NO. 24-93

In the Supreme Court of the United States

CHRISTOPHER PARIS, COMMISSIONER,
PENNSYLVANIA STATE POLICE,

Petitioner,

v.

MADISON M. LARA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE RESPONDENTS

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August 29, 2024

QUESTIONS PRESENTED

Does the Second Amendment permit Pennsylvania to restrict the firearm rights of 18-to-20-year-old adults solely on account of their age?

CORPORATE DISCLOSURE STATEMENT

No party to this brief has a parent company or a publicly held company with a ten percent or greater ownership interest in it.

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INTRODUCTION

As this Court is well aware, *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022), initiated an explosion of litigation across the country over the textual and historical contours of the Second Amendment. Two years later, some issues have clearly divided courts and judges, with significant disagreement, for instance, over "what types of weapons are 'Arms' protected by the Second Amendment," *Harrel v. Raoul*, 144 S. Ct. 2491, 2492 (2024) (mem.) (Thomas, J.), or when, if ever, the government can justifiably disarm for life individuals who have been convicted of felonies, *see* Suppl. Br. for the Federal Parties, *Garland v. Range*, No. 23-374 (June 4, 2024) (urging the Court to take multiple cases "to consider Section 922(g)(1)'s constitutionality across a range of circumstances that are fully representative of the statute's implications"). In *United States v. Rahimi*, 144 S. Ct. 1889, 1889 (2024), recognizing some of these difficulties and disagreements, several justices of this Court noted that it must provide additional help to the lower courts in trying to apply *Bruen* to thorny cases.

This is, happily, not one of those cases. The issue—whether adults between 18 and 21 years old have full Second Amendment rights—is undoubtedly important. But the lower courts have had no trouble deciding it under the *Bruen* standard and are in broad agreement. The courts of appeals are 2–0 post-*Bruen* in holding that 18-to-20-year-olds have full Second Amendment rights and the district courts are (to the best of Respondents' knowledge) currently 4–1 on the same issue, with several appeals (and one en banc reconsideration) still pending. The Court should not grant certiorari to review at this stage but should

permit the ordinary percolation process to continue and reserve its intervention for the point at which, if it comes at all, the courts of appeals are actually divided.

That is especially true in this case, because the decision below faithfully applied this Court's precedents in concluding 18-to-20-year-olds cannot be barred from carrying firearms for self-defense. The Third Circuit's textual analysis, which concluded that 18-to-20-year-olds are part of the group comprising "all Americans" who presumptively have Second Amendment rights, followed directly from this Court's decision in *Heller*. And its historical conclusion, that the militia laws from the Founding era that *required* 18-to-20-year-olds to be armed and the corresponding complete absence of *any* law cited by the Commissioner from that same period restricting their rights to use firearms when not serving in the militia demonstrated that 18-to-20-year-olds are entitled to exercise their Second Amendment rights on equal footing with other adults, was a textbook application of the *Bruen* framework.

For the same reason, this Court should not GVR this case in light of *Rahimi*. While *Rahimi* provided additional guidance on the appropriate application of *Bruen*, and particularly warned against an unduly stringent review of historical statutes in elucidating a historical tradition of firearm regulation, this is not a case where the Third Circuit required the Commissioner to find a "historical twin" before it would uphold the Pennsylvania law at issue. Rather, the Commissioner lost below because he failed to find *any* Founding era support whatsoever. *Rahimi* would not have

made the slightest difference in the outcome of this case and a GVR would be inappropriate.

STATEMENT

I. Pennsylvania bans firearm carriage by 18-to-20-year-olds during declared emergencies.

Pennsylvania generally requires a license to carry a concealed firearm in public. 18 PA. C.S. § 6106(a)(1). Though there are exceptions to this requirement, they do not permit ordinary, law-abiding Pennsylvanians to carry a concealed firearm lawfully without a license. 18 PA. C.S. § 6106(b). And 18-to-20-year-olds are categorically ineligible for licenses. 18 PA. C.S. § 6109(b). While Section 6106's licensing requirement does not apply tfo *open* carriage of firearms and although there are exceptions, law-abiding 18-to-20-year-olds who are unable to acquire a concealed carry license are generally permitted to openly carry a firearm in at least *some* manner for purposes of self-defense.

There are, however, limitations even on open carry and one such limitation is that Pennsylvania prohibits open carriage "during an emergency proclaimed by a State or municipal government[ ] executive unless that person is" either "[a]ctively engaged" in self-defense or possesses a license to carry concealed. 18 PA. C.S. § 6107. The upshot is that ordinary, law-abiding 18-to-20-year-olds in Pennsylvania are categorically barred from carrying firearms for self-defense during any declared state of emergency, like the nearly uninterrupted three-year state of emergency that was in effect when this case was filed. Pet.App. 5a.

II. Respondents have been hurt by the ban.

Respondents are two organizations that seek to promote and defend the fundamental right to keep and bear arms. Pet.App. 4a n.1; 53a n.1. When they filed this suit in October 2020, Pennsylvania was in a state of emergency and they were joined by three individuals, all aged between 18 and 20 years old, who resided in Pennsylvania and would have carried a handgun in public for self-defense, were it not for Pennsylvania's ban on them doing so. *Id.* By the time that the Third Circuit issued its opinion, all three of the original member plaintiffs had turned 21, but Respondents had identified an additional member with standing to challenge Pennsylvania's emergency carry ban and the Third Circuit permitted Respondents to supplement the record with his declaration. *See* Decl. of George Pershall, *Lara v. Comm'r Penn. State Police*, No. 21-1832, Doc. 71-2 (June 12, 2023); Order, *Lara*, No. 21-1832, Doc. 76 (Jan. 18, 2024).

III. Proceedings below.

A. Respondents filed this lawsuit on October 16, 2020. Pet.App. 54a. On December 1, 2020, they sought a preliminary injunction and to expedite the trial on the merits. *Id.* The Commissioner responded by moving to dismiss and opposing the request for preliminary injunctive relief. *Id.* Applying the then-applicable interest balancing test prescribed, in the Third Circuit, by *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010), the district court dismissed Respondents' complaint. Pet.App. 60a.

At the first step of the test, the district court described its task as "determin[ing] whether the restrictions forming the basis of Plaintiffs' action fall

within the scope of the Second Amendment or, on the contrary, fall within one of the 'presumptively lawful regulatory measures' recognized by *Heller* and subsequent caselaw." Pet.App. 61a. Finding that the ban on carriage during emergencies was "limited to public streets and public property" and contained an exception for those engaged in active self-defense, Pet.App. 62a, the district court stated that "the threshold question at bar is whether the relatively … limited restrictions imposed [here] facially implicate the Second Amendment." Pet.App. 67a.

The district court concluded that they did not, noting that "the established consensus of [pre-*Bruen*] federal appellate and district courts from around the country is that age-based restrictions limiting the rights of 18-to-20-year-olds" are " 'longstanding' and 'presumptively lawful' measures recognized by the Supreme Court in *Heller* as evading Second Amendment scrutiny." Pet.App. 73a–74a. Similarly, the district court noted that "licensing requirements"—including, apparently, bars on acquiring a license—also "generally do not implicate the Second Amendment." Pet.App. 76a–77a. "The confluence of these two considerations … compel[led] the Court to conclude that Pennsylvania's age-based limitation on the issuance of concealed carry licenses falls … outside the scope of the Second Amendment." Pet.App. 77a.

B. A panel of the court of appeals reversed.

1. Applying the test this Court laid out in *Bruen*, which had been decided when the appeal was pending, the majority held that Respondents' claims fell within the Second Amendment's "plain text," holding that "the people" referenced in the Second Amendment includes "all adult Americans." Pet.App. 11a. Noting

that this Court stated in *Heller* that "the people" refers, as in the case First and Fourth Amendments, " 'to all members of the political community, not an unspecified subset,' " and reiterated in *Bruen* that the " 'Amendment guaranteed to 'all Americans' the right to bear commonly used arms in public subject to reasonable, well-defined restrictions,' " the majority explained that "we have construed the term 'the people' to cast a wide net." Pet.App. 11a–12a (first quoting *District of Columbia v. Heller*, 554 U.S. 570, 580 (2008), then quoting *Bruen*, 597 U.S. at 70).

The court rejected the arguments, advanced by the Commissioner, that because 18-to-20-year-olds were considered "minors" at the Founding, they were not part of "the people" with Second Amendment rights, for three reasons. First, it would have excluded from the scope of the Second Amendment's protection *today* anyone who lacked rights at the Founding, a proposition that could limit the scope of the right today to white landowning men. Pet.App. 13a–14a. Second, even assuming being a minor at the Founding carried some disability with respect to firearm rights (an assumption the majority later showed had no basis in reality), "it does not follow that … they were ex ante excluded from the scope of 'the people.' " Pet.App. 14a (citing *Kanter v. Barr*, 919 F.3d 437, 453 (7th Cir. 2019) (Barrett, J., dissenting)). Third, the government's argument would have given "the people" a different construction with respect to the Second Amendment than any other constitutional right. Pet.App. 14a–15a.

Turning to history, the panel majority first considered "which period—the Second Amendment's ratification in 1791 or the Fourteenth Amendment's

ratification in 1868—is the proper historical reference point for evaluating the contours of the Second Amendment as incorporated against the Commonwealth." Pet.App. 17a. Noting that this Court has held that the Bill of Rights means the same thing whether applied against the states or the federal government and has always treated the public understanding of the Bill of Rights in 1791 as the touchstone for its interpretation, the majority held "that the Second Amendment should be understood in according to its public meaning in 1791." Pet.App. 20a.

Looking to the Founding, the issue was clear. The Commissioner's purported analogues from the period prior to the ratification of the Second Amendment did not meaningfully restrict the right to carry a firearm in public and did not apply differently to 18-to-20-year-olds than to "any other subset of the Pennsylvania population." Pet.App. 23a. "Against that conspicuously sparse record of state regulations on 18-to-20-year-olds at the time of the Second Amendment's ratification, [the panel] juxtapose[d] the Second Militia Act," which was effectively contemporaneous with the Second Amendment's ratification and required 18-to-20-year-olds to be armed and to participate in militia duty. Pet.App. 24a. While the duty to participate in the militia did not confer Second Amendment rights on 18-to-20-year-olds, the panel concluded that it was "good circumstantial evidence of the public understanding at the Second Amendment's ratification as to whether 18-to-20-year-olds could be armed, especially considering that the Commissioner cannot point us to a single founding-era statute imposing restrictions on the freedom of 18-to-20-year-olds to carry guns." Pet.App. 25a–26a.

2. Judge Restrepo dissented and would have held that the Pennsylvania law forbidding carriage of firearms by 18-to-20-year-olds during declared emergencies did not even trigger Second Amendment scrutiny because "at the Founding, people under 21 lacked full legal personhood." Pet.App. 37a. Suggesting that this was part of the "plain text" of the Second Amendment, Judge Restrepo nevertheless based this conclusion on a variety of historical restrictions. For example, noting that "infants" at the Founding could not marry without consent, had abridged contract rights, and limited capacity to sue or be sued, he would have held that "this legal incapacity controls in the context of the Second Amendment." Pet.App. 40a. He similarly found it persuasive that some colleges acting "in loco parentis" had regulations prohibiting possession of firearms by students, Pet.App. 42a, and discounted the fact that 18-to-20-year-olds served in the militia with firearms by noting that some militia statutes required parents to ensure their children were equipped with weapons for militia duty, arguing that under *Heller*, "the militia" and "the people" "are distinct." Pet.App. 44a–45a.

Though Judge Restrepo would have resolved this case as a matter of the Second Amendment's plain text, he also opined that history supports Pennsylvania's restrictions on 18-to-20-year-olds. Conceding that "the 1791 meaning of the Second Amendment controls," Pet.App. 48a, Judge Restrepo dismissed as irrelevant the concern that there was no Founding-era statutory support for his position because, in his view, there was no need for such laws at the Founding when 18-to-20-year-olds "bore arms only at the pleasure of their guardians, and they had no independent right to petition [the] courts for redress," Pet.App. 47a. He was

confirmed in this opinion by the existence of state laws from the latter half of the 19th century that restricted 18-to-20-year-olds from purchasing or carrying certain arms. These laws, he said, showed that legislatures could "abrogate the arms privileges of infants." Pet.App. 48a.

3. The Commissioner petitioned for rehearing en banc, which the Court denied. 84a. Judge Krause dissented, arguing that the panel majority had erred in focusing on 1791 as the critical year for understanding the scope of the Second Amendment. Judge Krause also argued that en banc review should have been granted both to resolve an alleged internal Third Circuit inconsistency regarding the weight of Reconstruction-era sources in interpreting the Constitution as well as "for error correction" and to consider whether the case implicates "unprecedented societal concerns or dramatic technological changes." Pet.App. 86a–88a (quoting *Bruen*, 597 U.S. at 27).

SUMMARY OF ARGUMENT

I. A. This case is not deserving of certiorari because the circuit courts are currently unanimous in holding that 18-to-20-year-olds have full Second Amendment rights. In attempting to generate a dispute on this issue, the Commissioner tellingly resorts to highlighting cases that were decided before *Bruen* and that upheld such restrictions through the application of intermediate scrutiny. Obviously, pre-*Bruen* interest-balancing cases cannot contribute to a circuit split today. And considering the pre-*Bruen* cases that *did* closely analyze the text and history of the Second Amendment only emphasizes the degree to which the lower courts that have looked at this issue through the correct lens have been unified in their conclusions.

B. Lacking a split on the merits, the Commissioner tries to make this a case about the weight of Reconstruction-era history in resolving Second Amendment challenges. The problem with that argument is that Reconstruction-era history could not change the result below, as shown by a recent decision of the Eighth Circuit, which carefully analyzed laws from that period and found them unsupportive of modern restrictions on 18-to-20-year-olds.

II. The decision below faithfully applied Supreme Court precedent. The Commissioner offers several arguments to the contrary, but none are persuasive. Starting with the text, the Commissioner complains that the Third Circuit did not credit his argument that because 18-to-20-year-olds were "minors" at the Founding, they were not part of "the people" within the meaning of the plain text of the Second Amendment. As the Third Circuit correctly noted below, this is not a textual argument at all, but a historical one. Under the "plain text" and *Heller*, 18-to-20-year-olds are part of "the people" as much as any other American.

Turning to history, the Commissioner claims that the court of appeals should have analyzed laws from the latter half of the 19th century. But in *Heller*, *Bruen*, and *Rahimi*, this Court has only ever used such evidence to confirm the scope of historical traditions that were evident at the Founding. Here, where there was no Founding-era evidence of *any* limitation on the rights of 18-to-20-year-olds, there was nothing to confirm and no need to consult later evidence.

The Commissioner's other historical arguments are equally unavailing. He claims the majority misunderstood the militia laws and argues that they

actually suggest that 18-to-20-year-olds were restricted in their exercise of their Second Amendment rights, because some required parents to furnish their children with arms and, when mustering for militia duty, all militia members were subject to discipline. But those arguments ignore the critical fact that the militia laws prove that 18-to-20-year-olds were armed at the Founding, and the Commissioner has not identified a single law from that period that would have limited the exercise of their rights on account of their age.

The failure to produce *any* relevant restriction from the Founding era also gives lie to the Commissioner's claim that the court below inappropriately required a "historical twin" to support the law. The Commissioner has failed to identify even a sibling or cousin of such a law. The fact is that the Commissioner failed to carry his burden under *Bruen* even according him the most generous possible reading of Founding-era history.

III. Even if the decision below was incorrect in some way (and it is not), this case is a poor vehicle for assessing the rights of 18-to-20-year-olds. The Pennsylvania statute at issue is not representative of the universe of laws targeting 18-to-20-year-olds' rights with firearms because it only applies during periods of declared emergencies. Below, the Commissioner argued, and the Third Circuit rejected, that this case became moot when Pennsylvania no longer was subject to a declared emergency. While the Third Circuit rightly rejected the Commissioner's mootness argument, if the Court were inclined to take a case addressing the Second Amendment rights of 18-to-20-

year-olds, it would be better to take a case that does not include this potential mootness issue.

IV. The Commissioner opens his brief by requesting this court GVR in light of *Rahimi*. That would be unwarranted. There is nothing in *Rahimi* that would suggest a different result than the one that obtained below. As already mentioned, this was not a case where the Third Circuit required a "historical twin" but rather, one in which the government failed to provide *any* Founding-era support for its law. Even looking, for the sake of argument, at the late-19th century evidence the Commissioner relied on below, those laws do not supply a "principle" underpinning our regulatory tradition that would support disarming legal adults today.

REASONS FOR DENYING THE PETITION

I. This case does not present a split of authority.

A. Following *Bruen*, the circuit courts have uniformly held that the Second Amendment protects the rights of 18-to-20-year-old adults to carry firearms for self-defense.

This case is one of several at various stages of litigation throughout the federal courts raising the question of whether the government can curtail the rights of law-abiding, adult 18-to-20-year-olds to possess and carry firearms on account of their age. The Commissioner is therefore not wrong that this case presents an important issue—but it is not an issue on which this Court must weigh in, for the simple reason that the circuit courts are, as yet, unified in answering the question "no." Pet. App. 27a. In addition to the Third

Circuit decision at issue here, the Eighth Circuit also recently confronted this question and reached the same conclusion, for much the same reasons. In *Worth v. Jacobson*, the court applied the *Bruen* framework to a Minnesota law that forbade sheriffs from granting firearm carry licenses to otherwise eligible 18-to-20-year-olds. 108 F.4th 677, 684 (8th Cir. 2024). Beginning with the text, *Worth* rejected the argument that 18-to-20-year-olds are not part of "the people" included within the Second Amendment's text, holding that

> [o]rdinary, 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.

108 F.4th at 689. Similar reasoning motivated the court below. *See* Pet.App. 11a–12a (citing *Heller* for the proposition that "the people" "unambiguously refers to all members of the political community); Pet.App. 13a (rejecting argument that "the first step of a *Bruen* analysis requires excluding individuals from 'the people' if they were so excluded at the founding").

As to history, much like the Third Circuit below, the Eighth Circuit focused on 1791 as the critical year for understanding the scope of the Second Amendment, finding that "*Bruen* strongly suggests that we should prioritize Founding-era history," as do this Court's other precedents that have interpreted the

Bill of Rights according to " 'the public understanding of the right when the Bill of Rights was adopted in 1791.' " *Id.* at 692–93 (quoting *Bruen*, 597 U.S. at 37). After rejecting the claim that 18-to-20-year-olds could be categorically disarmed as "dangerous," *id.* at 693–95, *Worth* analyzed three types of Founding-era sources: "(1) the common law, (2) college gun rules, and (3) municipal regulations," and, like the court below, found that the Minnesota carry ban was unjustifiable because there was not one Founding era regulation that was similar in "how" and "why" it burdened the right to keep and bear arms, *id.* at 695–96.

Indeed, the only significant difference between the Eight Circuit's approach and the decision below is that, despite its misgivings about their usefulness, the Eighth Circuit also analyzed the late-19th century laws relied on by the Commissioner here. But that difference proved immaterial to the outcome as *Worth* held that those laws had " 'serious flaws even beyond their temporal distance from the founding,' " noting that several barred only *concealed* carry, allowing 18-to-20-year-olds to carry openly for self-defense, a limitation that this Court suggested in *Bruen* was acceptable when applied to the population generally. *Id.* at 697 (quoting *Bruen*, 597 U.S. at 66). Other laws restricted the sale or furnishing of firearms, but such laws usually permitted *some* way for 18-to-20-year-olds to acquire firearms and, once they had them, permitted them to carry on equal footing with other adults. *Id.* Referencing specifically an 1856 Alabama statute that was Minnesota's (and the Commissioner's) earliest analogue of this type, but offering a criticism that applied to many of the 19th-century laws at issue, the Court noted that the statute, on its

own terms, "targets only minors, a status not held by 18 to 20-year-olds in Minnesota." *Id.* at 698.

That the only two circuits to assess the constitutionality of these laws post-*Bruen* have reached the same conclusion on very similar reasoning is justification enough to deny the petition. But in fact, focusing on the courts of appeals exclusively understates how unnecessary this Court's intervention is at this stage. As the Commissioner indirectly acknowledges, three district courts have *also* concluded, post-*Bruen*, that laws targeting 18-to-20-year-olds are unconstitutional in light of the text and history of the Second Amendment. *See* Pet. 18 (citing *Fraser v. BATFE*, 672 F.3d 118 (E.D. Va. 2023), *appeal pending sub. nom. McCoy v. BATFE*, No. 23-2085 (4th Cir.); *Rocky Mountain Gun Owners v. Polis*, 685 F. Supp. 3d 1033 (D. Colo. 2023), *appeal pending* No. 23-1251 (10th Cir.); *Firearms Policy Coalition v. McCraw*, 623 F. Supp. 3d 740 (N.D. Tex. 2022)). To that list, Respondents would add a fourth. *Brown v. BATFE*, 704 F. Supp. 3d 687 (N.D.W.V. 2023), *appeal pending* No. 23-2275 (4th Cir.). The other side of the alleged "split" is notably weak, with the Commissioner forced to rely, *see* Pet. 18–19, for post-*Bruen* support on a single district court decision (currently on appeal in the Fifth Circuit), *Reese v. BATFE*, 647 F. Supp. 3d 508 (W.D. La. 2022), *appeal pending* No. 21-30033 (5th Cir.), and a panel opinion from the Eleventh Circuit that has been vacated and is being reconsidered by the court sitting en banc, *NRA v. Bondi*, 61 F.4th 1317 (11th Cir. 2023), *reh'g en banc granted, op. vacated*, 72 F.4th 1346 (11th Cir. 2023).

In a tacit acknowledgment of the weakness of its split, the Commissioner looks to pre-*Bruen* cases to

find examples upholding restrictions on 18-to-20-year-olds, *see* Pet. 17, but given that *Bruen* invalidated the lower courts' reliance on intermediate scrutiny, it is questionable at best that such cases should be considered. And even if they are, evidence of a circuit split over the textual and historical scope of the Second Amendment is elusive. The only circuit court to uphold such restrictions pre-*Bruen* was the Fifth Circuit, and there the court couched its textual and historical analysis in tentative terms and ultimately held the laws at issue constitutional only through application of interest balancing. *See NRA v. BATFE*, 700 F.3d 185, 204 (5th Cir. 2012) ("[W]e face institutional challenges in conducting a definitive review of the relevant historical record. … We ultimately conclude that the challenged federal laws pass constitutional muster even if they implicate the Second Amendment guarantee."); *NRA v. McCraw*, 719 F.3d 338, 347 (5th Cir. 2013).[1]

On the other side of the ledger, the two pre-*Bruen* circuit court cases that most closely analyzed the text and history of the Second Amendment came to the same conclusion that the Third Circuit and Eight Circuit have after *Bruen*. *See Hirschfeld v. BATFE*, 5 F.4th 407, 440 (4th Cir. 2021) ("A review of the Constitution's text, structure, and history reveals that 18-year-olds are covered by the Second Amendment."), *vacated as moot* 14 F.4th 322 (4th Cir. 2021); *Jones v.*

[1] The Fifth Circuit is now reconsidering the constitutionality of the same law at issue in *NRA v. BATFE* in *Reese*, No. 21-30033. The Texas law at issue in *NRA v. McCraw* was held unconstitutional in *Firearms Policy Coalition*, 623 F. Supp. 3d at 756, a decision which became permanent when Texas dismissed its own appeal.

Bonta, 34 F.4th 704, 723 (9th Cir. 2022) ("[O]ur historical analysis leads us to conclude that young adults have a Second Amendment right to keep and bear arms."), *op. vacated on reh'g*, 47 F.4th 1124 (9th Cir. 2022). Although "*Hirschfeld* and *Bonta* were decided before *Bruen*," and "*Hirschfeld* was vacated as moot because the plaintiff turned 21" while "*Bonta* was vacated and remanded to the district court for consideration in light of *Bruen*," both hewed close to the analysis that this Court eventually clarified in *Bruen*, and the court below found both "nevertheless instructive." Pet.App. 15a n.12.

Taken together, far from demonstrating a split, the Commissioner's collected cases demonstrate uniformity among courts that have considered the issue in light of *Bruen*, and significant agreement even with courts pre-*Bruen* who looked at the issue through an appropriate textual and historical lens. They also highlight the fact that, absent this Court's intervention, additional cases raising this issue are currently pending in the Fourth, Fifth, Tenth, and Eleventh Circuits which promise to further air these issues. Lacking a split, there is simply no good reason, at this juncture, not to permit those courts to weigh in.

B. Reconstruction-era and Founding-era history tell the same story in this case.

Lacking a division of authority on the merits, the Commissioner attempts to make this a vehicle to resolve a doctrinal question that this Court has flagged twice: whether the Second Amendment's meaning is pegged to the public understanding of its scope at its ratification in 1791 or the Fourteenth Amendment's ratification in 1868. Pet. 13–14.

The Commissioner tries to set up a split between the Third Circuit below, which did not consider laws from the mid-to-late 19th century, and courts that have at least given the time period some weight, but the division of authority is immaterial here. This Court has already acknowledged that this question has yet to be explicitly addressed. *Bruen*, 597 U.S. at 37. But even as it acknowledged this important issue in both *Bruen* and *Rahimi*, this Court had the opportunity to address that question and declined to do so because it was unnecessary as "the public understanding of the right to keep and bear arms in both 1791 and 1868 was, for all relevant purposes, the same with respect to" the questions at issue. *Id.*; *see also Rahimi*, 144 S. Ct. at 1898 n.1.

The same is true here. Although the majority declined to consider mid-to-late-19th century laws, the fact of the matter is, even if it had looked at those laws, the Commissioner had offered just *three*, from Alabama, Kentucky, and Tennessee, that were enacted prior to 1870. Pet.App. 20a–21a n.15. Three statutes are not enough to "establish an early American tradition." *Espinoza v. Mont. Dep't of Rev.*, 591 U.S. 464, 482 (2020) (rejecting suggestion that laws of "more than 30 States" enacted "in the second half of the 19th century" evidenced a tradition informing the scope of the First Amendment). And as *Worth* demonstrated, even if every 19th-century statute relied on by the Commissioner is analyzed closely, there is more than just the date of enactment that prevents those laws from identifying a historical tradition of regulation that would excuse Pennsylvania's ban.

The Commissioner objects that *Bondi*, which also dealt with the Second Amendment rights of 18-to-20-

year-olds and reached a different result while focusing on the Reconstruction period as "the most relevant to our inquiry on the scope of the right to keep and bear arms," demonstrates that this debate does matter here. Pet. 15 (quoting *Bondi*, 61 F.4th at 1321). But *Bondi* has been vacated and is no precedent at all. And even leaving that aside, it is unpersuasive as its analysis is considerably less detailed than *Worth*'s, *see* 108 F.4th at 697–98, and the *Bondi* court entirely ignores the fact that the historical laws targeted only *minors* whereas modern restrictions on 18-to-20-year-olds affect *adults*, a serious disconnect in both "how" and "why" the laws impact the right to keep and bear arms, *see* 61 F.4th at 1326–27.

II. The decision below is consistent with this Court's Second Amendment caselaw.

It should be no surprise, given the broad agreement among courts to consider the question, that the Third Circuit's conclusion that the Second Amendment's text and history require holding special restrictions on the rights of 18-to-20-year-olds unconstitutional resulted from a faithful application of this Court's precedents. The Commissioner claims otherwise but his arguments are not well taken.

A. Beginning with the text of the Second Amendment, the Commissioner argues that the panel erred when it "simply *presumed* textual coverage and required the Commissioner to rebut that presumption" and compounded the problem when it "held that the Commissioner could not rely on *any* historical evidence to defeat that presumption" at the textual level. Pet. 20–21 (emphasis in original). The Commissioner's arguments miss the mark. The panel majority did not "presume" an answer to the textual question

under *Bruen*, but rather recognized that it was bound to follow this Court's binding interpretation of the text in *Heller*, which stated that "there is 'a strong presumption that the Second Amendment [right] … belongs to all Americans.' " Pet.App. 11a–12a (quoting *Heller*, 554 U.S. at 581). As *Bruen* would later make explicit, the purpose of the textual analysis is to determine what acts and people are *presumptively* protected by the Second Amendment. 597 U.S. at 17 ("[W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct."). The majority was not, therefore, presuming the text covered "all people," but applying *Heller*'s holding that it does (and that with the *actual* textual coverage comes the *presumption* of unconstitutionality). It therefore appropriately put the onus on the Commissioner to distinguish this case from *Heller*

The majority was also right to reject the Commissioner's assertion that historical evidence that 21 was the normal age of majority at the Founding had bearing on the "plain text" of the Second Amendment. Pet.App. 11a, 13a. As the majority explained, such evidence does not bear on who are "the people" but on whether certain people, who are minors, could also have their firearm rights curtailed. *Id.* And that is a *historical*, not a textual question, appropriate for consideration at the final stage of *Bruen*'s analysis. If in fact people were disarmed because they were "minors" (and they were not), that would possibly be relevant to restrictions that are similar both in "how" and "why" they limit the exercise of the right today, but that would say nothing about who are "the people" referred to in the Constitution. *See* Pet.App. 13a.

In counterargument, the Commissioner claims *Heller* itself supports consideration of such evidence as a matter of the plain text, because *Heller* examined "a variety of legal and other sources to determine *the public understanding*" of the Second Amendment. Pet. 21 (quoting *Bruen*, 597 U.S. at 21). There is no inconsistency here. While *Heller* looked to dictionaries, treatises, cases, and other historical sources to see how the *words* in the Amendment were used in context at the time of the Founding, the Commissioner's attempt to read alleged historical limitations on the right into the text, not as an element of its inherent meaning but because it supposes those restrictions existed at the Founding, is categorically different. In fact, it is exactly what courts are tasked with doing under *Bruen*'s *historical* analysis, where the burden is unmistakably on the Commissioner. The Commissioner's argument "conflates *Bruen*'s two distinct analytical steps," and the court of appeals rightly rejected it. Pet.App. 13a.

B. Turning to history, the Commissioner argues that the Third Circuit erred in giving no weight to his proffered analogues from after 1850. Pet. 21. As discussed above, if the court *had* considered that later evidence, it would have made no difference to the outcome of the case. But even accepting for the sake of argument that it could have made a difference, there was nothing inappropriate with how the Third Circuit treated 19th-century history.

The Commissioner claims that the panel's decision to set aside 20 laws, dating at the earliest to 1856, but mostly coming from the final quarter of the 19th century, in its assessment of the historical scope of the right, conflicts with this Court's own approach, which

"consistently looks to [the mid-to-late 19th century] to confirm its understanding of the Second Amendment." Pet. 21. But this language demonstrates the sleight of hand that the Commissioner is attempting here. It is true that in *Heller*, *Bruen*, and *Rahimi*, this Court looked to post-ratification sources to *confirm* the understanding of the Second Amendment it had arrived at from analyzing the Founding. But in each case, the relevant traditions of regulation were evidenced by Founding-era restrictions, and later sources merely demonstrated their continued vivacity long after the Second Amendment's ratification.

For example, the Commissioner points to this Court's discussion of "sensitive places" in *Bruen* as "particularly instructive on this score," because this Court noted that "there were 'relatively few 18th- and 19th-century sensitive places where weapons were altogether prohibited' " and referenced laws that largely post-dated the ratification of the Fourteenth Amendment. Pet. 22 (quoting *Bruen*, 597 U.S. at 30). But in that case there indisputably *were* such laws at the Founding, *see, e.g.*, D. Kopel & J. Greenlee, *The "Sensitive Places" Doctrine*, 13 CHARLESTON L. REV. 205, 235–36 (2018), and the later laws merely *confirmed* what was evidenced by earlier sources. The same was true of *Heller*'s historical work regarding the individual right to own firearms, where "19th-century treatises were treated as *mere confirmation* of what the Court thought had already been established" by earlier sources. *Gamble v. United States*, 587 U.S. 678, 702 (2019) (emphasis added). And in *Rahimi*, the Court focused on Founding era (and earlier) history, with discussions of later history largely limited to confirming that earlier restrictions had been accepted as part of American legal framework. 144 S. Ct. at 1901.

The Commissioner is right that in *McDonald* the Court did look closely at 19th century sources, *see* Pet. 22, but that made sense in context because *McDonald* did not attempt to determine what the *content* of the Second Amendment was, but rather whether it was considered, at both the Founding and the ratification of the Fourteenth Amendment, to be one of the "fundamental rights necessary to our system of ordered liberty." *McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010). *McDonald* was, therefore, not undertaking the same analysis exemplified in *Heller*, *Bruen*, and *Rahimi*, and its example is much less relevant.

Here, unlike in *Heller*, *Bruen*, or *Rahimi*, there are *zero* laws at the Founding or before that limited the Second Amendment rights of adults (or 18-to-20-year-olds) on account of their age. In fact, once the majority set aside late-19th century laws, all that was left was a single 1721 Pennsylvania statute "focused on preventing Pennsylvanians from hunting on their neighbors' land," and "to the extent the statute did burden the right to carry a gun in public, it did so without singling out 18-to-20-year-olds, or any other subset of the Pennsylvania population." Pet.App. 22a–23a.

Indeed, the landscape at the Founding is substantially worse for the Commissioner than the discussion so far has suggested, since "there is not just a vacuum at the founding era: instead, the founding-era evidence of militia membership [of 18-year-olds] undermines" the Commissioner's position. *Jones*, 34 F.4th at 722. As the Court below noted, "[t]hat young adults had to serve in the militia indicates that founding-era lawmakers believed those youth could, and indeed should, keep and bear arms." Pet.App. 24a. Following

that conclusion, there is nothing to "confirm" with later history, and so the Third Circuit's decision to disregard it is perfectly consistent with this Court's approach in *Heller*, *Bruen*, and *Rahimi*.

C. The Commissioner takes issue with the Third Circuit's reliance on these militia laws, parroting Judge Restrepo's criticism of the panel opinion as "based exclusively on 18th-century militia laws." Pet. 24 (quoting Pet.App. 86a). But that claim gets *Bruen* backwards. The Third Circuit's holding was based on a finding that the text of the Second Amendment extended to cover 18-to-20-year-old adults, and on the Commissioner's failure to provide *any* historical justification for treating them differently than the text would suggest. Plaintiffs did not need to prove, with the militia laws, that the Second Amendment reaches 18-year-olds, the Commissioner needed to prove the reverse. Furthermore, the panel did not treat the militia laws as somehow conferring the right to keep and bear arms on 18-to-20-year-olds. Rather, they provided "circumstantial evidence of the public understanding at the Second Amendment's ratification as to whether 18-to-20-year-olds could be armed" that aligned with what was already evident from the Commissioner's failure to cite "a single founding-era statute imposing restrictions on the freedom of 18-to-20-year-olds to carry guns." Pet.App. 26a.

The Commissioner disagrees with that conclusion, but he misunderstands the importance of the militia laws. He suggests that they "actually demonstrate the Founding generation's view that under-21-year-olds should have access to deadly weapons only under appropriate adult supervision" because such laws required parents to ensure their children were

adequately outfitted for militia duty and because, "once properly mustered, militiamen were subject to fines, strict discipline, and punishment, and their arms were subject to periodic inspection." Pet. 24–25. The panel correctly rejected the first of these claims. "[E]ven though there were founding-era militia laws that require parents or guardians to supply arms to their minor sons, nothing in those statutes says that 18-to-20-year-olds could not purchase or otherwise acquire their own guns." Pet.App. 26a. As for the second, there is nothing to it. That 18-to-20-year-olds were subject to discipline in the militia was not unique to their age class—all militia members were subject to these rules. *See* S. Cornell & N. DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 510 (2004). And of course, musters were only occasional events; whenever the militia was *not* mustering, that disciplinary structure did not apply. This demonstrates one of the most powerful implications from these laws, which is precisely the opposite of the argument the Commissioner lays out: at the time of the Founding, 18-to-20-year-olds were *required* to have firearms, and there was not a *single* law that would have restricted in any way their lawful use of those arms on account of their age when not actively mustering for militia duty. *See Jones*, 34 F.4th at 721.

D. The Commissioner claims that the majority below "demand[ed] that the Commissioner produce historical twins from the Founding era" and that its approach to historical analogues was generally more stringent than *Rahimi*, which this Court decided after the decision below was issued, would have permitted. Pet. 22–23. Not so. Though it predated *Rahimi*, the decision below was fully consistent with this Court's

instruction that courts must ask "whether the challenged regulation is consistent with the principles that underpin our regulatory tradition." 144 U.S. at 1898 (citing *Bruen*, 597 U.S. at 26–31). While the Commissioner castigates the court below for demanding a Founding era twin, as mentioned above, the Commissioner failed to cite a *single* Founding era law that singled out 18-to-20-year-olds (or any other age group, for that matter) for any form of infringement of the right to keep and bear arms on account of their age.

Even if the Court were to consider the Commissioner's too-late analogues from the latter half of the 19th century, that would not change the result of this case under *Rahimi*. As *Rahimi* stressed, the purpose of the historical analysis is to determine "the principles that underpin our regulatory tradition," and modern laws are permissible only to the extent they are consistent with those same principles. *Rahimi*, 144 S. Ct. at 1898. Although the Commissioner claims that "between 1856 and 1897 20 jurisdictions enacted laws specifically curtailing the gun rights of under 21-year-olds—most of which were significantly more restrictive than the Pennsylvania law under review here," Pet. 2, as he notes elsewhere in his petition, most individuals under 21 at those earlier periods were "minors." Indeed, the laws the Commissioner cites almost all explicitly state that they apply to "minors" (and for those that do not say so explicitly, that is still, in effect, what they did). *See, e.g.*, 1881 Ill. Laws 73 (prohibiting anyone other than the father, guardian or employer of "the minor herein named" to provide "any minor within this state" with a pistol or other enumerated weapon). So, under *Rahimi*, the appropriate principle to draw from these laws is that states have,

at times, curtailed the Second Amendment rights of *minors*. But 18-to-20-year-olds are not minors today, and the historical principle that undergirds even the Commissioner's best possible case cannot reach 18-to-20-year-old *adults* today. *See* John Bouvier, 1 INSTITUTES OF AMERICAN LAW 148 (1851) (Upon reaching the age of majority, "every man is in the full enjoyment of his civil and political rights.").

E. Finally, even if one of the Commissioner's foregoing objections to the Third Circuit's application of this Court's precedents did have some merit—and to be clear, none do—that would not be sufficient to justify a grant of certiorari. Given the lack of a split of authority on any significant question in this case, the Commissioner is left to rely on the fact that this case will have other impacts "within the Third Circuit." Pet. 25. Indeed, concerns with the Third Circuit's *internal* consistency were motivating factors for Judge Krause in dissenting from denial from rehearing en banc. Pet.App. 87a–88a. But those concerns were not even significant enough to attract a majority of the Third Circuit, the court directly impacted by the precedential nature of the opinion below. It should certainly not attract the attention of this Court.

III. This case is a poor vehicle.

That there is no split of authority on this issue and the decision below faithfully applied *Bruen* is reason enough to deny the petition. But if more is required, this case supplies it. Attempting to underscore the importance of this case, the Commissioner points out that several other states have laws that, in some way, single out 18-to-20-year-olds for differential treatment with respect to the right to keep and bear arms. *See* Pet. 19 n.13 (collecting laws). Respectfully, the

presence of so many other laws is a reason to deny the petition, not grant it. If, in fact, 18-to-20-year-olds have no share in the fundamental right to armed self-defense, then those laws provide many other opportunities to establish a split of authority requiring this Court's intervention. Indeed, as Respondents pointed out above, several such laws are being considered now in courts around the country.

It is also worth noting that in comparison to many of the other cases being litigated today, the Pennsylvania law at issue here burdens the right in an odd way, that is not broadly representative of the other laws cited by the Commissioner. For example, the law that was the subject of *NRA v. BATFE* and *Hirschfeld* and is currently at issue in the *Reese*, *Brown,* and *McCoy* cases is a flat ban on 18-to-20-year-olds acquiring a handgun in the regulated commercial market. *See* 18 U.S.C. § 922(b)(1). It is broadly similar to other laws restricting the purchase of firearms by 18-to-20-year-olds, like the one at issue in *Bondi*. And the law that was at issue in *NRA v. McCraw* and *Firearms Policy Coalition* was a straightforward bar on 18-to-20-year-olds acquiring licenses to carry handguns, in the same way that some other state laws do. But here, Pennsylvania permits open carry by 18-to-20-year-olds under most circumstances but suspends that ability during declared states of emergency. While neither party has focused on the unusual nature of this limitation on the right, it does mean that this case will map less cleanly onto future cases than others that this Court might consider taking (if a split arises) in the future.

The fact that the law at issue only impedes exercise of Second Amendment rights during declared

states of emergency also makes this case a poor vehicle for this Court's review. Below, the Commissioner argued that this case became moot when Pennsylvania ceased to operate under a series of declared states of emergency. The Commissioner may raise those arguments again before this Court, and even if he does not, because mootness is jurisdictional, this Court would have to address that issue itself. While Respondents firmly believe that the Third Circuit was correct to hold that this case is not moot under the "capable of repetition, yet evading review" exception, Pet.App. 28a–29a, the presence of the mootness issues adds complexity to this case and potentially could impede the Court's ability to answer the question presented if it were to determine, despite Respondents' arguments to the contrary, that this case is moot. *See Acheson Hotels, LLC v. Laufer*, 601 U.S. 1, 4–5 (2023). Therefore, if this Court were to determine that it is appropriate to grant review in a case addressing the Second Amendment rights of 18-to-20-year-olds, it would be preferable to do so in a case challenging a law that more sweepingly restricts the ability of members of that group to possess or carry firearms, without the question of mootness arising from temporally bounded bans such as those, like here, that are based on a state of emergency.

IV. The Court should not GVR this case.

This Court has previously explained that GVR is appropriate only where there is "a reasonable probability" that the lower court's view of the case will change in light of an "intervening development." *Tyler v. Cain*, 533 U.S. 656, 666 n.6 (2001). Here, the Commissioner claims that this Court's decision in *Rahimi* is such a development, *see* Pet. 12, arguing that the

Third Circuit required the Commissioner to put forward a "historical twin" to justify the 18-to-20-year-old emergency carry ban, and that *Rahimi* repudiated that approach. But as discussed above, the Court below did no such thing and even considering all the Commissioner's evidence, without respect to its proximity to the Founding, he has failed to elucidate any "principle" underpinning those historical regulations that would permit disarming adults today. *Rahimi*, 144 S. Ct. at 1898.

The Commissioner points out that this Court issued GVR orders in several Second Amendment cases following *Rahimi* and argues that "[t]he GVR order in *Range* [*v. Garland*, No. 23-374 (U.S. July 2, 2024)]" is "particularly instructive" because "[t]he panel here was required to follow [the now-vacated decision in] *Range*." Pet. 12–13. But those cases were all pending before this Court at the time that *Rahimi* was decided and almost all of them involved other provisions of 18 U.S.C. § 922, which were much more closely related in both relevant history and effect to the law at issue in *Rahimi* than is Pennsylvania's emergency carry ban. Even if there was some "reasonable probability" that *Rahimi* would bear on them, there is no reason to think the same is true here.

In fact, there is unusually strong evidence in this case that *Rahimi* would not change the result below. The Eighth Circuit's *Worth* decision was issued *after* *Rahimi* and, as discussed above, the court below and the *Worth* court reached the same conclusion on nearly the same reasoning, with no hint whatsoever that *Worth* approached the question differently because it had the benefit of *Rahimi*. And this all makes sense, given that *Rahimi* itself was clear that it was

not altering the historical test laid out in *Bruen* and merely sought to correct recent misunderstandings of the methodology of those cases by courts that had too rigidly applied the *Bruen* test. *Rahimi*, 144 S. Ct. at 1897. Because the Third Circuit's application of *Bruen* was faithful to this Court's dictates, there is no reason to expect that *Rahimi* should have resulted in the *Worth* court reaching a different result.

As for the fact that the Court below relied on *Range*, the majority only cited the case a handful of times, discussing it most significantly in its analysis of the textual scope of "the people," where *Range* clearly carried less weight than *Heller*'s dispositive interpretation of that term to mean "all Americans." *See* Pet.App. 12a. And in any event, the Commissioner is overreading the *Range* GVR. "As several courts have recognized, the issuance of a GVR does not speak to the underlying merits of the case and does not necessitate an automatic reversal." *Planned Parenthood S. Atl. v. Kerr*, 95 F.4th 152, 164–65 (4th Cir. 2024) (collecting cases from the First, Sixth and D.C. Circuits). The GVR order in *Range* does not mean that it was wrongly decided, and particularly does not invalidate its straightforward application of *Heller*'s textual analysis of the Second Amendment. It therefore should not cast the slightest doubt on the panel's opinion either.

Finally, as this Court has previously cautioned, the decision of whether to GVR depends "[up]on the equities of the case," and "if the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court, a GVR order is inappropriate." *See Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 167–68 (1996) (per

curiam). Here, in addition to the fact that a remand is unlikely to change anything, further delay is particularly inappropriate because the restriction at issue impacts Pennsylvanians only within a relatively narrow age range. For individuals who are 18-to-20-years old today, justice delayed is well and truly justice denied, as an order to vacate and remand for another round of briefing in the court of appeals would threaten to ensure that the identified member of the organizational Respondents would never experience the benefit of a court ruling in his favor, just as the original plaintiff members never did.

CONCLUSION

The Court should deny the petition for certiorari.

Respectfully submitted,

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