (taking judicial notice of an individual plaintiff with standing to allow similarly situated organizational plaintiffs to continue their suit); ***Reese v. BATFE***, No. 23-30033 (5th Cir. 2024) (order granting a similar motion to supplement the record).

In *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 718 (2007), after an organization's members with standing aged out, the Supreme Court accepted an affidavit from the organization listing other members with standing. *See* ***Ala. Legis. Black Caucus v. Alabama***, 575 U.S. 254, 285-86 (2015) (Scalia, J., dissenting) (describing supplementation of the record in *Parents Involved*).

This court grants the motion to supplement the record (and denies the related motion to dismiss the appeal). The organizational plaintiffs have an unbroken chain of standing through Knudsen.

III.

The Second Amendment reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." **U.S. Const. amend. II**. The Supreme Court, in *Heller*, recognized that the Second Amendment's right to keep and bear arms "protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes. . . ." ***District of Columbia v. Heller***, 554 U.S. 570, 577 (2008).

"[I]t has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right," "the natural right" to "resistance," "self-preservation and defence," not merely a common law right. ***Id.*** at 593-94, *quoting* 1 William Blackstone, **Commentaries On The Laws Of England** 139-40 (1765).

The Supreme Court has applied that right against the states through the Fourteenth Amendment (with a plurality incorporating it through the Due Process Clause and Justice Thomas recognizing it as within the Privileges or Immunities Clause). ***McDonald v. City of Chicago***, 561 U.S. 742, 791 (2010) (plurality opinion) ("We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*"); ***id.*** at 858 (Thomas, J., concurring in part) ("I agree with the Court that the Second Amendment is fully applicable to the States. I do so because the right to keep and bear arms is guaranteed by the Fourteenth Amendment as a privilege of American citizenship."). Thus, courts apply against the states, through the Fourteenth Amendment, the right to bear arms—the natural right of resistance, self-preservation, and defense.

"[C]onsistent with *Heller* and *McDonald*," *Bruen* held that "the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home." ***Bruen***, 597 U.S. at 10. The *Heller* opinion demands "a test rooted in the Second Amendment's text, as informed by history." ***Id.*** at 19.

Before *Bruen*, many circuits—but not this court—had "coalesced around a 'two-step' framework for analyzing Second Amendment challenges that combines history with means-end scrutiny." ***Id.*** at 17. The Supreme Court, in *Bruen*, rejected the two-step test as "one step too many." ***Id.*** at 19. The Court provided a new test to evaluate the text consistent with *Heller*'s reasoning:

> [W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

Id., *quoting* ***Konigsberg v. State Bar of Cal.***, 366 U.S. 36, 50, n.10 (1961).

The test has two parts: text, then history. (1) *If* a "focused" application of "the 'normal and ordinary' meaning of the Second Amendment's language" "covers an individual's conduct," *then* (2) "the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." ***Id.*** at 17, 19-20, *quoting* ***Heller***, 554 U.S. at 576-77.

First, this court conducts a textual analysis, determining if the Amendment's plain text covers the Plaintiffs—are they part of 'the people' with a right to keep and bear arms? If so, then that conduct is presumptively protected.

Second, the burden shifts to the government to demonstrate that the regulation is consistent with the Nation's historical tradition of firearm regulation. "[W]hen the Government regulates arms-bearing conduct, as when the Government regulates other constitutional rights, it bears the burden to 'justify its regulation.'" ***Rahimi***, 2024 WL 3074728, at *6, *quoting* ***Bruen***, 597 U.S. at 24. This court analyzes the government's identified historical analogues, whether "the government identif[ies] a well-established and representative historical *analogue*, not a historical *twin*." ***Bruen***, 597 U.S. at 30 (emphasis in original). If the regulation is consistent with the Nation's historical tradition of firearm regulation, it does not infringe the right of the people. If not, then the regulation improperly infringes the individual right to keep and bear arms.

A.

"*Bruen* does not command us to consider only 'conduct' in isolation and simply assume that a regulated person is part of 'the people.'" ***United States v. Sitladeen***, 64 F.4th 978, 987 (8th Cir. 2023), *citing Bruen*, 597 U.S. at 24.[4] Instead,

[4]In its reply brief, Minnesota argues that Plaintiffs did not meet their "burden" of proving *Bruen*'s textual part because they did not submit expert reports or facts about the Second Amendment's text. This court does not normally consider arguments raised in a reply brief. ***Gatewood v. City of O'Fallon***, 70 F.4th 1076,

we must begin by asking whether the Carry Ban "governs conduct that falls within the plain text of the Second Amendment." ***Id.*** at 985, *citing* ***Bruen***, 597 U.S. at 17. That is, *Bruen* tells us to begin with a threshold question using the plain text, are the Plaintiffs part of the people? ***Range v. Attorney General***, 69 F.4th 96, 101 (3d Cir. 2023) (en banc) ("After *Bruen*, we must first decide whether the text of the Second Amendment applies to a person and his proposed conduct."), *cert. granted, vacated and remanded*, No. 23-374 (U.S. July 2, 2024).

Minnesota asserts that ordinary, law-abiding, adult citizens that are 18 to 20-year-olds are not members of "the people," and, thus, the Plaintiffs are not protected under the plain text of the Second Amendment. *See* ***Bruen***, 597 U.S. at 31-32 ("It is undisputed that . . . ordinary, law-abiding, adult citizens—are part of 'the people' whom the Second Amendment protects"); ***Maryland Shall Issue, Inc. v. Moore***, 86 F.4th 1038, 1042-43 (4th Cir. 2023), *reh'g en banc granted*, 2024 WL 124290 (4th Cir. Jan. 11, 2024) ("'the people' whom the Second Amendment protects includes, at a minimum, 'ordinary, law-abiding, adult citizens'"), *quoting* ***Bruen***, 597 U.S. at 31-32; ***Lara***, 91 F.4th at 131 n.9 ("*Bruen* also stated that the protections of the Second Amendment extend to 'ordinary, law-abiding, adult citizens.'"), *quoting* ***Bruen***, 597 U.S. at 31-32. *See generally* ***Sitladeen***, 64 F.4th at 984 (noting that *Bruen* did not specifically "address the meaning of 'the people'" in the Second Amendment).

Minnesota argues that 18 to 20-year-olds are not members of "the people" because at common law, individuals did not have rights until they turned 21 years old. *See* 1 William Blackstone, ***Commentaries on the Laws of England*** 451 (Oxford, Clarendon Press 1765) ("So that full age in male or female, is twenty one years . . . who till that time is an infant, and so styled in law."); John Bouvier, **1**

1080 (8th Cir. 2023). Regardless, this requirement contradicts *Bruen*'s command that part one is a "focused" application of "the 'normal and ordinary' meaning" that would have been discernable by the people. ***Bruen***, 597 U.S. at 20, *quoting* ***Heller***, 554 U.S. at 576-77.

Institutes of American Law 148 (1858) (explaining that upon reaching the age of majority, "every man is in full enjoyment of his civil and political rights.").

Ordinary, law-abiding, adult citizens that are 18 to 20-year-olds are members of the people because: (1) they are members of the political community under *Heller*'s "political community" definition; (2) the people has a fixed definition, though not fixed contents; (3) they are adults; and (4) the Second Amendment does not have a freestanding, extratextual dangerousness catchall.

First, the right to keep and bear arms "is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed . . . ." ***United States v. Cruikshank***, 92 U.S. 542, 553 (1876); ***Heller***, 554 U.S. at 592 (same). The people codified that right, and that political tradition, in the Constitution. *Heller* recognizes the universal applicability of that right to "all Americans." ***Id.*** at 581.

Heller and *Bruen* command focus on the "normal and ordinary" meaning of the text of the Second Amendment. ***Bruen***, 597 U.S. at 20, *quoting* ***Heller***, 554 U.S. at 576-77; ***Heller***, 554 U.S. at 576 ("the Constitution was written to be understood by the voters"), *citing* ***United States v. Sprague***, 282 U.S. 716, 731 (1931). The 1773 edition of Samuel Johnson's dictionary definition of people reaffirms the definition used in *Heller*: "A nation; these who compose a community." **1 Dictionary of the English Language** (4th ed.) (reprinted 1978); *see* N. Bailey, **An Universal Etymological English Dictionary** 601-02 (1770) (defining "people" as "the whole Body of Persons who live in a Country[ ] or make up a Nation."). *See generally* ***United States v. Duarte***, 101 F.4th 657, 673 (9th Cir. 2024) (discussing additional, analogous dictionary definitions of "people").

Minnesota must overcome the "strong presumption" that the right applies to "all Americans." ***Heller***, 554 U.S. at 581. Further, "the term unambiguously refers to all members of the political community, not an unspecified subset." ***Id.*** at 580.

Eighteen to 20-year-olds are included in the "political community." *See* ***Cruikshank***, 92 U.S. at 549 ("Citizens are the members of the political community to which they belong. They are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as their collective rights."); ***United States v. Verdugo-Urquidez***, 494 U.S. 259, 265 (1990) (holding that "the people" covers even some non-citizens who are members of the "national community").[5] *See also* ***Duarte***, 101 F.4th at 673 ("This notion that one's status as a 'citizen' signified his membership among 'the people' traces its roots to English common law.").

Second, Minnesota asserts that because 18 to 20-year-olds did not possess all their "civil and political rights" as minors at the founding, they cannot today be considered members of the people. *See* 1 John Bouvier, **Institutes of American Law** 148 (Robert Peterson, ed., 1851). Minnesota emphasizes that the "political community at the time of the founding" was restricted not only to those over the age of 21, but also to "eligible voters, namely white, male, yeomen farmers." It concludes that because those 18 to 20-year-olds were not legally autonomous members of the political community at the founding, they are not part of the people in the plain text of the Second Amendment.

Arguments of this type, focusing on the original contents of a right instead of the original definition—i.e., that only those people considered to be in the political community in 1791 "are protected by the Second Amendment," instead of those

[5]The parties dispute whether this court should use the "political community" definition of the people from *Heller* and *Bruen,* or the "national community" definition from *Verdugo-Urquidez*. *See* Note, *The Meaning(s) of 'The People' in the Constitution*, 126 **Harv. L. Rev.** 1078, 1079-86 (2013) (arguing *Verdugo-Urquidez*'s "national community" definition is more expansive than *Heller*'s "political community" definition). Any difference between these definitions does not affect this case. This court relies on the definition from *Heller* and *Bruen*, "political community."

meeting the original definition of being within the political community—are "bordering on the frivolous." ***Heller***, 554 U.S. at 582. "We do not interpret constitutional rights this way." ***Id.*** (examining the interpretation of First and Fourth amendments, which consider modern forms of communications and search, respectively). *Heller* rejected the idea that the Second Amendment protected only the original contents of the defined term "arms" and, instead, applied that original definition "to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." ***Id.*** at 582. *Cf.* ***Bruen***, 597 U.S. at 47 ("Whatever the likelihood that handguns were considered 'dangerous and unusual' during the colonial period, they are indisputably in 'common use' for self-defense today."). "Although its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." ***Id.*** at 28.

Similarly, *Heller* defines "the people" as "all members of the political community, not an unspecified subset." ***Heller***, 554 U.S. at 580 & 582. "[T]he Second Amendment extends, prima facie," to all members of the political community, "even those that were not [included] at the time of the founding." ***Id.*** Contrary to Minnesota's assertion, the political community is not confined to those with political rights (eligible voters) at the founding. *See* ***Verdugo-Urquidez***, 494 U.S. at 265; ***Bush v. Vera,*** 517 U.S. 952, 1075 n.9 (1996) (Souter, J., dissenting) ("[Voting] is an assertion of belonging to a political community . . . ."), *quoting* Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 **N.C. L. Rev.** 303, 347, 350 (1986).

Even if Minnesota were correct in its assertions about the political community's definition, the contents of that defined term have changed. Since the founding, the guarantee of political rights has constitutionally expanded, especially in the right to vote. *See* **U.S. Const. amend. XV** (proscribing the abridgment of voting rights based on race); **U.S. Const. amend. XIX** (proscribing the abridgment of voting rights based on sex); **U.S. Const. amend. XXIV** (proscribing the poll tax); **U.S. Const. amend. XXVI** (proscribing the abridgment of voting rights based on

age for those over 18). Reading the Second Amendment in the context of the Twenty-Sixth Amendment unambiguously places 18 to 20-year-olds within the national political community. *See* ***Armstrong v. Exceptional Child Ctr., Inc.***, 575 U.S. 320, 325-26 (2015) (explaining that constitutional exegesis requires reading each provision "in the context of the Constitution as a whole," suggesting later amendments can impact the context of prior amendments); John F. Manning, *Foreword: The Means of Constitutional Power*, 128 **Harv. L. Rev.** 1, 61 (2014) (arguing that constitutional textual provisions are best understood "only after reading its text in the context of the Constitution as a whole. Reading a text in the context of a surrounding text is a standard form of textual exegesis."). Reading the Constitution as a whole, the Third Circuit recently (correctly) explained that "consistency has a claim on us." ***Lara***, 91 F.4th at 131. Those 18 to 20-years-old are "among 'the people' for other constitutional rights such as the right to vote, freedom of speech, peaceable assembly, government petitions, and the right against unreasonable government searches and seizures." ***Id.*** (internal citations omitted). "[T]here is no reason to adopt an inconsistent reading of 'the people.'" ***Id.***, *citing* ***Range***, 69 F.4th at 102. An inconsistent reading subjugates "the constitutional right to bear arms in public for self-defense [to] . . . 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.'" ***Id.*** at 132, *quoting* ***Bruen***, 597 U.S. at 70.

Minnesota asserts that this court has held that "the people" can have different meanings in different parts of the Constitution. *See* ***Sitladeen***, 64 F.4th at 983-84. In *Sitladeen*, this court held that *United States v. Flores*, 663 F.3d 1022, 1023 (8th Cir. 2011) is still good law post-*Bruen*, reaffirming the holding in *Flores* that illegal aliens are not part of the people. ***Id.***, *discussing* ***Flores***, 663 F.3d at 1023, *citing* ***United States v. Portillo-Munoz***, 643 F.3d 437, 441-42 (5th Cir. 2011). That holding is consistent with *Heller*—at a minimum, "all Americans" in the "political community" that are law-abiding "citizens" are members of the people. ***Heller***, 554 U.S. at 580 & 635; ***Kanter v. Barr***, 919 F.3d 437, 451-53 n.3 (7th Cir. 2019) (Barrett, J. dissenting) (interpreting *Heller*'s mandate that "all Americans" are members of the people to mean that the textual basis for gun regulation does not come from a

narrow definition of the people, even those presumptively stripped of the right (i.e. felons) are members of the people), *majority opinion abrogated by* ***Bruen***, 597 U.S. at 19. Even if the 18 to 20-year-olds were not members of the "political community" at common law, they are today.

Third, it is not disputed that plaintiffs are "ordinary," "law-abiding," or "citizens," only whether they are "adult" citizens. The "age of majority or minority is a status" "that lack[s] content without reference to the right at issue" rather than a fixed or vested right. ***Hirschfeld v. BATFE***, 5 F.4th 407, 435, *vacated as moot*, 14 F.4th 322 (4th Cir. 2021), *quoting* Jeffrey F. Ghent, Annotation, *Statutory Change of Age of Majority as Affecting Pre-Existing Status or Rights*, 75 **A.L.R. 3d** 228 § 3. Minnesota seems to assert the age of majority is fixed at 21 permanently. *But see* **Minn. Stat. § 645.451, subd. 3**. ("'Adult' means an individual 18 years of age or older."). That is not so. For political rights, the Twenty-Sixth Amendment sets the age of majority at age 18. *See* **U.S. Const. amend. XXVI**.

Fourth, Minnesota states that from the founding, states have had the power to regulate guns in the hands of irresponsible or dangerous groups, such as 18 to 20-year-olds. At the step one "plain text" analysis, a claim that a group is "irresponsible" or "dangerous" does not remove them from the definition of the people.

> Neither felons nor the mentally ill are categorically excluded from our national community[, the people]. That does not mean that the government cannot prevent them from possessing guns. Instead, it means that the question is whether the government has the power to disable the exercise of a right that they otherwise possess, rather than whether they possess the right at all.

Kanter, 919 F.3d at 453 (Barrett, J., dissenting). *See* ***Rahimi***, 2024 WL 3074728, at *11 ("[W]e reject the Government's contention that Rahimi may be disarmed simply because he is not 'responsible.'").

Importantly, the Second Amendment's plain text does not have an age limit. *See e.g.,* **U.S. Const. art. I, § 2 & 3** (asserting, in the plain text, a 25-year-old age requirement to serve in the House of Representatives and a 30-year-old age requirement to serve in the Senate); **U.S. Const. art. III § 2** (asserting, in the plain text, a 35-year-old age requirement to serve as President); ***Hirschfeld***, 5 F.4th at 421 ("In other words, the Founders considered age and knew how to set age requirements but placed no such restrictions on rights, including those protected by the Second Amendment.").

Ordinary, law-abiding 18 to 20-year-old Minnesotans are unambiguously members of the people. Because the plain text of the Second Amendment covers the plaintiffs and their conduct, it is presumptively constitutionally protected and requires Minnesota to proffer an adequate historical analogue consistent with the Nation's historical tradition of firearm regulation. ***Bruen***, 597 U.S. at 19.

B.

The historical analysis presumes that the individuals' conduct is protected and requires Minnesota to "identify a well-established and representative historical analogue." ***Id.*** at 30. "[W]hether modern and historical regulations impose a *comparable burden* on the right of armed self-defense and whether that burden is *comparably justified* are 'central' considerations when engaging in an analogical inquiry"—the "how and why," respectively, must be analogous. ***Id.*** at 29 (emphasis added).

As a threshold matter, the district court addressed which time period is better for understanding the scope of the Second Amendment as applied to the states, "1791 or 1868?" ***Worth***, 666 F.Supp.3d. at 918.

"*Bruen* cautions that 'not all history is created equal.'" ***Sitladeen***, 64 F.4th at 985, *quoting* ***Bruen***, 597 U.S. at 34. Rather, "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them."

Bruen, 597 U.S. at 34, *quoting* ***Heller***, 554 U.S. at 634-35. "Strictly speaking," Minnesota "is bound to respect the right to keep and bear arms because of the Fourteenth Amendment, not the Second." ***Id.*** at 37. Even so, *Bruen* strongly suggests that we should prioritize Founding-era history. *See* ***id.*** Otherwise, the "individual rights enumerated in the Bill of Rights and made applicable against the States through the Fourteenth Amendment" might not have "the same scope as against the Federal Government." ***Id.*** And for decades, the Court has "generally assumed" that "the public understanding of the right when the Bill of Rights was adopted in 1791" governs. ***Id.***, *citing* ***Crawford v. Washington***, 541 U.S. 36, 42-50 (2004) (Sixth Amendment); ***Virginia v. Moore***, 553 U.S. 164, 168-169 (2008) (Fourth Amendment); *and* ***Nevada Comm'n on Ethics v. Carrigan***, 564 U.S. 117, 122-125 (2011) (First Amendment).

While the Second Amendment is not a "regulatory straightjacket" and Minnesota does not need to provide this court with a "dead ringer," a regulation that "remotely resembles" the Carry Ban will not suffice. ***Id.*** at 30. "A court must ascertain whether the new law is 'relevantly similar' to laws that our tradition is understood to permit[.]" ***Rahimi***, 2024 WL 3074728, at *6. Minnesota must prove that it "is consistent with this Nation's historical tradition of firearm regulation" for the state to ban, on account of their age, the public carrying of handguns by ordinary, law-abiding, adult citizens. *See* ***Bruen***, 597 U.S. at 34. For each proffered analogue, this court considers (1) the "how" (comparable burden) and (2) the "why" (comparably justified). ***Id.*** at 29; *see* ***Rahimi***, 2024 WL 3074728, at *6 ("Why and how the regulation burdens the right are central to this inquiry.") (citation omitted).

The "how" of the Carry Ban—the burden to be compared—is a ban on the bearing of arms in an otherwise constitutional manner. *See* ***Bruen***, 597 U.S. at 70, *quoting* ***McDonald***, 561 U.S. at 780 (plurality opinion) ("The constitutional right to bear arms in public for self-defense is not 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.'").

Minnesota states the "why" of the Carry Ban is that 18 to 20-year-olds are not competent to make responsible decisions with guns and pose a risk of dangerousness to themselves and to others as a result.

Minnesota proffers three reasons that the Carry Ban survives *Bruen*'s historical tradition test: (1) a freestanding catchall for groups the state deems dangerous; (2) founding-era and common law analogues; and (3) Reconstruction-era analogues.

1.

Minnesota contends that status-based restrictions from the founding-era created a freestanding dangerousness catchall analogue: if the state deems a group of people to pose a risk of danger, it may ban the group's gun ownership.[6] *See* Joseph Blocher & Catie Carberry, *Historical Gun Laws Targeting "Dangerous" Groups and Outsiders* 12, in **New Histories of Gun Rights and Regulation: Essays on the Place of Guns in American Law and Society** (Joseph Blocher, Jacob Charles, & Darrell Miller, eds., 2023) ("One can accept that the Framers denied firearms to groups they thought to be particularly dangerous (or unvirtuous, or irresponsible) without sharing their conclusion about which groups qualify as such.").

Assuming that historical regulation of firearm possession can be viewed as an effort to address a risk of dangerousness, this risk does not justify the Carry Ban.

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[6]Minnesota relies on *United States v. Jackson*, 69 F.4th 495, 502-03 (8th Cir. 2023), discussing restrictions on Catholics, American Indians, slaves, and people who would not swear a loyalty oath to the government. *Cf.* ***United States v. Jackson***, 85 F.4th 468, 470-72 (8th Cir. 2023) (Stras, J., dissenting from the denial of rehearing en banc) (reaching a different conclusion based on the same history). This court's *Jackson* opinion has, however, been vacated, and the case remanded. *See* ***Jackson v. United States***, No. 23-6170 (U.S. July 2, 2024) (granting certiorari, vacating the judgment, and remanding for further consideration in light of *United States v. Rahimi*, 602 U.S. ___ (2024)).

Minnesota claims that 18 to 20-year-olds present a danger to the public, but it has failed to support its claim with enough evidence. *See* ***Rahimi***, 2024 WL 3074728, at *9 (upholding a carry ban, the Court repeatedly emphasized that the law at issue "applies only once a court has found that the defendant 'represents a credible threat to the physical safety' of another.") (citation omitted). Although we take no position on how high the risk must be or what the evidentiary record needs to show, the answer is surely more than what Minnesota's general crime statistics say. According to the report, "the murder arrest rate for 18 to 20-year-olds is almost 33 percent higher than the murder arrest rate for the next most homicidal age group." And they are the "most likely" of any age group "to use firearms to commit homicides and other violent crimes."

Even if we have no reason to doubt the accuracy of these statistics, they do not support the Carry Ban. *See* ***Rahimi***, 2024 WL 3074728, at *9 (noting that the statute at issue did "not broadly restrict arms use by the public generally"). For one thing, the Minnesota legislature could not have relied on them. The expert report, which was prepared solely for this case, uses data from 2015 through 2019—more than 10 years *after* it enacted the Carry Ban. And the record is devoid of statistics that Minnesota could have used to justify a conclusion that 18 to 20-year-olds present an unacceptable risk of danger if armed. After all, even using these recent statistics, it would be a stretch to say that an 18-year-old "poses a clear threat of physical violence to another." ***Id.***

For another, Minnesota has not attempted to explain why its other statutory restrictions, none of which the Plaintiffs have challenged, do not reduce the risk of danger already. First, permit applicants must complete "training in the safe use of a pistol" and not be "listed in the criminal gang investigative data system." **Minn. Stat. § 624.714, subd. 2(b)(1), (5)**. Certain state and federal statutes might already render an applicant ineligible, *See* ***id.*** **§ 624.714, subd. 2(b)(4),** including those who have been convicted of "a crime of violence" or a recent controlled-substance offense, *see* ***id.*** **§ 624.713, subd. 1(2), (3), (4)**. What the record lacks, in other words, is any support for the claim that 18 to 20-year-olds, who are otherwise eligible for a

public-carry permit, "pose [such] a credible threat to the physical safety of others" that their "Second Amendment right may . . . be burdened." ***Rahimi***, 2024 WL 3074728, at *9.

A legislature's ability to deem a category of people dangerous based only on belief would subjugate the right to bear arms "in public for self-defense" to "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." ***Bruen***, 597 U.S. at 70, *quoting* ***McDonald***, 561 U.S. at 780 (plurality opinion); *see also* ***Rahimi***, 2024 WL 3074728, at *11 ("[W]e conclude only this: An individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment."). While "our tradition of firearm regulation allows the Government to disarm individuals who present a credible threat to the physical safety of others[,]" Minnesota has failed to show that 18 to 20-year olds pose such a threat. ***Id.*** at *10. Accordingly, absent more, the Carry Ban cannot be justified on a dangerousness rationale.

2.

Minnesota proffers three founding-era sources: (1) the common law, (2) college gun rules, and (3) municipal regulations.

First, Minnesota reiterates that, at common law, 18 to 20-year-olds' Second Amendment rights were restricted because they were minors. The common law "is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." ***Bruen***, 597 U.S. at 19. *See* Roscoe Pound, *Common Law and Legislation*, 21 **Harv. L. Rev.** 383, 403 (1908) (discussing the importance of the common law to pre-Civil War jurisprudence). Minnesota cites common law evidence that (as minors) 18 to 20-year-olds did not have full rights. Minnesota, however, does not put forward common law analogues restricting the right to bear arms. Instead, Minnesota points to statutory law, such as the Militia Act of 1792 that required 18 to 20-year-olds to acquire firearms, as evidence the common law

was the inverse. *See The Militia Act of 1792*, ch. 33, **1 Stat. 271**, § 1. A mandate to acquire a firearm is hardly "evidence" that one was previously prohibited from owning one.

Inverse evidence of the common law is not a sufficient analogue to meet the state's burden. In fact, Minnesota contends elsewhere that statutes passed after the ratification of the Bills of Rights often codified the common law. *See* ***Bruen***, 597 U.S. at 39 ("'[T]he language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions *as they were when the instrument was framed and adopted*,' not as they existed in the Middle Ages."), *quoting* ***Ex parte Grossman***, 267 U.S. 87, 108-09 (1925) (emphasis in original). Minnesota does not provide convincing evidence why the Militia Act of 1792 is inverse evidence of the common law, rather than evidence of its codification. Further, if the state is correct that the Militia Act is inverse evidence of the common law, then the Militia Act may demonstrate that the Second Amendment and the common law diverge. *See* ***id.*** at 35. ("English common-law practices and understandings at any given time in history cannot be indiscriminately attributed to the Framers of our own Constitution . . . 'it [is] better not to go too far back into antiquity . . . unless evidence shows that medieval law survived to become our Founders' law."), *quoting* ***Funk v. United States***, 290 U.S. 371, 382 (1933).

Second, Minnesota cites college rules restricting students from possessing guns on campus. *See* ***Worth***, 666 F.Supp.3d at 921 (discussing rules from Yale College, the University of Georgia, and the University of North Carolina).

These rules are very different in their "how." These school procedural rules are not laws subject to constitutional limitations. Minnesota acknowledges that universities had guardianship authority *in loco parentis*. Universities had many practices that if compelled by the government, would have violated students' constitutional rights. *See University Church in Yale*, **Yale University**, https://church.yale.edu/history (explaining that until 1927, chapel attendance was

mandatory) (last accessed May 19, 2024). Thus, founding-era college rules are not persuasive sources to discern the constitutional rights of its students.

Further, a restriction on the possession of firearms in a school (a sensitive place) is much different in scope than a blanket ban on public carry. *See* ***Bruen***, 597 U.S. at 30. The Supreme Court has distinguished between "sensitive places" and the public. ***Id.*** at 31 ("Put simply, there is no historical basis for New York to effectively declare the island of Manhattan a 'sensitive place' simply because it is crowded and protected generally by the New York City Police Department."). A sensitive place restriction is not analogous to a no-guns-in-public restriction.

Third, Minnesota cites three municipal ordinances. *See* ***Worth***, 666 F.Supp.3d at 923 (discussing ordinances from New York, New York and Columbia, South Carolina); Oliver H. Strattan & John M. Vaughan, eds., *A Collection of the State and Municipal Laws in Force and Applicable to the City of Louisville, KY* (C. Settle, 1857), 175 (1853), available at https://firearmslaw.duke.edu/laws/oliver-h-strattan-city-clerk-a-collection-of-the-state-and-municipal-laws-in-force-and-applicable-to-the-city-of-louisville-ky-prepared-and-digested-under-an-order-from-the-general-council-of-s (last accessed May 22, 2024).

The first two ordinances, New York and Columbia, fine anyone who discharges a weapon within the city, increasing the fines (or allowing seizure of weapon in Columbia) for minors. The third ordinance prohibited the sale of gunpowder (but not firearms) to minors in Louisville and is also not a founding-era source (enacted more than 60 years after 1791). All three are distinct from the "how" of the Carry Ban, a blanket ban on carrying a weapon in public. The "how" is also different in the New York and Columbia ordinances, which prohibit conduct regardless of age.

Minnesota's proffered founding-era analogues do not meet its burden to demonstrate that the Nation's historical tradition of firearm regulation supports the Carry Ban.

3.

Minnesota makes four arguments why the Reconstruction era evinces a historical tradition of firearm regulation sufficient to support the 18 to 20-year-old Carry Ban: (1) unprecedented social concerns in the second half of the 19th Century (the increased prevalence of handguns) require this court to take a more nuanced approach; (2) Reconstruction-era and late 19th Century statutes; (3) 19th Century state court cases; and (4) that, as a longstanding prohibition, the Carry Ban should be considered presumptively constitutional.

As discussed, it is questionable whether the Reconstruction-era sources have much weight. *See* ***Bruen***, 597 U.S. at 37 ("that the scope of the protection applicable to the Federal Government and States [under the Bill of Rights] is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791."). Certainly, postenactment history of the Fourteenth Amendment is not given weight. ***Id.*** at 35 (explaining that for all history after the ratification of the Second Amendment, courts must "guard against giving postenactment history more weight than it can rightly bear"). Assuming it has any weight, this court will address Minnesota's arguments.

First, Minnesota argues that because the market revolution between the founding era and the Reconstruction era made pistols more accessible, this court must take a more "nuanced approach." *See* ***id.*** at 27 ("cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach").

Minnesota contends that because handguns were not "in common use" at the founding, founding-era regulations are insufficient to properly regulate them. This contention contradicts *Bruen* and *Heller*'s "in common use" doctrine: "the Second Amendment protects only the carrying of weapons that are those 'in common use at the time,' as opposed to those that 'are highly unusual in society at large.'" ***Id.*** at 47, *quoting* ***Heller***, 554 U.S. at 629. "Whatever the likelihood that handguns were

considered 'dangerous and unusual' during the colonial period, they are indisputably in 'common use' for self-defense today. They are, in fact, 'the quintessential self-defense weapon.'" ***Id.*** *See* Jamie McWilliam, *The Relevance of "In Common Use" After Bruen*, 37 **Harv. J. L. Pub. Pol'y (Per Curiam)** 1, 9 (2023) (describing how the "in common use" doctrine fits within *Bruen*'s test).

Second, Minnesota proffers 20 state laws from the Reconstruction-era and late 19th Century that in some way limit the Second Amendment rights of those under 21 years old. *See* ***NRA v. BATFE***, 700 F.3d 185, 202 (5th Cir. 2012) (citing the 20 state laws), *abrogated by* ***Bruen***, 597 U.S. at 19 n.4. Minnesota believes this represents a historical tradition of restricting the gun rights of those under 21 years old. As we have already discussed, however, these laws carry less weight than Founding-era evidence. *See* ***Bruen***, 597 U.S. at 37.

Besides, these laws have "serious flaws even beyond their temporal distance from the founding." ***Id.*** at 66. For starters, several prohibited only *concealed* carry. *See* **1859 Ky. Acts 245 § 23** (Kentucky); **1885 Nev. Stat. 51** (Nevada); **1890 La. Acts 39** (Louisiana); **1890 Wyo. Sess. Laws 1253** (Wyoming). Others prohibited only the kinds of weapons that could be easily concealed, like bowie knives and pistols. *See* **1856 Ala. Laws 17** (Alabama); *see also* ***State v. Reid***, 1 Ala. 612, 619 (1840) ("the Legislature cannot inhibit the citizen from bearing arms openly"); **1875 Ind. Acts 59** (Indiana) (prohibiting giving minors weapons that can be "concealed upon or about the person"); **1881 Ill. Laws 73** (Illinois) (prohibiting giving minors weapons "capable of being secreted upon the person"); **1882 Md. Laws 656** (Maryland) (permitting the sale of "shot gun[s], fowling pieces[,] and rifles" to minors, but not other "deadly weapons"). And as *Bruen* clarifies, these "concealed-carry prohibitions were constitutional only if they did not similarly prohibit *open* carry." ***Bruen***, 597 U.S. at 53.

Many, including some already mentioned, criminalized the *sale* or *furnishing* of weapons to minors, meaning they could publicly bear arms subject to generally applicable concealed-carry rules. *See* **16 Del. Laws 716 (1881)** (Delaware); **1856**

Tenn. Pub. Acts 92 (Tennessee); **1876 Ga. Laws 112** (Georgia); **1878 Miss. Laws 175-76** (Mississippi); **1893 N.C. Sess. Laws 468-69** (North Carolina); **1897 Tex. Gen. Laws 221-22** (Texas); **27 Stat. 116-17 (1892)** (D.C.); **Mo. Rev. Stat § 1274 (1879)** (Missouri). Several included exceptions for parental permission, *see* **1881 Ill. Laws 73**; **1897 Tex. Gen. Laws 221-22**; **Mo. Rev. Stat § 1274 (1879)**, or self-defense, *see* **1876 Ga. Laws 112.** And others prohibited the sale of only easily concealable weapons. *See* **1856 Tenn Pub. Acts 92**; **1878 Miss. Laws 175-76**. The point is "[n]one of these historical limitations on the right to bear arms approach" the burden of Minnesota's Carry Ban. ***Bruen***, 597 U.S. at 60.

Third, Minnesota argues that, because no historic cases found age restrictions to be unconstitutional, the Carry Ban is consistent with the historical tradition of firearms regulation. It cites four state supreme court cases involving laws restricting access to firearms by 18 to 20-year-olds. *See* ***State v. Callicutt,*** 69 Tenn. 714, 714-15 (1878); ***Coleman v. State,*** 32 Ala. 581, 582-83 (1858); ***State v. Allen***, 94 Ind. 441, 441 (1884); ***Tankersly v. Commonwealth***, 9 S.W. 702, 703 (Ky. 1888). Three of these cases do not analyze or discuss the constitutionality of the laws, rendering them irrelevant analogues.

Only one case addresses the constitutionality of a state law prohibiting carry by a minor. ***Callicutt,*** 69 Tenn. at 714-15. *Callicut*, a postenactment case interpreting a state statute that applies only to concealed carry by minors, is not analogous in its "how" (solely a conceal ban) or its "why" (only affecting minors).

Fourth, Minnesota argues the Carry Ban is a "presumptively lawful" "longstanding prohibition." *See* ***Heller***, 554 U.S. at 626-27 & n.26. *Heller* offered a list, which does not purport to be exhaustive, of longstanding prohibitions that were presumptively lawful. ***Id.*** Age restrictions are not on that list. ***Id.*** The Carry Ban here was enacted in 2003. Minnesota claims this court should look to Alabama's 1856 statute for the principle that all age restrictions are in the class of "longstanding prohibitions." *See* **1856 Ala. Acts 17**. Alabama's statute, a status-based law, targets only minors, a status not held by 18 to 20-year-olds in Minnesota. Further,

Minnesota tries to link the Carry Ban to several 20th Century laws banning the carry of arms by the mentally ill or those with unsound minds. *See* ***Mai v. United States***, 974 F.3d 1082, 1089 (9th Cir. 2020) (Bumatay, J., dissenting from denial of rehearing en banc) (the 1930 Uniform Firearms Act "prohibited [the] delivery of a pistol to any person of 'unsound' mind"). Those laws, still in effect, prevent the mentally ill from acquiring firearms. Minnesota may not claim all 18 to 20-year-olds are comparable to the mentally ill. This court declines to read a new category into the list of presumptively lawful statutes.

Minnesota did not proffer an analogue that meets the "how" and "why" of the Carry Ban for 18 to 20-year-old Minnesotans. The only proffered evidence that was both not *entirely* based on one's status as a minor and not *entirely* removed from burdening carry—Indiana's 1875 statute—is not sufficient to demonstrate that the Carry Ban is within this nation's historical tradition of firearm regulation. *See* ***Bruen***, 597 U.S. at 65 (a "single" "postbellum" "state statute" is insufficient weight to meet the state's burden).

Minnesota has not met its burden to proffer sufficient evidence to rebut the presumption that 18 to 20-year-olds seeking to carry handguns in public for self-defense are protected by the right to keep and bear arms. The Carry Ban, § 624.714 subd. 2(b)(2), violates the Second Amendment as applied to Minnesota through the Fourteenth Amendment, and, thus, is unconstitutional.

* * * * * * *

The judgment is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-2248

Kristin Worth; Austin Dye; Axel Anderson; Minnesota Gun Owners Caucus; Second Amendment Foundation; Firearms Policy Coalition, Inc.

Plaintiffs - Appellees

v.

Bob Jacobson, in his individual capacity and in his official capacity as Commissioner of the Minnesota Department of Public Safety

Defendant - Appellant

Kyle Burton, in his individual capacity and in his official capacity as Sheriff of Mille Lacs County, Minnesota; Dan Starry, in his individual capacity and in his official capacity as Sheriff of Washington County, Minnesota; Troy Wolbersen, in his individual capacity and in his official capacity as Sheriff of Douglas County, Minnesota

Defendants

Everytown for Gun Safety, formerly known as Everytown for Gun Safety Action Fund; United States; State of Illinois; State of Arizona; State of California; State of Colorado; State of Connecticut; State of Delaware; District of Columbia; State of Hawaii; State of Maryland; State of Massachusetts; State of Michigan; State of New Jersey; State of New Mexico; State of New York; State of North Carolina; State of Oregon; State of Pennsylvania; State of Rhode Island; State of Vermont; State of Washington; Giffords Law Center to Prevent Gun Violence; March For Our Lives Foundation; Brady Center to Prevent Gun Violence; Holly Brewer

Amici on Behalf of Appellant(s)

National Rifle Association of America, Inc.

Amicus on Behalf of Appellee(s)

Appeal from U.S. District Court for the District of Minnesota
(0:21-cv-01348-KMM)

JUDGMENT

Before SMITH, Chief Judge, BENTON, and STRAS, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

July 16, 2024

Order Entered in Accordance with Opinion:
Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

_____
/s/ Maureen W. Gornik

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Kristin Worth, Austin Dye, Axel Anderson, Minnesota Gun Owners Caucus, Second Amendment Foundation, Firearms Policy Coalition, Inc.,

Plaintiffs,

v.

John Harrington, *in his official capacity Commissioner of the Minnesota Department of Public Safety*; Don Lorge, *in his official capacity as Sheriff of Mille Lacs County, Minnesota*; Troy Wolbersen, *in his official capacity as Sheriff of Douglas County, Minnesota*; and Dan Starry, *in his official capacity as Sheriff of Washington County, Minnesota*;

Defendants.

Case No. 21-cv-1348 (KMM/LIB)

ORDER

The State of Minnesota requires a person to obtain a permit to lawfully carry a handgun in public, but does not issue permits to anyone under the age of twenty-one. The Plaintiffs, who are 18-to-20-year-old individuals and firearms advocacy organizations with members in that age range, argue that the minimum age requirement in Minnesota's permit-to-carry law violates their Second Amendment right to keep and bear arms. The parties have filed cross-motions for summary judgment. The Supreme Court's recent decision in *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022), compels the conclusion that Minnesota's permitting age restriction is unconstitutional, and Plaintiffs are entitled to judgment as a matter of law.

I. Background

The Minnesota Legislature enacted the Minnesota Citizens' Personal Protection Act of 2003 "recognize[ing] and declar[ing] that the second amendment of the United States Constitution guarantees the fundamental, individual right to keep and bear arms," while also enacting statutory provisions considered "to be necessary to accomplish compelling state interests in regulation of those rights." Minn. Stat. § 624.714, subd. 22. As part of that Act, Minnesota requires persons who are not law enforcement officers to obtain a "permit to carry [a] pistol" in a public place. Minn. Stat. § 624.714, subd. 1a.[1] Carrying a pistol in public without a permit is a gross misdemeanor, and a conviction for a second or subsequent offense is a felony. *Id.*

To obtain such a permit, the statute requires a person to submit an application to the sheriff in their county of residence, and the sheriff "must issue a permit to an applicant if the person" satisfies enumerated criteria. *Id.* § 624.714, subd. 2(a)–(b). The condition at issue in this case is that the applicant must be "at least 21 years old." *Id.* § 624.714, subd. 2(b)(2).[2] In addition to completing the application and meeting the age requirement, a

[1] There are exceptions to the permitting requirement. For example, a person does not need a permit to carry a handgun about her own place of business or dwelling; to carry a pistol between her home and place of business; to carry a pistol in the woods, fields, or open waters of Minnesota for hunting or target shooting; or to transport a pistol in a motor vehicle if it is unloaded and contained in a closed case or package. Minn. Stat. § 624.714, subd. 9.

[2] In the original version of Minnesota's permit-to-carry statute, enacted in 1975, the minimum age for eligibility was 18. 1975 Minn. Laws 1280–82 (H.F. No. 679, Ch. 378 §§ 3, 4). The Minnesota Citizens' Personal Protection Act of 2003 amended that law to substantially its current form, introducing the language requiring an applicant to be "at least 21 years old." 2003 Minn. Sess. Laws Serv. Ch. 28, art. 2, § 6.

person must also have "training in the safe use of a pistol" within a year of the application and not be prohibited from possessing a firearm by state or federal law. *Id.* §§ 624.714, subd 2a, and subd. 2(b)(1), (3), and (4).[3]

Kristin Worth, Austin Dye, and Axel Anderson, the individual Plaintiffs in this case, are older than 18, but under the age of 21.[4] Except for failing to meet the age requirement, it appears they are otherwise eligible to receive a permit to carry a pistol in Minnesota. They wish to carry pistols for self defense, but don't because they do not want to be subject to arrest or prosecution for violating the permitting requirement. If they could obtain a permit, they state that they would take the required safety training course and submit applications to their respective County Sheriffs. [Doc. 43-2; Doc. 43-3; Doc. 43-4].

The other Plaintiffs are gun-rights advocacy organizations: the Minnesota Gun Owners Caucus ("MGOC"), the Second Amendment Foundation ("SAF"), and the Firearms Policy Coalition ("FPC"). Each of the individual Plaintiffs is a member of all three of these organizations. MGOC has thousands of members in Minnesota, some of

[3] If a person meets these criteria, the sheriff may only deny a permit in the event "that there exists a substantial likelihood that the applicant is a danger to self or the public if authorized to carry a pistol under a permit." Minn. Stat. §§ 624.714, subd. 2(b), and subd. 6(a)(3).

[4] At oral argument, counsel for the Plaintiffs confirmed that although this case was filed on June 7, 2021, the individual Plaintiffs are still under the age of 21, and there is no evidence before the Court to suggest otherwise. Accordingly, the Court finds that the "requisite personal interest that must exist at the commencement of the litigation [has] continue[d] throughout its existence," and the controversy is not moot. *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980). Moreover, the evidence before the Court indicates that the organizational Plaintiffs also have members who are both 18–20-year-olds and otherwise qualified to receive a permit to carry.

whom are over 18, but under the age of 21, and "who would exercise their right to bear arms and acquire carry licenses if it were not for" the age requirement in Minn. Stat. § 624.714. [Doc. 43-5 ¶¶ 4, 6]. Similarly, SAF and FPC have members between the ages of 18 and 21 who would obtain permits and publicly carry pistols in Minnesota if they were legally allowed to do so. [Doc. 43-6 ¶¶ 3–7; Doc. 43-7 ¶¶ 3–7].

Plaintiffs claim that the Defendants' "active enforcement" of the permitting and age requirements bar them from obtaining a permit to carry handguns in public. [Compl. ¶¶ 43–44, 56–57, 69–70]. One of those Defendants is John Harrington, the Commissioner of the Minnesota Department of Public Safety.[5] The statutory scheme tasks the Commissioner with oversight and other responsibilities related to permitting. For example, the Commissioner is required by statute to adopt statewide standards governing the form and contents of all applications for carry permits. Minn. Stat. § 624.7151. The Commissioner must also make the forms for new and renewal applications available on the internet. *Id.* § 624.714, subd. 3(h). Further, the Commissioner is required to maintain a database of persons authorized to carry pistols. *Id.* § 624.714, subd. 15(a). The Commissioner must keep track of other states with laws governing the issuance of permits to carry weapons that differ from Minnesota's permit-to-carry law, and execute reciprocity agreements with

[5] Although Plaintiffs originally sued the Commissioner in his individual capacity as well as his official capacity, all that remain are Plaintiffs' official-capacity claims against him. [Doc. 74 at 3 n.1 ("Plaintiffs note that the Commissioner seeks summary judgment for claims against him in his individual capacity (for both nominal damages and injunctive relief) based on qualified immunity. As in Plaintiffs' stipulation regarding these same claims as to the Sheriffs . . ., Plaintiffs agree to dismiss the individual capacity claims against the Commissioner.")].

other jurisdictions whose carry permits are recognized in Minnesota. *Id.* § 624.714, subd. 16(a), (d). Finally, the Commissioner receives set amounts from the fees for new and renewal applications that are paid to the individual county sheriffs who process the applications. *Id.* § 624.714, subd. 3(f).

Defendant Don Lorge is the Sheriff of Mille Lacs County, where Ms. Worth resides; Dan Starry is the Sheriff of Washington County, where Mr. Dye resides; and Troy Wolberson is the Sheriff of Douglas County, where Mr. Anderson resides (collectively "the Sheriffs"). As noted, applications for permits to carry must be made to the sheriff in the county where a person resides. Minn. Stat. § 624.714, subd. 2(a). And a sheriff who receives an application "must issue a permit" if an applicant satisfies the statutory criteria. *Id.* § 624.714, subd. 2(b). Each of the Sheriffs explains that his respective County played no role in the State's enactment of the permit-to-carry law and that he strictly follows the requirements of the statute. Moreover, the Sheriffs declare that they have never received applications from the individual Plaintiffs who reside within their Counties, and indeed, have never received an application for a permit to carry by a person under the age of 21. [Doc. 55; Doc. 56; Doc. 57].

II. Summary Judgment Standard

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986); *Dowden v. Cornerstone Nat'l Ins. Co.*, 11 F.4th 866, 872 (8th Cir. 2021). In ruling on a motion for summary judgment, the court must view the facts in the light most favorable to the nonmoving party and draws

reasonable inferences in that party's favor. *Grant v. City of Blytheville*, 841 F.3d 767, 770 (8th Cir. 2016).

III. Plaintiffs' Motion

Plaintiffs seek summary judgment in their favor on their claim that the age requirement in Minn. Stat. § 624.714, subd. 2, violates their Second Amendment rights.[6] In light of the Supreme Court's ruling in *Bruen*, the Court concludes that Plaintiffs are entitled to summary judgment.

A. Second Amendment Framework

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed." U.S. Const. amend. II. In two cases decided over a decade ago, the Supreme Court held that "the Second and Fourteenth Amendments protect the right of an ordinary, law-abiding citizen to possess a handgun in the home for self-defense." *Bruen*, 142 S. Ct. at 2122 (citing *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. Chicago*, 561 U.S. 742 (2010)). And in *Bruen* last year, the Court held "that the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home." *Id.*

[6] In their summary judgment briefing, the Plaintiffs characterize the statute they are challenging as "the Carry Ban." However, it is clear from their arguments that they are specifically challenging the minimum age requirement of the permitting scheme found in Minn. Stat. § 624.714, subd. 2(b)(2). They have neither argued nor demonstrated that any other aspect of Minnesota's permit-to-carry law raises a constitutional concern.

In the decade of litigation following *Heller*, Courts of Appeals around the country adopted a variety of balancing tests which weighed a government's interest in a particular gun control measure against the extent and nature of that law's infringement of Second Amendment rights. *Id.* at 2126–27 (describing the tests in several circuits). Indeed, every Circuit Court to address the issue prior to *Bruen* gave weight in the analysis to the societal goals served by the regulation at issue. *United States v. Jackson*, Crim. No. ELH-22-141, 2023 WL 2499856, at *3 (D. Md. Mar. 13, 2023) (discussing federal appellate courts uniform approach between *Heller* and *Bruen*). But *Bruen* rejected any "two-step," "means-end scrutiny" entirely. 142 S. Ct. at 2125–26. Instead, the Court adopted the following test for evaluating whether a government regulation of firearms is permissible:

> [W]e hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

Id. at 2126.[7] Although the first step of the Supreme Court's test refers to the amendment's "plain text" and the second step to "historical tradition," both steps of the analysis are historical in focus.

[7] *Bruen* states that it "made the constitutional standard endorsed in *Heller* more explicit." 142 S. Ct. at 2134.

Step One – Textual Analysis

At the first step, *Bruen* requires a court to conduct a "textual analysis" that is "focused on the 'normal and ordinary' meaning of the Second Amendment's language." 142 S. Ct. at 2127 (quoting *Heller*, 554 U.S. at 576–77, 578). This inquiry into the "normal meaning" of the "words and phrases used" is backward looking, focused on what those words meant in 1791 when the Second Amendment was ratified, and "excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation." *Heller*, 554 U.S. at 576–77. A court applying the first step of "*Heller*'s methodological approach," *Bruen*, 142 S. Ct. at 2127, can employ several tools in discerning the text's normal and ordinary meaning. These may include: (1) comparison of a phrase within the Second Amendment to the same or similar language used elsewhere in the Constitution, *Heller*, 554 U.S. at 579–81 (comparing "right of the people" in the Second Amendment to the same and similar language in the First, Fourth, and Ninth Amendments); (2) consideration of historical sources, including dictionaries, founding-era statutes, 18th-century legal treatises, and others, that could suggest a common understanding of the terms used, *id.* at 581–92 (examining the meaning of "keep and bear arms");[8] and (3) evaluation of the historical background leading to the Second Amendment's adoption, *id.* at 592–95. See also *Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco, and Explosives*, 5 F.4th 407, 418–19, 421–23 (4th Cir. 2021) (discussing sources relevant to understanding the original public meaning of the Second Amendment), *vacated as moot*, 14 F.4th 322, 328 (4th Cir.

[8] *See id.* at 595–96 (consulting "founding-era sources" to illuminate the meaning of "well-regulated militia"); *id.* at 597–98 (similar for "security of a free state").

2021); *Nat'l Rifle Ass'n, Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 714 F.3d 334, 337 (5th Cir. 2013) ("*NRA II*") (Jones, J., dissenting from denial of rehearing en banc) ("First, the text of the Constitution was interpreted [in *Heller*] in light of historical documents bearing on each phrase and clause of the Second Amendment as those were understood at the time of its drafting.").[9]

Step Two – Historical Analysis

If the normal and ordinary meaning of the Second Amendment's text protects the individual's proposed course of conduct, then the Amendment "presumptively guarantees" the individual's right related to firearms, and the burden falls on the government to justify the challenged regulation. *Bruen*, 142 S. Ct. at 2135. However, *Bruen* held that this justification cannot be based on the policy reasons that motivated the regulation at issue. *Id.* at 2127 (describing the two-step approach adopted by Courts of Appeals post-*Heller* as "one step too many" and stating that "*Heller* and *McDonald* do not support applying means-end scrutiny in the Second Amendment context"). Instead, the government must show that the law is "consistent with this Nation's historical tradition of firearm regulation." *Id.* at 2135.

Such an assessment ultimately comes down to "reasoning by analogy." *Id.* at 2132. The government must identify historical firearm regulations that are consistent with the modern, challenged regulation, and courts must decide whether a "historical regulation is

[9] Though Judge Jones' opinion in *NRA II* was a dissent from the denial of the request for rehearing by the Fifth Circuit *en banc*, her reasoning, including her discussion of *Heller*'s analytical approach, largely tracks the test clarified by the Supreme Court in *Bruen*.

a proper analogue" through "a determination of whether the two regulations are "'relevantly similar.'" *Id.* (quoting C. Sunstein, *On Analogical Reasoning*, 106 Harv. L. Rev. 741, 774 (1993)). *Bruen* did not "provide an exhaustive survey of the features that render regulations relevantly similar under the Second Amendment," but it did instruct courts to consider "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id.* at 2132–33. Courts applying *Bruen* must consider "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified." *Id.* at 2133. However, the Court has cautioned that "[t]his does not mean that courts may engage in independent means-end scrutiny under the guise of analogical reasoning."[10] *Id.* at 2133 n.7.

Bruen explains that on occasion, the inquiry required at the second step of the test "will be fairly straightforward" and offers a few examples. *Id.* at 2131. A law directed at a "general societal problem that has persisted since the 18th century," will likely be "inconsistent with the Second Amendment," if there is a "lack of distinctly similar

[10] Courts have struggled with deciphering exactly how to apply *Bruen's* instruction to consider only "relevantly similar" historical analogues through evaluation of how and why they burden the right to keep and bear arms without engaging in means-end scrutiny. *E.g.*, *United States v. Price*, No. 2:22-CR-00097, --- F. Supp. 3d ----, 2022 WL 6968457, at *4 n.3 (S.D.W. Va. Oct. 12, 2022) (stating that the *Bruen* Court's "discussion of what constitutes an 'analogous regulation' is curious," and noting the tension between applying the "relevantly similar" analysis and the instruction not to engage in interest-balancing).

historical regulation addressing that problem."[11] *Id.* And a modern regulation might also be unconstitutional if, in the face of a persistent societal problem, historical regulations used "materially different means" to address it. *Id.*

"[C]ases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach." *Id.* at 2132. Although *Bruen* cautioned that it is not enough for a contemporary regulation to "remotely resemble[]" a colonial era law, the government is only required to "identify a well-established and representative historical *analogue*, not a historical *twin*." *Id.* at 2133. The modern regulation at issue need not be "a dead ringer for historical precursors" to be "analogous enough to pass constitutional muster." *Id.*[12]

The *Bruen* Court acknowledged that the framework it adopted might be challenging to apply. "To be sure, '[h]istorical analysis can be difficult; it sometimes requires resolving

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[11] According to *Bruen*, the District of Columbia's "flat ban on the possession of handguns in the home" at issue in *Hellller* was an example of a case involving a "straightforward historical inquiry." 142 S. Ct. at 2131. The D.C. law addressed an issue—"firearm violence in densely populated communities"—by adopting a measure that the Founders could have just as easily adopted to address the same problem. *Id.* But because the historical tradition of firearm regulation identified nothing analogous to the total ban on firearm possession in the home that D.C. had adopted, the law was unconstitutional. *Id.*

[12] *Bruen* offers as an example another analogical scenario through another reference to *Heller*. 142 S. Ct. at 2133. *Bruen* notes that *Heller* identified a tradition of "'laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." *Id.* (quoting *Heller*, 554 U.S. at 626). Although the *Bruen* Court identified few *other* founding-era sensitive places with outright prohibitions on weapons, the lack of evidence of "disputes regarding the lawfulness of such prohibitions" suggested that "arms carrying could be prohibited [in schools and government buildings] consistent with the Second Amendment." *Id.* Accordingly, a court could permissibly compare those historical regulations to a modern regulation and determine that prohibitions on carrying firearms in "*new* and analogous sensitive places are constitutionally permissible." *Id.* (emphasis in *Bruen*).

threshold questions, and making nuanced judgments about which evidence to consult and how to interpret it.'" *Bruen*, 142 S. Ct. at 2130 (quoting *McDonald*, 561 U.S. at 803–04 (Scalia, J., concurring)). But the *Bruen* Court decided that reliance on history is "more legitimate, and more administrable, than asking judges to make difficult empirical judgments about the costs and benefits of firearms restrictions." *Id.* (cleaned up).

B. Applying the Textual Analysis

The Court now applies *Bruen*'s two-part framework to Minnesota's age requirement for a permit to publicly carry a handgun. The first step—textual analysis—requires the Court to consider the Plaintiffs' "proposed course of conduct" and ask whether the Second Amendment's plain text "covers" that conduct.[13] 142 S. Ct. at 2134, 2126. It is already settled that the plain text of the Second Amendment covers "carrying handguns publicly for self-defense," *id.* at 2134, and here, the parties do not dispute that the course of conduct proposed by the Plaintiffs involves doing just that. [Doc. 43-2 ¶ 4; Doc. 43-3 ¶ 4; Doc. 43-4 ¶ 4]. So, consistent with *Bruen*'s holding, the parties do not dispute that Plaintiffs'

[13] Courts reading the Second Amendment's "plain text" do not always reach the same conclusion about whether it covers particular conduct. *Compare Def. Distributed v. Bonta*, Case No. CV 22-6200-GW-AGRx, 2022 WL 15524977, at *3–5 (C.D. Cal. Oct. 21, 2022) (concluding that the plaintiff's proposed conduct of selling a milling machine used for the self-manufacturing of certain untraceable firearms is not covered by the plain text of the Second Amendment because it has nothing to do with keeping or bearing arms), *tentative ruling adopted by* Case No. CV 22-6200-GW-AGRx, 2022 WL 15524983 (C.D. Cal. Oct. 24, 2022), *with Rigby v. Jennings*, C.A. No. 21-1523 (MN), --- F. Supp. 3d ---, 2022 WL 4448220, at *8 (D. Del. Sept. 23, 2022) (stating that "the right to keep and bear arms implies a corresponding right to manufacture arms" and concluding that plaintiffs demonstrated a likelihood of success on the merits of their claim that a statute prohibiting them from manufacturing untraceable firearms violated the Second Amendment).

proposed course of conduct is covered by the plain text of the Second Amendment. But that clarity does not end the textual analysis.

In this case, the dispute is not about whether the conduct is covered by the text, but whether the Plaintiffs are covered if they engage in that conduct. The parties disagree whether the Plaintiffs are among "the people" referred to in the Second Amendment's so-called operative clause—"the right of the people to keep and bear arms shall not be infringed." Plaintiffs argue that the Second Amendment's reference to *the people* applies to *all* the people, including adults who are over the age of eighteen, but not yet twenty-one. Defendants argue that the plain and ordinary meaning of "the people," as understood at the time the Second and Fourteenth Amendments were adopted, would not have included persons under twenty-one, and adopting the Plaintiffs' *all*-the-people reading too literally would lead to absurd results, such as allowing young children to publicly carry firearms. For the reasons that follow, the Court concludes that the Second Amendment's plain text is better read to include adults 18 and older in its protections.

First, although it did not address the age-related issue before the Court in this case, *Heller*'s discussion of the normal and ordinary meaning of the phrase "the right of the people" places a thumb on the scale in favor of the Plaintiffs' preferred interpretation. The *Heller* majority compared "the people" in the Second Amendment to the Constitution's other references to the same or similar phrases, then explained that "the term unambiguously refers to all members of the political community, not an unspecified subset." 554 U.S. at 580. So construed, *Heller* explained that "the people" is a "term of art" within the Constitution that "refers to a class of persons who are a part of a national

community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Id.* (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990)). The *Heller* Court concluded that such an interpretation supports a "strong presumption that the Second Amendment right is exercised individually and belongs to *all Americans*." *Id.* at 580–81 (emphasis added). *Bruen* repeated this broad articulation of the Second Amendment's scope: "The Second Amendment guaranteed to 'all Americans' the right to bear commonly used arms in public subject to reasonable, well-defined restrictions." 142 S. Ct. at 2156 (quoting *Heller*, 554 U.S. at 581). Neither *Heller* nor *Bruen* addressed the specific issue of whether the Second Amendment's text protects the rights of 18-to-20-year-olds. But because the normal and ordinary meaning of "the people" includes all Americans who are a part of the national community, the right codified by the Amendment appears to include them. *Firearms Pol'y Coal. v. McCraw*, No. 4:21-cv-1245-P, --- F. Supp. 3d ---, 2022 WL 3656996, at *4 (N.D. Tex. Aug. 25, 2022) ("*McCraw*") (discussing *Heller*'s interpretation of "the people" and concluding that it protects the rights of 18–20-year-olds).

Second, neither the Second Amendment's text nor other provisions within the Bill of Rights include an age limit. However, the Founders placed age requirements elsewhere in the Constitution, including for eligibility to be a House Member, Senator, or the President. U.S. Const. art I, §§ 2–3; *id.* art II, § 1. "In other words, the Founders considered age and knew how to set age requirements but placed no such restrictions on rights, including those protected by the Second Amendment." *Hirschfeld*, 5 F.4th at 421. This

lends additional support to the notion that the Second Amendment's "plain text" does not include an age restriction.

Third, the inclusion of "the people" elsewhere in the Bill of Rights supports the interpretation that the Second Amendment extends to individuals over the age of eighteen. The Supreme Court found meaning in the Constitution's use of the same or a similar phrase as that used in the Second Amendment. *Heller*, 554 U.S. at 579; *McCraw*, 2022 WL 3656996, at *4 (stating that both *Heller* and *Verdugo-Urquidez* "suggest that the term 'the people' is defined consistently throughout the Constitution"). Indeed, in considering the reach of the Second Amendment, the *Heller* Court considered the fact that both the First Amendment and the Fourth Amendment refer to a right belonging to "the people." *Heller*, 554 U.S. at 579. The First, of course, protects "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const., amend. I. And the Fourth proscribes violations of the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const., amend. IV. Although one can find certain limitations upon the rights of young people secured by both the First and Fourth Amendments, neither has been interpreted to exclude 18-to-20-year-olds from their protections. *Hirschfield*, 5 F.4th at 422 (reasoning that the inclusion of young people within the scope of the First and Fourth Amendments' protections suggests the Second Amendment applies to those over the age of eighteen); *McCraw*, 2022 WL 3656996, at *4–5 (same).

Finally, founding era militia laws lend support to the understanding that "the people" referred to in the Second Amendment includes 18-to-20-year-olds. "Before

ratification, when militias were solely defined by state law, most colonies and states set the age for militia enlistment at 16. . . . Every colony passed, at some point, laws identifying 18-year-olds as persons required to possess arms." *Jones v. Bonta*, 34 F.4th 704, 718 (9th Cir. 2022), *vacated and remanded on rehearing by* 47 F.4th 1124 (9th Cir. 2022) (mem.) (vacating district court decision for further proceedings consistent with *Bruen*). These early laws reflected a "tradition of young adults keeping and bearing arms . . . deep-rooted in English law and custom." *Id.* at 717. While some laws in the colonial period increased the "minimum age requirements for militia service to not include 18- to 20-year-olds," the majority of pre-ratification and post-ratification militia laws suggest that persons between the ages of 18 and 20 were expected to supply their own weapons in connection with their militia service. *Id.* at 718–19, 734–40 (Appendix 1 & 2). Shortly after ratification of the Second Amendment, the Second Congress passed the Militia Act, ch. 33 § 1, 1 Stat. 271, which set the minimum age for membership in the militia at 18 and required each member to "equip himself with appropriate weaponry." *Id.* at 719 (quoting *Perpich v. Dep't of Defense*, 496 U.S. 334, 341 (1990)). Other courts examining founding-era militia laws have similarly found that because 18-to-20-year-olds were "within the 'core' rights-holders at the founding, their rights should not be infringed today." *NRA II*, 714 F.3d at 339–41 (Jones, J. dissenting) (discussing the 1792 Militia Act and the laws prior to and immediately surrounding the ratification of the Second Amendment); *Hirschfeld*, 5 F.4th at 440 ("At the time of ratification, every state and the federal government required 18-year-old men to enroll in the militia."); *McCraw*, 2022 WL 3656996, at *6 (same). Founding-era militia laws requiring service in the militia by 18–20-year-olds who are

responsible for supplying their own weapons is consistent with a contemporary understanding that this age group was not excluded from the class of persons who had the right to keep and bear arms. And the fact that the Second Amendment itself discusses the "well regulated militia" means the age-range of militia laws is of particular relevance to the reach of its protections.

The Commissioner suggests several reasons why the Court should find that such militia laws are not evidence that 18–20-year-olds had Second Amendment rights. [Doc. 72 at 6–9]. For example, the Commissioner suggests that militia laws compelling some men under the age of 21 to keep and bear arms did not automatically create a right because imposition of a duty does not necessarily confer individual rights. [*Id.* at 7 ("The fact that early America governments compelled some infants to keep and bear arms did not establish a right that an infant could claim against the government." (quoting Doc. 50-1 at 5))]. While true, the significance of the Militia Act of 1792, or indeed any of the founding-era militia laws referenced in the cases cited above, is not that they *created* a right to keep and bear arms at all. Indeed, *Heller* described the Second Amendment as having "codified a *pre-existing* right." 554 U.S. at 592. Similarly, *Heller* explained that the "well-regulated militia" mentioned in the Amendment's text was a reference to an entity "already in existence." *Id.* at 596. The militia laws' significance is that they provide some indication that the existing right to keep and bear arms likely included those who were included in the already existing militia.

Nor is the Court persuaded by the Commissioner's assertion that because certain state militia laws from 1776 through 1825 required parents to provide weapons to their

minor children, such minors would have been understood to fall outside of the Second Amendment's scope. As the *Hirschfeld* court noted:

> [T]hose laws do little to suggest that those under 21 were not required to keep and bear arms. Most of those laws require 18-year-olds to enlist but do not set an age for parental liability, just requiring guardians to be liable for the equipment and food of those "who shall be under their care." And the existence of these laws is unsurprising given that some states required those older than 16 to enroll in the militia. Regardless, "the point remains that those minors were in the militia and, as such, they were required to own their own weapons," even if their parents had to buy those weapons or consent to them joining.

5 F.4th at 434 (citations and footnote omitted).

The Commissioner's remaining textual arguments are similarly unavailing. For example, the Commissioner suggests that a literal reading of Plaintiffs' interpretation would place no limits on Second Amendment rights such that "even toddlers or those declared mentally unfit by the courts would have the right to bear arms." [Doc. 72 at 3]. The Court disagrees. Of course, "[l]ike most rights, the right secured by the Second Amendment is not unlimited." *Heller*, 554 U.S. at 626. No court has read the Second Amendment to cover those under the age of 18, and this case does not raise that issue.[14] Moreover, this decision neither addresses nor calls into question whether Minnesota may constitutionally prohibit the possession or carrying of firearms by any individual whom a

[14] At least one court suggested that Second Amendment protections do not "extend in full force to those under 18" and stated that "the history of the right to keep and bear arms, including militia laws, may well permit drawing the line at 18." *Hirschfeld*, 5 F.4th at 422 & n.13.

court has determined is mentally unfit to have a weapon, nor whose right to possess firearms has been restricted due to violations of the law.[15]

Next, the Commissioner argues that the Second Amendment's reference to "the people" should not be understood to include 18–20-year-olds because at the time that both the Second and Fourteenth Amendments were ratified the age of majority was 21. Consequently, 18-to-20-year-olds would have been minors who could not have purchased a firearm without the consent of a parent or guardian and would have been subject to an array of legislative restrictions under states' police powers. [Doc. 72 at 4–6]. However, as other courts have observed, "the age of majority—even at the Founding—lacks meaning without reference to a particular right." *Hirschfeld*, 5 F.4th at 435. Although the full age of majority was often 21, "that only mattered for specific activities"; for others, such as taking an oath (12), selling land (21), receiving capital punishment (14), serving as an executor or executrix (17), being married (for a woman 12), choosing a guardian (for a woman 14), the age of majority varied widely. *Id.* Essentially, 18-year-olds might have been considered minors for some purposes during the founding era, and adults for others. But the Defendants offer no authority to support the proposition that the voters who adopted the

[15] *Bruen* referred to the Second Amendment's protections for the rights of "law-abiding" Americans on more than one occasion, but some courts applying *Bruen*'s two-part test have considered whether a person's violations of the law disqualify them from keeping or bearing arms under the second part of the analysis, rather than as an aspect of the textual inquiry. *Price*, 2022 WL 6968457, at *7 (S.D. W. Va. Oct. 12, 2022) ("The plain text of the Second Amendment does not include 'a qualification that Second Amendment rights belong only to individuals who have not violated any laws.'" (quoting *United States v. Jackson*, No. CR-22-59-D, 2022 WL 3582504, at *2 (W.D. Okla. Aug. 19, 2022)).

Second Amendment would have used the phrase "the people" in the "normal and ordinary" sense to express a limitation based on the general common law age of majority. *See Heller*, 554 U.S. at 576 ("In interpreting [the Second Amendment's] text, we are guided by the principle that 'the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from their technical meaning.'" (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)) (cleaned up).

For all these reasons, the Court concludes that the text of the Second Amendment includes within the right to keep and bear arms 18-to-20-year-olds, and therefore, the Second Amendment "presumptively guarantees [Plaintiffs'] right to 'bear' arms in public for self-defense." *Bruen*, 142 S. Ct. at 2135.

C. Applying the Historical Analysis

Because the Second Amendment's text presumptively guarantees Plaintiffs' right to publicly carry a handgun for self-defense, under *Bruen* Defendants must demonstrate that the age requirement in Minn. Stat. § 624.714, subd. 2(b)(2), is consistent with the nation's history and tradition of firearms regulation. Based on a careful review of the record, the Court finds that Defendants have failed to identify analogous regulations that show a historical tradition in America of depriving 18–20-year-olds the right to publicly carry a handgun for self-defense. As a result, the age requirement prohibiting persons between the ages of 18 and 20 from obtaining such a permit to carry violates the Second Amendment.

The Court pauses here to comment on the task set before it by the second step in the *Bruen* framework. This Court shares the reservations about the required historical inquiry

expressed by other courts and commentators. As observed before *Bruen*[16] and after it was decided,[17] judges are not historians. The process of consulting historical sources to divine the intent of those responsible for ratifying constitutional amendments is fraught with potential for error and confirmation bias. *See Bruen*, 142 S. Ct. at 2177–79 (Breyer, J., dissenting) (cataloguing criticism of the historical analysis in *Heller*); *Bullock*, 2022 WL 16649175, at *2 (noting criticism of the Supreme Court's historical analysis in the Second Amendment context as having involved "cherry-picked" evidence from "the historical record to arrive at its ideologically preferred outcome"); *Swearingen*, 545 F. Supp. 3d at 1254 n.8 (quoting David A. Strauss, *The Living Constitution* 20–21 (2010) ("Time and again, judges—and academics, too—have found that the original understandings said pretty much what the person examining them wanted them to say")).

Certainly, the *Bruen* majority expressed a preference for a historical inquiry, despite its flaws, because the Justices considered the problems presented by means-end scrutiny to be a greater threat. 142 S. Ct. at 2130. But even beyond concerns with training and

[16] *Nat'l Rifle Ass'n of Am., Inc. v. Swearingen*, 545 F. Supp. 3d 1247, 1254 n.8 (N.D. Fla. 2021) ("Judges are not historians").

[17] *United States v. Bullock*, No. 3:18-CR-165-CWR-FKB, 2022 WL 16649175, at *1 (S.D. Miss. Oct. 27, 2022) ("This Court is not a trained historian. The Justices of the Supreme Court, distinguished as they may be, are not trained historians. We lack both the methodological and substantive knowledge that historians possess. The sifting of evidence that judges perform is different than the sifting of sources and methodologies that historians perform. . . . And we are not experts in what white, wealthy, and male property owners thought about firearms regulation in 1791. Yet we are now expected to play historian in the name of constitutional adjudication."); *United States v. Kelly*, Case No. 3:22-cr-00037, 2022 WL 17336578, at *3 n.5 (M.D. Tenn. Nov. 16, 2022) (questioning whether appointment of experts pursuant to Fed. R. Evid. 706 "can be scaled to the level that would be required by the federal courts' massive docket of gun prosecutions").

objectivity, the workability of the historical approach presents challenges. The *Bruen* majority says the solution lies in the traditional role of judges to resolve controversies presented through the adversarial process: judges must answer questions about the constitutionality of modern firearm regulations "based on the historical record compiled by the parties." 142 S. Ct. at 2130 n.6. Perhaps this takes the sting out of the concern that lower courts lack the time and research resources to conduct deep historical inquiries on a scale akin to that undertaken by the *Bruen* Court. 142 S. Ct. at 2177 (Breyer, J., dissenting). But relying too heavily on party presentation to resolve a dispute about constitutional history opens the door to other problems. For example, courts faced with virtually identical issues could easily reach different conclusions based not on a complete or accurate picture of the relevant aspects of the nation's history and tradition of firearms regulation, but on something as ahistorical as expert witness availability or the researching acumen of the litigants appearing before them.

In the end, despite its apprehenshion about the historical inquiry that *Bruen* commands, the Court must analyze the age requirement in Minnesota's permit-to-carry law to determine its consistency with the nation's history and tradition of firearms regulation. Applying *Bruen*'s analogical reasoning to decide whether Defendants have identified a tradition of relevantly similar regulations that prohibit 18-to-20-year-olds from publicly carrying handguns for self-defense, the Court concludes that they have not.

1. 1791 or 1868?

In searching for historical analogues, the Court must first decide where to look. This is a difficult question and one which highlights a serious tension in *Bruen*'s analytical

framework. Plaintiffs insist that 1791, when the Second Amendment was ratified, and the nearby years of the founding era are the most relevant historical reference points for finding analogous firearms regulations. In contrast, the Commissioner argues that the years surrounding 1868, the year the Fourteenth Amendment was ratified, mark the correct period in which to review historical analogues. It was, after all, the Fourteenth Amendment that "incorporated" the protections of many parts of the Bill of Rights, including the Second Amendment, against the states. *Bruen*, 142 S. Ct. at 2137 (describing incorporation of Bill of Rights against the states through the Fourteenth Amendment); *McDonald*, 561 U.S. at 750 (holding that the Second Amendment is applicable to the states). But *Bruen* left this very question open because it found that the public understanding of the right to keep and bear arms was, for purposes of the New York statute it was considering, the same regardless of which era was considered. 142 S. Ct. at 2138.

In its very recent decision in *National Rifle Ass'n v. Bondi*, No. 21-12314, --- F.4th ---, 2023 WL 2484818 (11th Cir. 2023), the Eleventh Circuit confronted that open question. *Bondi* noted that *Bruen* "expressly declined to decide whether 'courts should primarily rely" on sources from the time of the Fourteenth Amendment's adoption in 1868 when considering the constitutionality of state laws, or sources from 1791 and the founding era. *Id.* at *4 (quoting *Bruen*, 142 S. Ct. at 2138). But unlike in *Bruen*, the *Bondi* court found the dispute before it could not be decided without resolving that issue. *Bondi*, 2023 WL 2484818, at *5. In *Bondi*, the dispute involved the constitutionality of a Florida law that prohibits individuals under the age of 21 from purchasing a firearm. *Id.* at *7 (citing Fla. Stat. § 790.065(13)). The reason *Bondi* could not avoid the issue was because the historical

sources in 1791 and 1868 pointed toward different conclusions about the public understanding of the scope of the right in each of those two periods. *Id.*

Bondi's answer to the question that *Bruen* left open begins with the premise that the "claim to democratic legitimacy" for originalist theory of constitutional interpretation is that it is governed by the understanding of the scope of constitutional rights held by the people who adopted them. *See id.* at *3 (citing *Bruen*, 142 S. Ct. at 2136 and *Heller*, 554 U.S. at 634–35). When courts adhere to originalism, they must "respect the choice that those who bound themselves to be governed by the constitutional provision in question understood themselves to be making when they ratified the constitutional provision." *Id.*

But of course not all individual rights enshrined in the Constitution were ratified at the same time. As *McDonald* made clear, the Bill of Rights did not apply against the states when the Second Amendment was ratified in 1791. 561 U.S. at 742. Most of those rights did not become applicable to the states until 1868 when, according to the theory of incorporation, the Fourteenth Amendment was adopted. *Bondi*, 2023 WL 2484818, at *4 (citing *McDonald*, 561 U.S. at 764). More than 70 years separates the group of people who ratified the Second Amendment, making it applicable to the federal government, and those who agreed that it applied to the states as well.

Notwithstanding the realities of the passage of time, the rights enumerated in the Bill of Rights, including Second Amendment rights, have generally been assumed to have the same scope whether the right is asserted against the federal government or in response to a state regulation. *Bruen*, 142 S. Ct. at 2137. Thus, for the originalist, if the public understood that the Second Amendment would not have permitted certain firearms

regulations in 1791, and the people who chose to make that right applicable against the states in 1868 understood its scope to allow a regulation that was previously forbidden, arguably either principled originalism or uniform application of constitutional rights to states and the federal government must give way.

Bondi suggests that the only path through this thicket while following *Bruen*'s emphasis on originalism is to stay "faithful to the principle that constitutional rights are enshrined with the scope that they were understood to have *when the people adopted them*." *Id.* at *5 (quoting *Bruen*, 142 S. Ct. at 2136). Because the later ratification of the Fourteenth Amendment was the act by which the states made the Second Amendment applicable against themselves, the understanding of the scope of the right by those who ratified it in 1868 is, therefore, "the more appropriate barometer" for gauging what scope the Second Amendment right was enshrined with when it was incorporated against the states. *Id.* Per *Bondi*'s reasoning "it makes no sense to suggest that the States would have bound themselves to an understanding of the Bill of Rights—including that of the Second Amendment—that they did not share when they ratified the Fourteenth Amendment." 2023 WL 2484818, at *5; *Ezell v. City of Chicago*, 651 F.3d 684, 702 (7th Cir. 2011) ("*McDonald* confirms that when state- or local-government action is challenged, the focus of the original-meaning inquiry is carried forward in time; the Second Amendment's scope as a limitation on the States depends on how the right was understood when the Fourteenth Amendment was ratified.").

It is difficult to see an answer to the question that *Bruen* saw no need to resolve that is different from the one reached by the *Bondi* court if the answer is derived from adherence

to originalist theory. But, in this Court's view, *Bondi* declined to follow rather clear signs that the Supreme Court favors 1791 as the date for determining the historical snapshot of "the people" whose understanding of the Second Amendment matters. *See Bruen*, 142 S. Ct. at 2137 ("And we have generally assumed that the scope of the protection applicable to the Federal Government and States is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791."). *Bondi* does not mention the *Bruen* Court's warning to "guard against giving postenactment history more weight than it can rightly bear." *Bruen*, 142 S. Ct. at 2136. The *Bruen* majority made no small effort to distance itself from even *Heller*'s reliance on postenactment history except to the extent that such history was consistent with the founding-era public meaning. *Bruen*, 142 S. Ct. at 2136–37; *see also Gamble v. United States*, 139 S. Ct. 1960, 1975–76 (2019) (stating that *Heller* treated 19th century treatises "as mere confirmation of what the Court thought had already been established"). And the *Bruen* Court further explained that "post-ratification adoption or acceptance of laws that are inconsistent with the original meaning of the constitutional text obviously cannot overcome or alter that text." *Heller*, 670 F.3d at 1274, n.6 (Kavanaugh, J., dissenting). And *Bondi*'s conclusion is difficult to square with the Supreme Court's emphasis on applying the Bill of Rights against the states and federal government according to the same standards. *Bruen*, 142 S. Ct. at 2137; *Ramos v. Louisiana*, 140 S. Ct. 1390, 1398 (2020) (explaining that the Supreme Court has "rejected the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights") (cleaned up); *Timbs v. Indiana*, 139 S. Ct.

682, 687 (2019) ("[I]f a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires.").

This reasoning makes it difficult to agree with the Commissioner's position that 1868 should control. Other courts applying *Bruen*'s second step have similarly placed particular emphasis on founding-era analogues. *Price*, 2022 WL 6968457, at *5–6; *McCraw*, 2022 WL 3656996, at *11; *United States v. Harrison*, Case No. CR-22-00328-PRW, --- F. Supp. 3d ----, 2023 WL 1771138, at *8 & n.41 (W.D. Okla. Feb. 3, 2023), *appeal filed* No. 23-6028 (10th Cir. Mar. 30, 2023). This is not to say that post-enactment history, including that from around the time of the Fourteenth Amendment's ratification, could never shed light on the original understanding of the scope of the Second Amendment. *See Frey v. Nigrelli*, No. 21 CV 05334 (NSR), 2023 WL 2473375, at *13 (S.D.N.Y. Mar. 13, 2023) (finding "no issue in considering the abundance of examples provided by the Defendants regarding the existence of municipal gun regulations from 1750 to the late 19th century" because the Supreme Court left open the question of the appropriate period for consideration). But the Commissioner offers no persuasive reason why this Court should rely upon laws from the second half of the nineteenth century to the exclusion of those in effect at the time of the founding in light of *Bruen*'s warnings not to give post-Civil War history more weight than it can rightly bear. 142 S. Ct. at 2136.

Ultimately, however, *Bondi* does not impact this Court's conclusion because, even if *Bondi* is correct, analyses based on 1791 and on 1868 yield the same results in *this* case. The contour of the Second Amendment right that we are addressing in this case is not whether a law prohibiting the *sale* of handguns to 18-to-21-year-olds is consistent with the

nation's history and tradition of firearm regulation as it existed in either 1791 or in 1868, as it was in *Bondi*. Instead, the issue here concerns the right of that cohort to publicly carry a handgun for self-defense. As discussed below, the laws reviewed and considered by the *Bondi* court no more reveal a history and tradition of firearms regulations relevantly similar to Minnesota's age requirement than do those cited by the Commissioner.[18]

2. Proposed Analogues

Following the roadmap laid out in *Bruen*, the Court must assess any historical analogues identified by the Commissioner using two metrics to determine if they are "relevantly similar": "how" and "why" they burden the Second Amendment right as compared to the challenged regulation. *Bruen*, 142 S. Ct. at 2132–33. The Commissioner has identified rules limiting students' possession of guns on campus and two municipal ordinances as possible colonial-era analogues for Minnesota's age requirement. The Court considers them in turn.

College Campus Restrictions

To support the position that there is a tradition of firearm regulation limiting firearms rights for 18–20-year-olds, the Commissioner first points to policies on college campuses prohibiting students from owning weapons, including firearms. The Defendants

[18] Of the laws cited in *Bondi*'s Appendix, only the Nevada (1885) and Wisconsin (1883) statutes outlawed any form of public carry by a person under the age of 21, and Nevada's was limited in its application to "concealed" weapons. *See* 1883 Wis. Sess. Laws 290 § 1 ("It shall be unlawful for any minor, within this state, to go armed with any pistol or revolver . . . ."); 1885 Nev. Stat. 51 § 1 ("Every person under the age of twenty-one (21) years who shall wear or carry any dirk, pistol, . . . or other dangerous or deadly weapon concealed upon his person shall be deemed guilty of a misdemeanor. . .").

assert that persons under the age of 21 "who left their parental home and went to college then lived under the guardianship authority of their college *in loco parentis*. Many colleges prohibited students from possessing or keeping firearms." [Doc. 72 at 13; *see also* Doc. 49 at 26–27]. Evidence of such collegiate regulations is found in the report of the Commissioner's expert, Professor Saul Cornell. These include the following:

- Yale College's prohibition in 1800 on students' possession of any guns or gun powder.[19]
- An 1811 regulation at the University of Georgia providing that: "no student shall be allowed to keep any gun, pistol, Dagger, Dirk sword cane or any other offensive weapon in College or elsewhere, neither shall they or either of them be allowed to be possessed of the same out of the college in any case whatsoever."[20]
- An 1838 University of North Carolina Ordinance which stated: "No Student shall keep a dog, or firearms, or gunpowder. He shall not carry, keep, or own at the College, a sword, dirk, sword-cane."[21]

[Doc. 50-1 at 14–15 & nn.64–66 and accompanying text]. According to Professor Cornell, these rules "support the conclusion that, for individuals below the age of majority, there was no unfettered right to purchase, keep, or bear arms." [Doc. 50-1 at 15].

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[19] *The Laws of Yale-College, in New-Haven, in Connecticut, Enacted by the President and Fellows, the Sixth Day of October, A.D. 1795*, at 26 (1800).

[20] *The Minutes of the Senatus Academicus* 1799–1842, p.73 University of Georgia Libraries (1976), *available at* http://dlg.galileo.usg.edu/do:guan_ua0148_ua0148-002-004-001.

[21] Acts of the General Assembly and Ordinances of the Trustees, for the Organization and Government of the University of North Carolina 15 (1838). Aside from the other problems identified with these proposed analogues below, a rule from 1838 stretches the boundaries of what may reasonably be interpreted as falling within the period referred to as the founding era.

The Court cannot agree that these rules and regulations demonstrate a relevantly similar historical tradition of restrictions on 18-to-20-year-olds possessing or carrying firearms. For one thing, none of these proposed analogues appears to be the product of a legislative body elected by founding-era voters, but instead they are rules established by the institutions' boards of trustees or other leadership. Moreover, the reach of these prohibitions—students at three colleges in an era when higher education was attended by few—is not enough to suggest an original public understanding that restrictions on 18-to-20-year-olds' possession and carrying of firearms were consistent with the Second Amendment. Indeed, they would not have prevented a person under the age of 21 who was not a student at one of the schools from possessing or carrying a firearm, and they undoubtedly applied with equal force to students older than 21.

Moreover, considering whether such regulations are "relevantly similar" must also involve an inquiry into why the cited university regulations at issue burden the students' right to armed self-defense, and whether that motivation is akin to the purpose of the age requirement in Minnesota's permitting scheme. *Bruen*, 142 S. Ct. at 2132–33. The Minnesota Legislature made the empirical judgment that individuals under 21 present greater risks when carrying firearms and believed preventing them from carrying the handguns in public is consistent with the Second Amendment. *See* Minn. Stat. § 624.714, subd. 22 (indicating that the legislature recognizes the "fundamental, individual right to keep and bear arms" protected by the Second Amendment and stating that the "provisions of this section are declared to be necessary to accomplish compelling state interests in

regulation of those rights").[22] One can similarly surmise that the leadership of Yale and the Universities of Georgia and North Carolina imposed restrictions on student possession of firearms for comparable safety reasons. But identifying that a proposed analogue and a modern regulation are both aimed at promoting safety by limiting accidents and intentional violence is not enough to suggest that the campus rules are "distinctly similar" historical analogues. *Bruen*, 142 S. Ct. at 2131.

The Commissioner fares no better with the suggestion that because these rules derive from the colleges' *in loco parentis* guardianship responsibilities, they reveal a historical tradition that people under 21 were minors without rights. [Doc. 72 at 13]. The argument is that the rules stemmed from the institutions' assumption of the "obligations incident to the parental relation," because they have acquired custody of the student and "such power of control over the person of the child as is incident to the family government." 29 William Mack, *Cyclopedia of Law and Procedure* 1670–71 (1908).[23] However, the age

[22] The Minnesota Supreme Court has observed that the permitting requirement was enacted "'to prevent the possession of firearms in places where they are most likely to cause harm in the wrong hands, i.e., in public places where their discharge may injure or kill intended or unintended victims.'" *State v. Hatch*, 962 N.W.2d 661, 664 (Minn. 2021) (quoting *State v. Paige*, 256 N.W.2d 298, 303 (Minn. 1977)). The Expert Report of Professor John J. Donohue, offered by the Commissioner, also observes that "the age-based restriction on gun carrying adopted by Minnesota and challenged in this case promotes public health and safety by generating meaningful reductions in violent crime, firearm accidents, gun theft, and suicide." [Doc. 50-1 at 54]. Generally speaking, Professor Donohue's report catalogues the evidence he relied on to support his opinion that individuals under the age of 21 present greater public safety risks.

[23] *See Brinkerhoff v. Merselis' Executors*, 24 N.J.L 680, 683 (1855) (stating that the "proper definition of a person *in loco parentis* to a child is, a person who means to put himself in the situation of the lawful father of the child, with reference to the father's office and duty of making provision for the child" or someone "discharging parental duties" (citing, among other English cases, *Wetherby v. Dixon* [1815], 34 Eng. Reprint 568)).

requirement in Minnesota's permit-to-carry law does not stem from a similar justification.[24] These proposed analogues, therefore, are "relevantly similar" in their motivation for intruding on the right at the center of the Second Amendment in only the most general way. Overall, they do not demonstrate a founding-era tradition of firearm regulation consistent with the challenged law.

Municipal Ordinances

The Commissioner also points to two municipal laws that, although they post-date ratification, can reasonably be linked to the founding era: an 1803 New York ordinance, and an 1817 ordinance from Columbia, South Carolina. [Doc. 49 at 27; Doc. 50-1 & nn.67–68]. The New York ordinance "To Prevent the Firing of guns in the City of New York," provided that if the person firing the weapon was a minor, then the guardian would

It seems likely that the Commissioner's focus on the *in loco parentis* rationale behind these regulations is to provide further support for his position that those who were legally minors in 1791 would not have been included among "the people" to whom the Second Amendment's protections extend. The Court has considered it in that context as well, and unfortunately for the Defendants, the argument does not change the Court's conclusion regarding the first step of the *Bruen* test.

[24] It is also worth noting that a person standing *in loco parentis* may have a duty to prevent the minor from harming others to avoid incurring tort liability. 67A Corpus Juris Secundum, Parent and Child § 370, *Tort liability and rights of action*. If the campus rules at issue were passed with the purpose of institutional avoidance of tort liability in mind, one would be hard pressed to say that such a reason is relevantly similar to any reason the Minnesota Legislature likely included the age requirement in its permitting scheme.

responsible for paying the $5 fine.[25] The 1817 Columbia ordinance similarly prohibited the firing of weapons by anyone within the town, subject to a $5 fine for any violation, but if a minor or indigent person broke the law and was unable to pay, then the firearm could be seized and sold to pay the fine.[26] However, these proposed analogues are not "relevantly similar" because they burden the right to bear arms for different reasons and in different ways than Minnesota's age requirement. As to *how* they burden the right, they place restrictions on the discharge of firearms, but do not ban carrying them outright. And as to the *why*, both ordinances contain a whereas clause generally citing dangers associated with the discharge of weapons within city or town. Though the remedies for each recognize that a minor might be less able to pay the fine, both the laws governed conduct regardless of age, prohibiting conduct of adults of any age.

Other Founding-Era Analogues

The Commissioner has proposed no other founding-era firearm regulations as historical analogues justifying Minnesota's age requirement. Other courts looking for

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[25] Ordinance of the City of New York, to Prevent the Firing of Guns in the City of New York § 1, *Laws and Ordinances, Ordained and Established by the Mayor, Alderman and Commonalty of the City of New-York, in Common-Council Convened, for the Good Rule and Government of the Inhabitants and Residents of Said City* 83–84 (1803), https://firearmslaw.duke.edu/laws/edward-livingston-laws-and-ordinances-ordained-and-established-by-the-mayor-aldermen-and-commonalty-of-the-city-of-new-york-in-common-council-convened-for-the-good-rule-and-government-of-the-inh/.

[26] An Ordinance for Prohibiting the Firing of Guns in the Town of Columbia (1817), *Ordinances of the Town of Columbia, (S.C.) Passed Since the Incorporation of Said Town: To Which are Prefixed the Acts of the General Assembly, for Incorporating the Said Town, and Others in Relation Thereto* 61 (1823), https://firearmslaw.duke.edu/laws/ordinances-of-the-town-of-columbia-s-c-passed-since-the-incorporation-of-said-town-to-which-are-prefixed-the-acts-of-the-general-assembly-for-incorporating-the-said-town-and-others-in-relati/.

historical restrictions from the founding era on the rights of 18-to-20-year-olds to keep and bear arms have similarly come up empty. *McCraw*, 2022 WL 3656996, at *9–10 (finding that Texas had failed to identify any relevantly similar historical analogue for its law prohibiting 18–20-year-olds from applying for a license to carry); *Hirschfeld*, 5 F.4th at 439 ("At the time of ratification, there were no laws restricting minors' possession or purchase of firearms").[27] But the Commissioner argues that a narrow focus on the presence—or absence—of laws expressly prohibiting people under 21 from carrying firearms creates a skewed perception of the reality of gun possession during the founding era.

The Commissioner states that "context is key to understanding historical analogues to Minnesota's permitting scheme from the Founding Era." [Doc. 72 at 13]. The Commissioner points to Professor Cornell's response to a deposition question asking him to identify a law from the founding era restricting 18-to-20-year-olds from purchasing or carrying firearms. Professor Cornell testified that he was aware of no such laws, but deemed the inquiry a "bad question." [Doc. 72 at 14 (citing Cornell Dep. 177:9–21) (alteration in original)]. And in his expert report, Professor Cornell explains that "[a]ny effort to understand the Second Amendment and the history of gun regulation must . . . canvass a variety of historical topics, including such diverse subfields as legal history,

[27] *See also Swearingen*, 545 F. Supp. 3d at 1256 ("[T]his Court has found no case or article suggesting that, during the Founding Era, any law existed that imposed restrictions on 18-to-20-year-olds' ability to purchase firearms. . . . Given the amount of attention this issue has received, if such a law existed, someone surely would have identified it by now. Thus, this Court proceeds under the assumption that no law restricting the purchase of firearms by 18-to-20-year-olds existed at the Founding.").

social history, cultural history, economic history, and military history," because failing to do so risks adopting a "discredited 'tunnel vision' approach to historical analysis." [Doc. 50-1 at 9–10]. Essentially, the Commissioner's expert argues that the absence of founding-era laws restricting 18-to-20-year-olds from publicly carrying firearms only permits an inference that the public understood that group to possess a corresponding constitutional right to public carry if one makes anachronistic and flawed assumptions about what that regulatory silence means.

Professor Cornell's testimony raises a compelling question about the propriety of drawing conclusions about a modern regulation's validity from the absence of laws prohibiting 18-to-20-year-olds from possessing weapons during the founding era. Professor Cornell persuasively argues that without the proper contextual framing, the straightforward search for so-called "relevantly similar" laws will yield a conclusion that is unsound as a matter of historical methodology. And such a critique highlights the challenge of having judges, most of whom are not trained historians, look narrowly at laws on the books to discern true historical understandings. But persuasive as one may find this criticism, *Bruen* instructs lower courts that "when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment." 142 S. Ct. at 2131. Here, while it might be more analytically sound to consider the context Professor Cornell referenced, the Court cannot discern how to incorporate that context into *Bruen*'s mandated approach to analogical reasoning. Ultimately, the Court is constrained to conclude that

Defendants have not met their burden to show that Minnesota's challenged law is consistent with the nation's founding-era history and tradition of firearm's regulation.

Reconstruction-Era Analogues

The Commissioner points to potential analogues from before and after ratification of the Fourteenth Amendment as evidence that Minnesota's age requirement is consistent with the nation's history and tradition of firearm regulation. These include several laws from shortly before the Civil War,[28] and 19 regulations enacted between 1875 and 1899 that prohibited, with limited exception, selling or otherwise furnishing pistols, revolvers, or other deadly weapons to groups variously identified as minors, minors under 16, and minors under the age of 21.[29] As explained above, relying on laws so far removed in time from the ratification of the Second Amendment to demonstrate the "historical tradition of firearm regulation" contemplated by *Bruen* would "giv[e] postenactment history more

[28] 1856 Ala. Acts 17; 1856 Tenn. Pub. Acts. 92; 1859 Ky. Acts 245. The text of these statutes, and others referenced in this section, may be found online at https://firearmslaw.duke.edu/repository/search-the-repository/ (under Subjects, select "Possession by, Use of, and Sales to Minors and Others Deemed Irresponsible," choose desired Jurisdictions from the list below, and click on "Submit" button).

[29] 1883 Kan. Sess. Laws 159; 1883 Wis. Sess. Laws 290 § 2; 1890 La. Acts 39, § 1; 1882 Md. Laws 656, § 2; 1875 Ind. Acts 59; 1876 Ga. Laws 112; 1878 Miss. Laws 175; 1881 Del. Laws 716; 1881 Fla. Laws 87; 1881 Ill. Laws 73; 1881 Pa. Laws 111; 1882 W. Va. Acts 421; 1883 Mo. Laws 78; 1884 Iowa Acts 86; 1890 Okla. Laws 495; 1890 Wyo. Sess. Laws 127; 1893 N.C. Sess. Laws 468; 1895 Neb. Laws Relating to the City of Lincoln 237; 1897 Tex. Gen. Laws 221. See also Doc. 50-1 at 25–26 (Table Two); *Nat'l Rifle Ass'n of Am., Inc. v. Bur. of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 202 & n.14 (5th Cir. 2012) ("Arms-control legislation intensified through the 1800s, . . . and by the end of the 19th century, nineteen states and the District of Columbia had enacted laws expressly restricting the ability of persons under 21 to purchase or use particular firearms, or restricting the ability of 'minors' to purchase or use particular firearms while the state age of majority was set at age 21."), *abrogated by Bruen*, 142 S. Ct. at 2127 n.4.

weight than it can rightly bear." 142 S. Ct. at 2135–36; *McCraw*, 2022 WL 3656996, at *11 (same).

Nonetheless, the Court has carefully reviewed the text of each of the 19th century laws offered by the Commissioner as possible analogues. Even aside from the fact that they were enacted decades after the founding, for various reasons, none of these regulations is "relevantly similar" to the age requirement in Minnesota's permit-to-carry law. Several of the Reconstruction-era laws pointed to by the Commissioner prohibited sales of firearms to minors, but did not place restrictions on minors receiving them from parents or even employers.[30] And other proffered laws limited firearm possession by those under the age of 16, but not the 18-to-20-year-old cohort at issue in Minnesota's law. 1881 Fla. Laws 87; 1881 Pa. Laws 423. In addition, the Nevada statute "only prohibits those under twenty-one from *concealed* carry of pistols," but not from carrying altogether. *NRA II*, 714 F.3d at 344 (Jones, J. dissental) (emphasis in original). These restrictions do not burden the Second Amendment right in a manner distinctly similar to the age requirement Minnesota's permit-to-carry law.

In sum, the Commissioner's reliance on statutes passed in the second half of the 19th century does not support his burden to show the age requirement in Minn. Stat.

[30] 1878 Miss. Laws 175–76, § 2 (prohibiting only sales to minors); 1881 Fla. Laws 87, § 1 (allowing sales or other transactions to minors with permission of the parent); 16 Del. Laws 716 (1881) (prohibiting sales to minors); 1881 Ill. Laws 73 (exceptions for transfers by the "father, guardian, or employer" of a minor); 1883 Mo. Laws 76 (allowing transfers to minors with parental consent); 1897 Tex. Gen. Laws 221–22 (permitting transfers with written consent of parent or guardian).

§ 624.714, subd. 2(b)(2), is consistent with the nation's history and tradition of firearm regulations as required by *Bruen*.

D. Policy Concerns

Missing from the above application of *Bruen*'s test is any discussion of either the legitimacy of the reasons Minnesota adopted the age requirement or the tailoring of the means to fit the purposes served by the law. The Commissioner submitted the Expert Report of Professor John J. Donohue in connection with the summary judgment briefing. Professor Donohue, an economist and law professor with a focus on empirical legal studies, discusses the relevant population of young adults, including important features of their neurobiological and behavioral development, increased risks associated with them having greater access to weapons, the effectiveness of Minnesota's existing regulations in addressing higher rates of violence among the population of young adults, the empirical data regarding whether public carry among the population will actually result in effective use of guns for protection, and other issues. [Doc. 50-1 (beginning at p.54 of the attachment)]. *Amici curiae*, Giffords Law Center to Prevent Gun Violence and Protect Minnesota, similarly link the still-developing nature of 18–20-year-olds' brains to increased impulsivity and a prediction that greater access to firearms among young adults leads to disproportionate rates of violent crimes involving firearms and suicides. [Doc. 71 at 12–28]. Indeed, Minnesota enacted the age requirement in 2003 for reasons that align with these very concerns, with the Legislature balancing safety interests against its understanding of the right to keep and bear arms. Minn. Stat. § 624.714, subd. 22. There is

no basis in the record for the Court to question the conclusions reached by Professor Donohue's Report and *amici*.

If the Court were permitted to consider the value of these goals and how well Minnesota's age requirement fits the ends to be achieved, the outcome here would likely be different. But whatever the evidence may reveal about the wisdom behind enacting a 21-year-old requirement for publicly carrying a handgun, such analysis belongs to a regime of means-end scrutiny scuttled by *Bruen*. Under *Bruen*, the balancing of interests in public safety and the right to keep and bear arms has already been "struck by the traditions of the American people." 142 S. Ct. at 2131 (citing *Heller*, 554 U.S. at 635). Second Amendment jurisprudence now focuses a lens entirely on the choices made in a very different time, by a very different American people. Given the relative dearth of firearms regulation from the most relevant period where that lens is aimed, the endeavor of applying *Bruen* seems likely to lead, generally, to more guns in the hands of more people, not just young adults.[31] Some Minnesotans are surely fine with that result. Others may wonder what public safety measures are left to be achieved through the political process where guns are concerned. But *Bruen* makes clear that today's policy considerations play no role in an analytical framework that begins and ends more than two hundred years ago.

[31] *United States v. Rahimi*, No. 21-11001, 2023 WL 2317796 (5th Cir. 2023) (applying *Bruen* to hold that 18 U.S.C. § 922(g)(8), which makes it a crime to possess a firearm while subject to a domestic violence restraining order, violates the Second Amendment).

E. Conclusion

Because the plain text of the Second Amendment covers the Plaintiffs' proposed course of conduct and Defendants have not met their burden under the historical prong of *Bruen*'s test, Plaintiffs are entitled to judgment as a matter of law on their Second Amendment claim. As noted above, Plaintiffs seek both a declaratory judgment and injunctive relief. Specifically, they ask for the following relief in their Complaint:

> a) Declare that Minn. Stat. § 624.714, subd. 1a and § 624.714, subd. 2(b)(2), their derivative regulations, and all related laws, policies, practices, and customs violate—facially, as applied to otherwise qualified 18–20-year-olds, or as applied to otherwise qualified 18–20-year-old women—the right of Plaintiffs and Plaintiffs' similarly situated members to keep and bear arms as guaranteed by the Second Amendment and Fourteenth Amendments to the United States Constitution; [and]
>
> b) Enjoin Defendants, their officers, agents, servants, employees, and all persons in active concert or participation with him from enforcing, against Plaintiffs and Plaintiffs' similarly situated members Minn. Stat., § 624.714, subd. 1a and § 624.714, subd. 2(b)(2), their derivative regulations, and all related laws, policies, practices, and customs that would impede or criminalize Plaintiffs and Plaintiffs' similarly situated members' exercise of their right to keep and bear arms.

[Compl., Prayer for Relief].

Based on the record here, the Court grants Plaintiffs' motion for summary judgment, but will not direct entry of Judgment giving Plaintiffs the declaratory and injunctive relief specifically requested in their Complaint. Because the Court has concluded that the age requirement is unconstitutional, Defendants will ultimately be enjoined from denying a permit to carry a pistol from an otherwise-qualified applicant who is at least 18 years old.

However, nothing before the Court establishes that, once enforcement of the age requirement is enjoined and it forms no impediment to receipt of a permit by those over the age of 18, it would still be unconstitutional to require 18–20-year-olds to first obtain a permit pursuant to the permitting requirement in Minn. Stat. § 624.714, subd. 1a, as older Minnesotans must now do.

Consistent with the foregoing, the Court finds that Plaintiffs are entitled to the following relief: (1) a declaration that Minn. Stat. § 624.714, subd. 2(b)(2)'s requirement that a person must be at least 21 years of age to receive a permit to publicly carry a handgun violates the federal constitutional right of 18–20-year-olds to keep and bear arms; and (2) Defendants are enjoined from enforcing the minimum-age requirement in Minn. Stat. § 624.714, subd. 2(b)(2), against 18–20-year-olds, provided that any individual Plaintiff or other 18–20-year-old who applies to receive a permit-to-carry is not otherwise ineligible.[32]

IV. Defendants' Motions

For the same reasons that the Court has granted the Plaintiffs' summary judgment on the merits of their Second Amendment claim, the Court concludes that the Defendants are not entitled to summary judgment on the merits of the constitutional arguments explored above. In support of their motions, Defendants raised other arguments that have

[32] The Court notes that in *McCraw*, a case involving a successful challenge to Texas' 21-year-old minimum-age requirement for a permit-to-carry, the court stated that although "Texas cannot impose a 'substantial burden on public carry' for 18-to-20-year-olds, Texas could, under *Bruen*, require 18-to-20-year-olds to satisfy additional objective criteria when compared to those above the age of 21." *McCraw*, 2022 WL 3656996, at *11 n.9.

not yet been addressed in this Order. These remaining issues do not change the outcome for the Defendants, and their motions are denied.

A. Standing

The Commissioner argues that the Plaintiffs cannot establish standing. [Doc. 78 at 3]. And in any event, standing "is a jurisdictional requirement, [that] 'can be raised by the court sua sponte at any time during the litigation.'" *Pucket v. Hot Springs Sch. Dist. No. 23-2*, 526 F.3d 1151, 1156–57 (8th Cir. 2008) (quoting *Delorme v. United States*, 354 F.3d 810, 815 (8th Cir. 2004)). Article III standing requires a plaintiff to show "(1) that he or she suffered an 'injury-in-fact, (2) a causal relation between the injury and the challenged conduct, and (3) that the injury likely will be redressed by a favorable decision." *Id.* at 1157 (quoting *Steger v. Franco, Inc.*, 228 F.3d 889, 892 (8th Cir. 2000)). An organization may bring suit on behalf of its members when: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Red River Freethinkers v. City of Fargo*, 679 F.3d 1015, 1022 (8th Cir. 2012) (quotations omitted).

The Court has no trouble concluding that Plaintiffs have met their burden to show that they have standing. Courts addressing nearly identical claims on very similar records have found the requisite criteria are satisfied for Article III standing. *See McCraw*, 2022 WL 3656996, at *2 (finding that individual and organizational plaintiffs had standing to challenge 21-year-old age restriction in Texas' permit-to-carry law on similar facts). The Sheriffs' implicit suggestion that Plaintiffs have shown no injury because the Sheriffs have

never received an application for a permit-to-carry from the individual Plaintiffs or anyone else under the age of twenty-one does not defeat the Plaintiffs' standing. Indeed, submission of such an application would have been futile.[33] *See Pucket*, 526 F.3d at 1162 ("[W]e may find a plaintiff has standing even if he or she has failed to take steps to satisfy a precondition if the attempt would have been futile."); *McCraw*, 2022 WL 3656996, at *2 (noting that the plaintiffs did not need to violate the permit-to-carry statute to show standing, but could meet the injury requirement by showing they intended to engaged in arguably protected, but prohibited conduct, with a credible threat of prosecution). Similarly, the Commissioner's suggestion at the hearing that the discovery in this case failed to reveal any immediate harm does not undermine the Plaintiffs' standing. Publicly carrying a handgun in Minnesota without a permit is a criminal offense, Plaintiffs have provided uncontroverted evidence of an intention to engage in conduct arguably protected by the Second Amendment, and nothing in the record suggests Plaintiffs would be free from enforcement of any criminal penalties should they choose to violate the law. Because there exists a credible threat of prosecution if Plaintiffs engage in the arguably protected conduct at issue, they satisfy the imminence requirement of injury-in-fact. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158–59 (2014) (discussing the injury-in-fact requirement where there is a credible threat of prosecution) (quotation marks omitted); *Christian v. Nigreli*, 22-CV-695 (JLS), --- F. Supp. 3d ---, 2022 WL 17100631, at *4

[33] Moreover, the declarations submitted by organizational plaintiffs MGOC, SAF, and FPC set forth a sufficient basis for the Court to conclude that these associations have standing to bring claims on behalf of their members.

(W.D.N.Y. Nov. 22, 2022) (applying *Driehaus* in the Second Amendment context). Accordingly, the Court concludes that Plaintiffs have Article III standing in this matter.

B. Proper Defendants

In slightly different ways, the Commissioner and the Sheriffs argue that they are each entitled to summary judgment because they are not the proper parties against whom Plaintiffs should have brought their Second Amendment claims. The Commissioner does not point his finger directly at the Sheriffs, and they, in turn, do not expressly say that Plaintiffs should only have sued the Commissioner. But the Commissioner essentially contends he is not the proper defendant because he is not directly responsible for issuing the permits, and the Sheriffs suggest that the responsibility rests with the State rather than their respective counties. If both the Commissioner and the Sheriffs were correct, Plaintiffs would potentially be without a means to obtain relief for the alleged violation of their constitutional rights.

The Court concludes that the Commissioner and the Sheriffs are both properly named Defendants in this litigation.

1. *Ex Parte Young* and the Commissioner

The Commissioner asserts that the Plaintiffs' official-capacity claims against him are jurisdictionally barred by Eleventh Amendment sovereign immunity. Because Minnesota has not waived that immunity, and 42 U.S.C. § 1983 does not override it, the Commissioner argues that the only exception that would allow Plaintiffs' claims to go forward would be that recognized in *Ex parte Young*, 209 U.S. 123 (1908). "In *Ex parte Young*, the Supreme Court recognized Eleventh Amendment sovereign immunity does not

bar certain suits seeking declaratory and injunctive relief against state officers in their individual capacities based on ongoing violations of federal law." *Minn. RFL Republican Farmer Lab. Caucus v. Freeman*, File No. 19-cv-1949 (ECT/DTS), 2020 WL 1333154, at *2 (D. Minn. Mar. 23, 2020) ("*Freeman*") (brackets and internal quotation omitted) (quoting *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1131 (8th Cir. 2019)).[34] According to the Commissioner, the *Ex parte Young* exception does not apply because the Commissioner is not responsible for enforcement of the permit-to-carry statute and has not threatened to commence any proceedings to enforce the statute.

The Court concludes that Plaintiffs' claims for prospective declaratory and injunctive relief may proceed against the Commissioner. Under the *Ex parte Young* doctrine, for the defendant "to be amenable for suit challenging a particular statute the [defendant] must have some connection with the enforcement of the act." *281 Care Comm. v. Arneson*, 638 F.3d 621, 632 (8th Cir. 2011) (internal quotation marks omitted); *Calzone v. Hawley*, 866 F.3d 866, 869 (8th Cir. 2017) (same). But the official's connection "'does not need to be primary authority to enforce the challenged law.'" *Church v. Missouri*, 913 F.3d 736, 748 (8th Cir. 2019) (quoting *281 Care*, 638 F.3d at 632).

Here, the thrust of the Commissioner's argument is that the Sheriffs, and not the Commissioner, are "responsible for reviewing, investigating, denying and issuing licenses

[34] *Freeman* explains that discussion of the *Ex parte Young* exception has not always been precise regarding a distinction about official-capacity or individual-capacity claims, but the distinction appears to be "insignificant in these cases. The point is that *Ex parte Young* permits suits against state officers for prospective declaratory and injunctive relief—not damages—the Eleventh Amendment notwithstanding." 2020 WL 1333154, at *2 n.3.

under the statute." The Commissioner suggests that his connection to the statute is only "ministerial" and he is not charged with enforcing the statute as a matter of law. [Doc. 49 at 13]. But the statutory scheme plainly gives the Commissioner "some connection" with enforcement of the act. Indeed, the Commissioner is required by Minn. Stat. § 624.7151 and § 624.714, subd. 3, to develop statewide standards for application forms that are consistent with the criteria set forth in § 624.714, subd. 2(b). The record demonstrates that the Commissioner created such a form, which among other things, requires an applicant to provide his or her date of birth. [Doc. 43-1]. Though no one suggests an injunction should require removal of the date-of-birth box from the form, it is clear that the Commissioner facilitates enforcement of the age requirement. More directly, the Commissioner is required to make the standardized forms available on the Internet, Minn. Stat. § 624.714, subd. 3(h), which he has done.[35] And on that same Minnesota Department of Public Safety website, the requirements for getting a permit to carry are listed on a Frequently Asked Questions page. That FAQ section includes an indication that the applicant "[m]ust be at least 21 years of age."[36] The Commissioner, consistent with the current language of the statute, informs members of the public who are 18–20-year-olds that they are ineligible to receive a permit to carry.

The Court concludes that the Commissioner is not entitled to summary judgment based on his argument that he is the wrong Defendant. Even if the Commissioner does not

[35] https://dps.mn.gov/divisions/bca/bca-divisions/administrative/Pages/firearms-permit-to-carry.aspx.

[36] https://dps.mn.gov/divisions/bca/bca-divisions/administrative/Pages/Permit-to-Carry-FAQ.aspx.

"have the full power to redress [Plaintiffs'] injury," *281 Care*, 638 F.3d at 633, Plaintiffs have sufficiently demonstrated that he has some connection to enforcement of the statute such that he can be ordered to provide meaningful prospective injunctive relief.

2. *Monell* and the Sheriffs

The Sheriffs likewise argue that they are the wrong defendants, but they base their argument on *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978). Under *Monell*, a municipality can be a "person" subject to liability for constitutional violations pursuant to 42 U.S.C. § 1983 when the violation at issue was caused by an official municipal policy. 436 U.S. at 690–91. "For a municipality to be liable, a plaintiff must prove that a municipal policy or custom was the moving force behind the constitutional violation." *Mettler v. Whitledge*, 165 F.3d 1197, 1204 (8th Cir. 1999) (quotations and brackets omitted). The Sheriffs argue that Plaintiffs cannot prevail against them under *Monell* because when the Sheriffs deny a permit to carry a handgun, they are simply following a statutory obligation to apply Minn. Stat. § 624.714.[37] According to the Sheriffs, Plaintiffs cannot show that any county policy is implicated in this case at all, let alone one that is the moving force behind the alleged violation of Plaintiffs' Second Amendment rights.

[37] The Sheriffs aptly and thoroughly discuss the unsettled answer to the issue of when a municipality may be sued pursuant to *Monell* for enforcement of state law. As one court in this District put it: "[t]he short story is that the Supreme Court has not decided the issue. Nor has the Eighth Circuit. And the other circuits are split." *Freeman*, 2020 WL 1333154, at *2 (quoting *Slaven v. Engstrom*, 710 F.3d 772, 781 n.4 (8th Cir. 2013) ("Whether, and if so when, a municipality may be liable under § 1983 for its enforcement of state law has been the subject of extensive debate in the circuits.")).

Here, for purposes of enforcing the age requirement in Minn. Stat. § 624.714, subd. 2(b)(2), and issuing permits to carry, the Sheriffs are arms of the State. The Court reaches this conclusion based on its review of the Sheriffs' role in the statutory licensure scheme. *Evans v. City of Helena-West Helena*, 912 F.3d 1145, 1146 (8th Cir. 2019) ("Whether the clerk acts on behalf of the State, the City, or the County depends on the definition of the clerk's official functions under the relevant state law.").

Under Minnesota's permit-to-carry law, the Sheriffs implement the permitting scheme. In doing so, they process applications on a form created by the Commissioner for statewide administration. Minn. Stat. § 624.714, subd. 3 (form and contents of application); *id.* § 624.7151 (requiring adoption of standardized forms). While Sheriffs process applications for residents of the counties in which they have been elected, "nonresidents" are permitted to apply to any sheriff for a permit to carry. *Id.* § 624.714, subd. 2 (citing § 171.01, subd. 42). When they review, process, and issue or deny a permit, including if they were to deny a permit to a person under the age of 21, the Sheriffs are exercising authority on behalf of the State of Minnesota. *Id.* § 624.714, subd. 2(b) (providing that the sheriff "must issue a permit to an applicant if the person" meets specified criteria); *id.* § 624.714, sudb. 6(a). The permit cards issued by the Sheriffs are on a standardized form adopted by the Commissioner. *Id.* § 624.714, subd. 7(a). The Sheriffs collect application fees, but are required to send portions of those fees back to the Commissioner to be deposited into the general fund. *Id.* § 624.714, subd. 3(f); *id.* § 624.714, subd. 7(c)(1). Any portion of the fees collected by the Sheriffs must be held in a segregated fund and only used to pay the costs of administering the permitting regime. *Id.* § 624.714, subd. 21. The

Sheriffs are required to provide the Department of Public Safety with basic data required to allow the Commissioner to complete reports to the Minnesota Legislature regarding the issuance of carry permits. *Id.* § 624.714, subd. 20(b).

Considering "the definition of the [Sheriffs'] functions under relevant state law," *McMillian v. Monroe County*, 520 U.S. 781, 786 (1997), the Court finds that for purposes of enforcing the provisions of Minn. Stat. § 624.714, the Sheriffs actually represent the State of Minnesota. And like the Commissioner, the Sheriffs are significantly involved in implementing the unconstitutional prohibition on law-abiding 18–20-year-olds' right to publicly carry firearms for self-defense. Accordingly, as acting State officials for purposes of their enforcement of the permit-to-carry law, the Sheriffs have a sufficient connection with the ongoing enforcement to allow the Plaintiffs' claims for prospective injunctive relief to go forward against them under the doctrine of *Ex parte Young*. *See Freeman*, 2020 WL 1333154, at *2–3; *see also McMillian* (holding that Alabama sheriffs acting in their law enforcement capacities represented the State of Alabama).

V. Order

For the foregoing reasons, **IT IS HEREBY ORDERED that:**

1. Plaintiffs' Motion for Summary Judgment [Doc. 40] is **GRANTED IN PART**;
2. Judgment is granted to Plaintiffs on the issue of whether Minn. Stat. § 624.714, subd. 2(b)(2), violates the right of the individual Plaintiffs and the otherwise-qualified 18–20-year-old members of MGOC, SAF, and FPC to

keep and bear arms as guaranteed by the Second and Fourteenth Amendments to the United States Constitution;

a. The Court declares that Minn. Stat. § 624.714, subd. 2(b)(2)'s requirement that a person must be at least 21 years of age to receive a permit to publicly carry a handgun in Minnesota violates the rights of individuals 18–20 years old to keep and bear arms protected by the Second and Fourteenth Amendments; and

b. Defendants are enjoined from enforcing the 21-year minimum-age requirement in Minn. Stat. § 624.714, subd. 2(b)(2), against the individual Plaintiffs and otherwise-qualified 18–20-year-olds;

3. Commissioner Harrington's Motion for Summary Judgment [Doc. 45] is **DENIED**; and

4. Sheriffs Lorge, Wolbersen, and Starry's Motion for Summary Judgment [Doc. 52] is **DENIED**.

Let Judgment be Entered Accordingly.

Date: March 31, 2023

s/ Katherine Menendez
Katherine Menendez
United States District Judge

UNITED STATES DISTRICT COURT

District of Minnesota

Kristin Worth, Austin Dye, Axel Anderson, Minnesota Gun Owners Caucus, Second Amendment Foundation, Firearms Policy Coalition, Inc.,

Plaintiffs,

v.

John Harrington, Don Lorge, Troy Wolbersen, Dan Starry,

Defendants.

JUDGMENT IN A CIVIL CASE

Case Number: 21-cv-1348 (KMM/LIB)

☐ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT:

1. Plaintiffs' Motion for Summary Judgment [Doc. 40] is **GRANTED IN PART**;

2. Judgment is granted to Plaintiffs on the issue of whether Minn. Stat. § 624.714, subd. 2(b)(2), violates the right of the individual Plaintiffs and the otherwise-qualified 18–20-year-old members of MGOC, SAF, and FPC to keep and bear arms as guaranteed by the Second and Fourteenth Amendments to the United States Constitution;

    a. The Court declares that Minn. Stat. § 624.714, subd. 2(b)(2)'s requirement that a person must be at least 21 years of age to receive a permit to publicly carry a

handgun in Minnesota violates the rights of individuals 18–20 years old to keep and bear arms protected by the Second and Fourteenth Amendments; and

b. Defendants are enjoined from enforcing the 21-year minimum-age requirement in Minn. Stat. § 624.714, subd. 2(b)(2), against the individual Plaintiffs and otherwise-qualified 18–20-year-olds;

3. Commissioner Harrington's Motion for Summary Judgment [Doc. 45] is **DENIED**; and

4. Sheriffs Lorge, Wolbersen, and Starry's Motion for Summary Judgment [Doc. 52] is **DENIED**.

Date: 4/25/2023 KATE M. FOGARTY, CLERK