No. 23-55276

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LANCE BOLAND *et al.*,
Plaintiffs-Appellees,
v.
ROB BONTA,
in his official capacity as Attorney General
of the State of California,
Defendant-Appellant.

On Appeal from the United States District Court
for the Central District of California

No. 22-cv-1421-CJC-ADS
The Honorable Cormac J. Carney, Judge

BRIEF OF *AMICI CURIAE* LAW ENFORCEMENT GROUPS AND FIREARMS RIGHTS GROUPS IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE (*AMICI* LISTED ON INSIDE FRONT COVER)

Stephen P. Halbrook*
3925 Chain Bridge Road, Suite 403
Fairfax, Virginia 22030
Telephone: (703) 352-7276
protell@aol.com

*Counsel of Record for *Amici Curiae*

Dan M. Peterson
Dan M. Peterson PLLC
3925 Chain Bridge Road, Suite 403
Fairfax, Virginia 22030
Telephone: (703) 352-7276
dan@danpetersonlaw.com

Counsel for *Amici Curiae*

June 2, 2023

The following law enforcement groups and firearms rights groups are *amici curiae* in this case: Western States Sheriffs' Association, National Association of Chiefs of Police, International Law Enforcement Educators and Trainers Association, Law Enforcement Legal Defense Fund, Gun Owners' Action League Massachusetts, Gun Owners of California, and Second Amendment Law Center.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONS, STATUTES, AND REGULATIONS

OTHER AUTHORITIES

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *amici curiae* certify that none of the *amici* has a parent corporation and no publicly held corporation owns 10% or more of the stock of any of the *amici*.

INTEREST OF *AMICI CURIAE*

The Western States Sheriffs' Association was established in 1993, and consists of more than three hundred members from seventeen member states throughout the Western United States. Its mission is to assist sheriffs and their offices with federal and state legislative issues, address policy and procedural matters, and work together to keep the office of sheriff strong.

The mission of the National Association of Chiefs of Police, a non-profit organization founded in 1967, is to promote and support the law enforcement profession. Membership is limited to command staff officers, and it currently has over 7,000 members.

The International Law Enforcement Educators and Trainers Association is an association of 4,000 professional law enforcement instructors committed to the reduction of law enforcement risk, and to saving lives of police officers and citizens through the provision of training enhancements for criminal justice practitioners.

The Law Enforcement Legal Defense Fund is non-profit organization that provides legal assistance to law enforcement officers. LELDF has aided nearly one hundred officers, many of whom have been acquitted, mostly in cases where officers have faced legal action for otherwise authorized and legal activity in the line of duty.

The following are groups that educate the public about firearms, and defend the rights protected by the Second Amendment: Gun Owners' Action League Massachusetts, Gun Owners of California, and Second Amendment Law Center.

Amici believe that the perspective of front line law enforcement personnel and organizations that are knowledgeable about firearms law and history should be of assistance to this Court in evaluating whether California's ban on large numbers of common handguns through its handgun roster can withstand Second Amendment scrutiny.

SUMMARY OF ARGUMENT

This brief presents three major arguments.

First, California's Unsafe Handgun Act ("UHA") bans numerous popular semiautomatic pistols that are protected by the "in common use" test set forth in *Heller*. The UHA bans all models of semiautomatic pistols introduced since 2013, and most that were introduced since 2007. The banned pistols number well into the millions. Since the UHA and roster constitute a ban on handguns, they are unconstitutional under *Heller*, and it is neither necessary nor proper to look to historical analogues to reach a different test than *Heller* arrived at after reviewing the Second Amendment's text, history, and tradition.

Second, although *Heller's* "in common use" test governs, the State nevertheless argues that two early laws on the proof testing of firearm barrels provide a historical analogue to support its current bans. An 1805 Massachusetts law required that barrels made in-state be tested to ensure that they would safely fire a minimum distance. Maine passed a similar law in 1821. A violator of those laws would incur no criminal penalty. The purpose was to ensure that purchasers, particularly militiamen, had access to safe, reliable firearms.

By contrast, California mandates features not desired by consumers, and bans pistols that do not have them. The magazine disconnect mechanism renders the firearm unusable. The loaded chamber indicator is irrelevant to barrel safety.

Microstamping has nothing to do with discharge. Unlike the proving laws, a violator is subject to imprisonment.

In addition to not being historical analogues, Massachusetts and Maine were outliers, constituting only 2 out of 24 states in 1820-21 and totaling only 8.5% of the U.S. population.

The State also cites to policies that required firearms being purchased for the state to be tested. These were nothing more than contractual provisions with no applicability to private transactions.

Third, California and an *amicus* brief by Everytown for Gun Safety look to years after 1868 (the year of ratification of the Fourteenth Amendment) rather than 1791 (the year the Second Amendment was ratified) as the proper period for examining such analogues. That is erroneous because the current case law cited by Everytown traces back to a single error, later corrected, in the *Ezell* case. Furthermore, the Supreme Court has held that the meaning of a constitutional provision is fixed at the time of its adoption, in this case 1791. The Supreme Court has also made it clear that each provision of the Bill of Rights means the same thing when applied against the states as it does when applied against the federal government. A later meaning when applied against the states cannot be used to contradict that original understanding. In all cases in which the Supreme Court has looked to history to determine the meaning of a provision of the Bill of Rights, it

has looked exclusively or primarily to the Founding period, and never primarily to 1868.

ARGUMENT[1]

I. THE THREE CHALLENGED PROVISIONS OF CALIFORNIA'S UNSAFE HANDGUN ACT TOGETHER BAN ALL RECENT SEMIAUTOMATIC PISTOLS AND ARE FLATLY UNCONSTITUTIONAL UNDER THE "IN COMMON USE" TEST RECOGNIZED IN HELLER.

A. *Heller* Provides The Test For Determining Which Arms Are Protected Under The Second Amendment And Cannot Be Banned.

This case must be decided by a straightforward application of the *Heller* test.[2] There is no need to resort to historical analogues, because *Heller* has already decided that handguns are protected under the Second Amendment and cannot be banned. It would be improper for a lower court to conduct its own historical analysis to arrive at a test that contradicts the *Heller* test.

Heller held that the Second Amendment protects all bearable arms that are "in common use" for lawful purposes. *Heller*, 554 U.S. at 624. The "in common use" test is "fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" *Id*. at 627. Only those arms that are "not

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[1] No party's counsel authored this brief in whole or in part. No party or party's counsel, and no person other than *amici*, their members, or their counsel, contributed money that was intended to fund preparing or submitting this brief. All parties have consented to the filing of this brief.

[2] *District of Columbia v. Heller*, 554 U.S. 570 (2008).

typically possessed by law-abiding citizens for lawful purposes" might not receive Second Amendment protection. *Id.* at 625.

Bruen reaffirmed *Heller*'s "in common use" test, and held that the test is whether they are in common use today.[3] Handguns "are indisputably in 'common use' for self-defense today." *Bruen*, 142 S.Ct. at 2143. It reiterated *Heller*'s finding that handguns are "the quintessential self-defense weapon." *Id.* (quoting *Heller*, 554 U.S. at 629). Because they are in common use and protected, any resort to historical tradition is irrelevant. "[E]ven if these colonial laws prohibited the carrying of handguns because they were considered 'dangerous and unusual weapons' in the 1690s, they provide no justification for laws restricting the public carry of weapons that are *unquestionably in common use today*." *Id.* (emphasis added).

Official manufacturing statistics collected by the government confirm that semiautomatic pistols are in common use. Federally licensed firearms manufacturers are required annually to report to the Bureau of Alcohol, Tobacco, Firearms & Explosives ("ATF") how many firearms they have manufactured and of what type. According to the most recent Annual Firearms Manufacturing and

[3] *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S.Ct. 2111 (2022).

Export Report ("AFMER Report")[4], in 2021 American manufacturers produced 6,751,919 pistols, nearly all of which were semiautomatic. Contrast this with the 1,159,918 revolvers made that year. *Id.* Semiautomatic pistols were produced at a rate almost six times that of revolvers. The number of pistols manufactured outnumbered all rifles (3,934,374), shotguns (675,426), and miscellaneous firearms (1,283,282) combined (5,893,082). *Id.*

The sheer number of handguns owned, most of which are pistols, is also confirmed by recent survey data. The largest, most comprehensive survey of gun owners to date, with 16,708 respondents, estimates that "Americans own over 415 million firearms, consisting of approximately 171 million handguns, 146 million rifles, and 98 million shotguns."[5]

Although *Heller* declared a handgun ban unconstitutional in the District of Columbia, a federal enclave, the Second Amendment applies equally to the states. *McDonald v. City of Chicago*, 561 U.S. 742 (2010). The right against the states is identical to the right against the federal government. The Court "decades ago abandoned the notion that the Fourteenth Amendment applies to the States only a

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[4] AFMER Report, https://www.atf.gov/explosives/docs/report/afmer2021finalwebreportpdf/download.

[5] William English, *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned* 4, 21 (Expanded Report: May 13, 2022). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4109494.

watered-down, subjective version of the individual guarantees of the Bill of Rights." *McDonald*, 561 U.S. at 785-86 (quoting *Malloy v. Hogan*, 378 U.S. 1, 10–11 (1964)) (cleaned up).

Thus, *Heller* resolves this case because the handguns at issue are protected by the Second Amendment under the test announced in that case and confirmed in *Bruen*.[6]

B. The UHA, As Implemented By The California Handgun Roster, Constitutes A Ban On All Semiautomatic Handguns That Are Not Grandfathered, And Is Unconstitutional Under the Second Amendment.

It is undisputed that no pistol has been added to California's Handgun Roster since 2013, when the microstamping requirement went into effect.[7] Microstamping technology is not commercially available for any firearm, so California prohibits any pistol from being sold if it is a model first introduced after that year.

For semiautomatic pistol models to be added to the roster since 2007, they must have both a chamber loaded indicator ("CLI") and a magazine disconnect mechanism ("MDM"). MDMs have never been popular on semiautomatic

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[6] *See also Caetano v. Massachusetts*, 577 U.S. 411, 420 (2016) (Alito, J., concurring) (observing that approximately "200,000 civilians owned stun guns" in a recent year, and concluding that: "*While less popular than handguns*, stun guns are widely owned…. Massachusetts' categorical ban of such weapons therefore violates the Second Amendment.") (emphasis added).

[7] Appellant's Opening Br. 7.

handguns, and only a few makes and models have them. Since 2007, there have been only 32 pistols on the roster that have had both a CLI and an MDM. ER-0706. Only four manufacturers produced those 32 models, and many are apparently just minor variations of other models. 4-ER-0743, 4-ER-0748. Thus, with the exception of old, grandfathered models—which are considered "unsafe" under California's current standards—only 32 models have come onto the roster in more than 15 years, and zero have come on the roster in the past 10 years. No other non-grandfathered pistols can be purchased from dealers. That is a ban on handguns that are widely possessed by citizens throughout the country for lawful purposes, including all of the latest semiautomatic models. Because it is a handgun ban, the UHA cannot stand under *Heller* and *Bruen*, and is unconstitutional under the Second Amendment.

Heller has already done the historical analysis and defined a constitutional test for what arms are protected by the Second Amendment. *Bruen* reaffirmed that test. All that remains is for courts to apply that test to the arms in question in a particular case. It is improper to look at historical analogues because *Heller* has already made that determination, and it is not the province of lower courts to devise a different standard to replace it.

Although Parts II and III below discuss matters pertaining to historical analogues, the analysis should really begin and end with whether the UHA bans

handguns that are in common use. It does. Therefore, it is unconstitutional and that is the end of the matter.

II. OUTLIER PROVING LAWS ARE NOT HISTORICAL ANALOGUES TO THE UHA'S PROHIBITIONS.

A. The Proving Laws Of Two States Are Not Analogous.

At the founding of the United States, able-bodied males were required to enroll in the militia of their state and to provide their own arms. The Massachusetts Militia Act of 1793 required the enrollment of "each and every free able bodied white male citizen" of ages eighteen to forty-five.[8] It provided that "[e]ach horseman shall furnish himself with . . . a pair of pistols," and each infantryman "shall constantly keep himself provided with a good musket . . . or with a good rifle."[9]

"Privately Owned Militia Muskets were the standard service arms of the Massachusetts militia from the Revolutionary War to 1840, when they were replaced with muskets issued by the state." George D. Moller, *Massachusetts Military Shoulder Arms, 1784-1877*, at 19 (1988). Moller adds:

> In order to ensure that the muskets supplied and used by the individual militia men were safe and met certain minimum standards, the state

[8] 2 *The Perpetual Laws of the Commonwealth of Massachusetts, From the Establishment of its Constitution in the Year 1780, To the End of the Year 1800*, at 172-73 (1801).

[9] *Id*. at 178, 181.

> appointed inspectors to each county and, on March 5, 1805, the Massachusetts legislature passed 'An act to Provide for the Proof of Fire Arms manufactured within this Commonwealth'. . . . [N]ote that rifles were not mentioned in this law.

Id. at 21.

The 1805 Act states that, in anticipation that arms "may be introduced into use which are unsafe," it was necessary to enact a law "for the proof [testing] of Fire Arms manufactured in this Commonwealth." Persons would be appointed "to prove all Musket Barrels and Pistol barrels" by shooting a ball (bullet) with a specified amount of gunpowder to ensure that they were safe and that a musket ball would go eighty yards and a pistol ball would go seventy yards. After they passed the test, the prover would stamp the barrel with his initials and the year.[10]

The law only applied to a person who "shall manufacture within this Commonwealth any musket or pistol," excluding any "Manufactured in the Armory of the United States" or pursuant to a contract with the United States.[11] The federal Springfield Armory manufactured "most of the guns produced in the state." 2-ER-0070-32.

The law also did not apply to muskets and pistols that were manufactured in other states or imported from abroad. Nor did it apply to rifles at all. Those

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[10] "An Act to Provide for the Proof of Fire Arms Manufactured Within this Commonwealth,"1804 Mass. Acts. 111, ch. 81, § 1 (approved 1805).

[11] *Id*. §§ 2, 3.

categories would have accounted for the overwhelming majority of firearms sold in Massachusetts.

Since most firearms were made locally, Massachusetts was not a major exporter of firearms to other states. The State's expert states: "Early America firearms production in the era of the Second Amendment . . . was dominated by artisan production. Local gun smiths . . . were responsible for selling most firearms." 2-ER-234-37.

A person who manufactured, sold, or bought a musket or pistol in violation of the above was liable to forfeit ten dollars "to be recovered in an action of Debt . . . by any person who shall sue for and recover the same to his own use."[12] Violation was thus not made a crime, but resulted in a civil penalty.[13]

Maine, formerly part of Massachusetts, became a state in 1820. In 1821, Maine passed a law providing for the appointment of "the provers of the barrels of all new, or unused fire arms," who would mark and number each proved barrel. A person who sold an unproved barrel would forfeit ten dollars to be recovered by an

[12] "An Act to Provide for the Proof of Fire Arms," § 2.

[13] Massachusetts' 1805 law was superseded in part by an 1814 enactment, but it did not materially alter the above basic provisions. An Act in addition to an Act, entitled "An Act to provide for the proof of Fire Arms, manufactured within this Commonwealth." 1814 Mass. Acts 464, ch. 192.

action of debt by any person who would sue and recover it, or "by indictment to the use of the State."[14]

By its limitation to sales, the law did not apply to firearms that persons coming into the state would bring with them. And like Massachusetts, a civil penalty was the only consequence for violation.

It is unclear the extent to which the Massachusetts and Maine laws were enforced, or when they were repealed.[15] They are not mentioned in any judicial decisions of those states.

B. Proving Laws Are Not Comparable As To The "How And Why" Of The California Law.

Nothing about the proving laws is comparable to the "how and why the regulations burden a law-abiding citizen's right to armed self-defense" under the California law. *Bruen* at 2132-33 (2022). "[W]hether modern and historical regulations impose a comparable burden on the right of armed self-defense and

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[14] An Act to provide for the Proof of Fire Arms, 2 Laws of the State of Maine 685 (1821), ch. 162. Contrary to the usual criminal law use of that term, Maine had a number of laws using the term "indictment" in reference to the state's recovery of monetary penalties where private persons failed to seek recovery.

[15] State's expert Saul Cornell described an 1871 Maine law as "renewing and updating firearm proving and gunpowder safety inspection laws," but it only concerned flammable substances, not firearms. Engine Men and Fires, Maine Revised Statutes 293 (1871).

whether that burden is comparably justified are '*central*' considerations when engaging in an analogical inquiry." *Id*. at 1233.

The "how" of the proving laws was to test fire barrels to ensure that they had sufficient quality that (1) they did not burst and (2) they would shoot a ball (bullet) a minimum distance. They did not require additional features mandated by the state but not desired by consumers. The Massachusetts law did not apply to arms imported from other states. A violator would incur no criminal penalty. The "why" was to ensure what every purchaser, *especially every militiaman*, demands in a firearm – that it will safely fire a reasonable distance. Proofing firearms enhanced the ability of consumers to use them in self-defense.

By contrast, the "how" of the California law is to ban most models of pistols from the marketplace, depriving consumers of those they demand as best for self-defense, and to mandate features that do nothing to enhance self-defense and thus are not desired by consumers. The MDM renders the firearm unusable. The CLI is irrelevant to the firing of the pistol. Microstamping has nothing to do with ability to discharge. Unlike the Massachusetts law's civil remedies, a person who manufactures, imports, or sells an "unsafe handgun" is subject to imprisonment for one year. Cal. Penal Code § 32000(a)(1).

The "why" of the first two of these provisions is to substitute the state's version of a "not unsafe" handgun with what the consumers actually demand. The

"why" of microstamping, since the manufacture of handguns with this feature is not feasible, is the unrealistic goal of solving crimes. And the "why" of neither is to ensure safe firearms for the militia – the act does not apply to the sale of handguns to "the military or naval forces of this state" or members thereof. Cal. Penal Code § 32000(b)(4).

C. Proving Laws Were Outliers That Fail As Historical Analogues.

When examination of analogues is appropriate, the government has the burden to "identify a well-established and representative historical *analogue*," and may not "uphold every modern law that remotely resembles a historical analogue," which "risk[s] endorsing outliers that our ancestors would never have accepted." *Bruen*, 142 S. Ct. at 2133 (citation omitted). As in *Heller*, *Bruen* stated that it would not "stake our interpretation of the Second Amendment upon a single law, in effect in a single [State], that contradicts the overwhelming weight of other evidence regarding the right to keep and bear arms . . . ." *Id*. at 2153.

In 1821, there were 24 states,[16] and only Massachusetts and Maine (which had just become a state) had firearm proving laws. As of the 1820 census, the population of Massachusetts was 523,287 and Maine's was 298,335, which totaled

[16] Samuel Shipley, *List of U.S. states' dates of admission to the union*, Britannica Online (February 11, 2020). https://www.britannica.com/topic/list-of-U-S-states-by-date-of-admission-to-the-Union-2130026.

only 8.5% of the U.S. population of 9,625,734.[17] These laws are insufficiently widespread to be analogues. Historically, and today, quality has been assured by contract and tort law, and by institutes that set standards.[18]

In sum, the proving laws of two states are not proper historical analogues for California's law, and in any event were outliers that provide no historical tradition to justify current firearm regulation.

D. Revolutionary War Era Contractual Provisions For Inspection Of Firearms Purchased By The Colonies Are Not Analogous To California's Bans

The State claims that in 1775, New Hampshire, Maryland, and Pennsylvania adopted *resolutions* (not laws) "which required that firearms meet certain manufacturing and inspection specifications prior to purchase." Appellant's Opening Br. 35 (citing 2-ER-255). But they simply required that firearms be inspected before being purchased on behalf of the state, and had no applicability to firearms purchased by private citizens.

New Hampshire's "Plan for Providing Fire-Arms for the Colony"

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[17] United States Census Bureau, *Census for 1820*, at 18 (1821). https://www.census.gov/library/publications/1821/dec/1820a.html.

[18] In the twentieth century, the U.S. government encouraged industries to develop minimum standards for many products. That was the impetus for the founding of the Sporting Arms and Ammunition Manufacturers' Institute ("SAAMI") in 1926, which since then has created industry standards "for safety, interchangeability, reliability and quality, coordinating technical data and promoting safe and responsible firearms use." SAAMI, https://saami.org/.

conditioned payment for firearms on being tested with a certain amount of gunpowder.[19] Maryland's Council of Safety resolved that muskets "be proved before purchase."[20] Pennsylvania's Committee on Safety resolved that an agent must "prove all Muskets made in this City for the Provincial Service" before payment was made.[21] These were merely contractual policies requiring that firearms purchased by the states must be tested before being paid for, and imposed no requirements regarding private transactions.

The policies of three early states to buy firearms only after being tested were no different than the desire of consumers, then and now, to decide which firearms to purchase. The State turns the basic rule of contract upside down by dictating that consumers may only buy firearms they do not desire and that they consider inferior, while banning large swaths of modern firearms.

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[19] 8 *Documents and Records Relating to the State of New Hampshire During the Period of the American Revolution from 1776-1783*, at 15-16 (Nathaniel Bouton ed. 1874).

[20] 2-ER-255. No source is given.

[21] Resolution of the Pennsylvania Committee on Safety, Oct. 27, 1775, 10 *Colonial Records of Pennsylvania* 383 (1852).

III. THE APPROPRIATE TIME PERIOD TO DETERMINE ORIGINAL PUBLIC UNDERSTANDING OF THE SECOND AMENDMENT IS 1791, WHEN THE BILL OF RIGHTS WAS ADOPTED.

A. Briefing In This Case That Advocates That The Time To Determine The Original Meaning Of The Bill Of Rights Is When The Fourteenth Amendment Was Ratified Is Seriously In Error.

Bruen made it clear that "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them," *Bruen*, 142 S.Ct. 2136 (quoting *Heller*, 554 U.S. 570, 634–635 (2008)). The Second Amendment was adopted by the people in 1791, when they ratified the Bill of Rights. Plainly, since the Supreme Court has twice so held, the scope of the Second Amendment is determined by the meaning it had in 1791.

The time of ratification of the Fourteenth Amendment has nothing to do with the original public understanding of the Second Amendment in 1791 and tells us nothing important about the tradition of firearms regulation in this country. Yet the amicus brief filed by Everytown for Gun Safety contends that 1868, and not 1791, is the "most relevant" time period for the historical inquiry because that is "when the Fourteenth Amendment was ratified and made the Second Amendment applicable to the states." Everytown Br. 11.

An examination of the case law that the Everytown brief relies on reveals that claim to be baseless. *See* Part I.B., below. Such a claim is illogical and barred by principles that are firmly established in the Supreme Court's Bill of Rights

jurisprudence. *See* Parts I.C., I.D., and I.E., below. Most conclusively, it is contrary to the Court's universal practice of looking at the time of the Founding, not the Reconstruction period, to determine the meaning of the substantive provisions of the Bill of Rights, including the Second Amendment. *See* Part I.F., below.

B. The Case Law And Quotations Relied On To Establish 1868 As The Pertinent Year Are Illusory.

To try to support its contention that 1868 is the pertinent year, Everytown argues that several courts of appeals have reached this conclusion. It first cites a panel decision in the case of *National Rifle Association v. Bondi*, 61 F.4th 1317 (11th Cir. 2023). However, the mandate was withheld in that case on the day it was decided, *id.*, Case No. 21-12314, Doc. No. 67 (Mar. 9, 2023), and a petition for rehearing en banc was later filed. *Id.*, Doc. No. 68 (Mar. 30, 2023). If rehearing en banc is granted, the panel decision will, of course, be vacated. Thus, it would be prudent not to give much weight to this panel opinion before the case is concluded.

The Everytown brief next quotes *Ezell v. City of Chicago*, 651 F.3d 684, 702 (7th Cir. 2011), as stating that "*McDonald* [*v. City of Chicago*, 561 U.S. 742 (2010),] confirms that if the claim concerns a state or local law, the 'scope' question asks how the right was publicly understood when the Fourteenth Amendment was proposed and ratified." *Ezell* contains that quote, but the Everytown brief omits the Seventh Circuit's citation to *McDonald*, which was

"*McDonald*, 130 S.Ct. at 3038–47." But Justice Alito's *McDonald* opinion in that page range merely examines history after the Civil War to determine whether the Second Amendment should be held to be incorporated. It does not say that 1868 is the principal time period for determining the meaning or scope of the Second Amendment.

The Seventh Circuit simply made a mistake in *Ezell*. It corrected that mistake the next year in *Moore v. Madigan*, 702 F.3d 933, 935 (7th Cir. 2012). There, it held that "1791, the year the Second Amendment was ratified" was "the critical year for determining the amendment's historical meaning, according to *McDonald v. City of Chicago, supra*, 130 S.Ct. at 3035 and n. 14."

Everytown next quotes the First Circuit to the effect that "[b]ecause the challenge here is directed at a state law, the pertinent point in time would be 1868 (when the Fourteenth Amendment was ratified)." Everytown Br. 12. The citation in the Everytown brief is: "*Gould v. Morgan*, 907 F.3d 659, 668 (1st Cir. 2018) (citing cases), criticized by *Bruen*, 142 S. Ct. at 2124, 2126-27." Everytown Br. 12. But *Gould* relied only on the *Greeno* case (see below) which relied on the mistake in *Ezell*. Massachusetts was one of the six states whose licensing schemes were expressly condemned in *Bruen*. *Bruen*, 142 U.S. at 2124. *Gould* also explicitly adopted the two-step interest balancing scheme rejected by *Bruen*, *Gould*, 907 F.3d at 668-69, and held that "the core Second Amendment right is limited to self-

defense in the home," *id*. at 671, another holding contrary to *Bruen*. *Gould* was not "criticized by" *Bruen*, it was abrogated by *Bruen*.

The Everytown brief next cites *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012) as "following *Ezell*," and *Drummond v. Robinson Twp.*, 9 F.4th 217, 227 (3d Cir. 2021), quoting language that "[T]he question is if the Second and Fourteenth Amendments' ratifiers approved [the challenged] regulations …." Everytown Br. 12-13. But as one scholar has noted:

> *Greeno* simply quoted the mistaken language in *Ezell*, apparently without investigating its accuracy.… The *Drummond* case did not hold that 1868 is the proper date… [and] did not attempt to determine what the ratifiers of the Fourteenth Amendment may have understood the right's scope to be in 1868 (citations omitted). [22]

Thus, the Everytown brief relies on a mistake in *Ezell*. *Greeno* relied only on the same mistake. And *Gould* relied only on *Greeno*. This line of cases in the courts of appeals proves nothing.

What does the Everytown brief *not* cite for the proposition that the 1868 time of ratification ought to be controlling? It does not cite a single Supreme Court

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[22] Mark W. Smith, *"Not all History is Created Equal": In the Post-Bruen World, the Critical Period for Historical Analogues is when the Second Amendment was Ratified in 1791, and not 1868*, at 32, SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4248297. *See also* Mark Smith, *Attention Originalists: The Second Amendment Was Adopted in 1791, not 1868*, Harvard Journal of Law & Public Policy Per Curiam (Fall 2022) https://www.harvard-jlpp.com/wp-content/uploads/sites/21/2022/12/Smith-1791-vF1.pdf.

case that has ever held that 1868 is the principal relevant time for determining the original public understanding of the Second Amendment or of any of the first eight provisions of the Bill of Rights. That is because when the Supreme Court consults history to determine the original meaning of a provision of the Bill of Rights, it has always looked to the Founding era as the principal focus. *See* Part I.F., below.

The Everytown brief mentions *Bruen*, but tries to transmute a passing remark made by Justice Thomas, the author of the *Bruen* opinion, into a holding that 1868 is the key year for determining meaning, which neither *Bruen* nor any other Supreme Court opinion has ever held.

Bruen merely noted the unexceptionable principle that:

> Strictly speaking, New York is bound to respect the right to keep and bear arms because of the Fourteenth Amendment, not the Second….[citation omitted] Nonetheless, we have made clear that individual rights enumerated in the Bill of Rights and made applicable against the States through the Fourteenth Amendment have the same scope as against the Federal Government. [multiple citations omitted] 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. [citing three Court cases from the past twenty years holding that 1791 is the proper period for determining public understanding of the First, Fourth, and Sixth Amendments].

Justice Thomas's opinion then acknowledged what it called an "ongoing scholarly debate" on whether courts should primarily rely on the prevailing understanding in 1868, citing A. AMAR, THE BILL OF RIGHTS: CREATION AND

RECONSTRUCTION xiv, 223, 243 (1998); K. Lash, *Re-Speaking the Bill of Rights: A New Doctrine of Incorporation* [now published at 97 Ind. L.J. 1439 (2022)]. He concluded by observing that "We need not address this issue today because . . . 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 public carry." *Bruen*, 142 S.Ct. at 2138.

Several things are worth noting in this passage. First, though characterized as an "assumption," the test actually applied by the *Bruen* court, and in numerous cases cited by *Bruen*, was 1791, not 1868. Second, the acknowledgement of an "ongoing scholarly debate" does not imply that the Court has changed the historical period for determining original public understanding. Third, adoption of 1868 as the historical period to determine original meaning would nullify the entire course of Supreme Court incorporation jurisprudence, and would require that all Bill of Rights cases, whether based on incorporation against the states or directly against the federal government, be revisited.

C. The Constitution's Meaning Is Fixed According To The Understandings Of The Founders.

Bruen held that the Constitution's "meaning is fixed according to the understandings of those who ratified it," although "the Constitution can, and must, apply to circumstances beyond those *the Founders* specifically anticipated." *Bruen*, 142 S.Ct. 2132. Thus, it is the understanding of "the Founders" that is dispositive. For that proposition, *Bruen* cited *United States v. Jones*, 565 U.S. 400, 404–405 (2012), a Fourth Amendment case that held that installation of a tracking device "would have been considered a 'search' within the meaning of the Fourth Amendment *when it was adopted*"). *Id*. (emphasis added). *Heller* also expressly determined that the Founding was the relevant time for ascertaining original public understanding. It said that the "normal meaning of the Constitution" "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 (emphasis added). So, the Constitution, including the Bill of Rights and Second Amendment, had an ascertainable, fixed meaning at the time it was adopted, which is the time of the Founding.

D. Each Provision of The Bill Of Rights Means The Same Thing When Applied Against The States As It Does When Applied Against The Federal Government.

Bruen itself made it clear that "individual rights enumerated in the Bill of

Rights and made applicable against the States through the Fourteenth Amendment have the same scope as against the Federal Government." *Bruen*, 142 S.Ct. at 2137. The Second Amendment therefore cannot have one meaning when applied against the federal government and a different meaning when incorporated against the states. That principle was conclusively established in *Malloy v. Hogan*, 378 U.S. 1 (1964) and has been adhered to by the Court ever since. *McDonald* reviewed the debate on this issue, and concluded that *Malloy* "decisively held that incorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'" *McDonald*, 561 U.S. at 765-66 (citing cases).

If the Second Amendment meant something in 1791 regarding the restraints placed on the federal government, as it surely did (*see Heller*), then the principle just described means that it meant the identical thing when applied to restrain the states in 1868 and thereafter. And that meaning was fixed in 1791.

E. *Bruen* And *Heller* Both Held That History From Around The Time Of The Civil War Or Later Cannot Be Used To Contradict The Original Understanding From 1791, But Only To Confirm That Understanding.

Although both *Heller* and *Bruen* examined a small amount of evidence from the mid- to late-nineteenth century, they clearly did so only to confirm the original

understanding from the time of the ratification of the Second Amendment in 1791. *Bruen* relied on *Gamble v. United States*, 139 S.Ct. 1960 (2019), to make that point concisely. *Bruen* noted that "we made clear in *Gamble* that *Heller's* interest in mid- to late-19th-century commentary was secondary. *Heller* considered this evidence 'only after surveying what it regarded as a wealth of authority for its reading—including the text of the Second Amendment and state constitutions.'" *Bruen,* 142 S.Ct. at 2137 (quoting *Gamble*, 139 S.Ct. at 1975–76). Any evidence from the mid- to late-nineteenth century was treated as "mere confirmation of what the Court thought had already been established." *Id*.

Furthermore, both *Heller* and *Bruen* noted that little weight should be given such nineteenth century evidence under any circumstances. *Bruen* expressly cautioned "against giving postenactment history more weight than it can rightly bear." *Bruen*, 142 S.Ct. at 2136. *Bruen* also quoted *Heller* regarding post-Civil War discussions of the right to keep and bear arms, observing that because they "took place 75 years after the *ratification of the Second Amendment*, they do not provide as much insight into its original meaning as earlier sources." *Bruen,* 142 S.Ct. at 2137 (emphasis added). If 1868 were the proper period, then such evidence would be the most relevant of all; but both *Heller* and *Bruen* viewed the "ratification of the Second Amendment" as the proper period for determining original meaning. In fact, *Bruen* refused even to consider "any of the 20th-century

historical evidence brought to bear by respondents or their amici." *Id.* at 2154 n.28. The Court's reason was straightforward: "As with their late-19th-century evidence, the 20th century evidence presented by respondents and their amici does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence." *Id.*

The reason that California offers historical analogues from after the Civil War is precisely *because* they contradict earlier evidence. The tradition at the time of the Founding, and up until a smattering of short-lived laws in the 1920s and 1930s, was that the government could not ban the sale or possession of arms.

F. The Position That 1868 Is The Proper Year Is Contrary To The Supreme Court's Prior Holdings And Will Not Be Adopted By The Court.

1. The Supreme Court's universal practice has been to look at the Founding era, not 1868, to determine the original understanding of the Bill of Rights.

When it has employed history, the Supreme Court has always considered the Founding period to be the principal or exclusive period that is determinative. Following is a partial list of such cases using history from the Founding:[23]

First Amendment: *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1894–912 (2021) (Free Exercise Clause) (concurrence by Justices Alito, Thomas, and

[23] This list is based in part on the list contained in Smith, *Attention Originalists*, *supra* n.22, at 7 n.35.

Gorsuch); *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171, 182–84 (2012) (Establishment Clause and Free Exercise Clause); *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 122–125 (2011) (freedom of speech); *Lynch v. Donnelly*, 465 U.S. 668, 673–74 (1984) (Establishment Clause); *Near v. Minnesota*, 283 U.S. 697, 713–17 (1931) (freedom of the press); *Reynolds v. United States*, 98 U.S. 145, 163 (1878) (Free Exercise Clause).

Second Amendment: *New York State Rifle Association v. Bruen*, 142 S. Ct. 2111, 2136 (2022); *District of Columbia v. Heller*, 554 U.S. 570, 634–635 (2008).

Fourth Amendment: *Virginia v. Moore*, 553 U.S. 164, 168–169 (2008); *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999); *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995).

Fifth Amendment: *Gamble v. United States*, 139 S. Ct. 1960, 1965 (2019) (Double Jeopardy Clause); *Benton v. Maryland*, 395 U.S. 784, 795–96 (1969) (Double Jeopardy Clause).

Sixth Amendment: *Ramos v. Louisiana*, 140 S. Ct. 1390, 1395–96 (2020) (Jury Trial Clause); *Crawford v. Washington*, 541 U.S. 36, 42–50 (2004) (Confrontation Clause); *Duncan v. Louisiana*, 391 U.S. 145, 151–54 (1968) (right to jury trial in state cases); *Klopfer v. North Carolina*, 386 U.S. 213, 223–25 (1967) (right to speedy trial); *Washington v. Texas*, 388 U.S. 14, 20, 23 (1967) (Compulsory Process Clause); *In re Oliver*, 333 U.S. 257, 266–268 (1948) (right to

public trial); *Powell v. Alabama*, 287 U.S. 45, 60–67 (1932) (Right to Counsel Clause).

Eighth Amendment: *Timbs v. Indiana*, 139 S. Ct. 682, 687–99 (2019) (Excessive Fines Clause).

Justice Thomas's statement in *Bruen* that the Court has "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," is thus rather modest. *Bruen*, 142 S.Ct. at 2137. The cases listed above demonstrate that, when the Court looks at history, the period around 1791 has been the central time period that it has examined to determine original public understanding of the Bill of Rights.

2. The Supreme Court will not overturn its fundamental incorporation jurisprudence to focus on 1868 rather than the Founding.

The "ongoing scholarly debate" referenced by the *Bruen* opinion has not turned out to be much of a debate. The Court cited only Prof. Akhil Amar's 1998 book on the Bill of Rights, and a recent law review article by Prof. Kurt Lash. See Part III.B., above. The most relevant of these is the article by Lash. According to Westlaw at the time this is written, there have been twenty-four citations to Lash's article. All but four were in briefs or cases in post-*Bruen* litigation, most of which were briefs by Everytown.

Amar's book does not argue that 1868 is the central or exclusive time focus for determining the original meaning or public understanding of the Bill of Rights. His approach is more subtle, arguing that "a particular principle in the Bill of Rights may change its shape in the process of absorption into the Fourteenth Amendment." Amar at xiv. With regard to the Second Amendment, Amar argues that the words of that Amendment "take on a different coloration and nuance when they are relabeled 'privileges or immunities of citizens' rather than 'the right of the people,'" and that "the core applications and central meanings of the right to keep and bear arms and other key rights were very different in 1866 than in 1789." Amar at 223. He stopped far short of contending that in determining original public understanding of the Bill of Rights, the time of the Fourteenth Amendment should prevail over and replace the time of the Founding.

Lash takes the erroneous position that the relevant time period for determining meaning is 1868, not 1791. He claims that when the Fourteenth Amendment was ratified, the people "respoke" the provisions of the Bill of Rights and "invested those original 1791 texts with new 1868 meanings." Lash at 1441. He calls this "reverse incorporation,"[24] and contends that his version of "reverse

[24] That is the term sometimes used for the unique approach taken in *Bolling v. Sharpe*, 347 U.S. 497 (1954), in which the equal protection clause of the Fourteenth Amendment was "read back" into the Fifth Amendment's due process clause.

incorporation" would turn that "proposition about equal protection and a single clause of the Fifth Amendment into a proposition about the entire content of the Bill of Rights." Lash at 1442.

Indeed it would. A special rule regarding which time period to use cannot be employed for the Second Amendment, because as the Supreme Court has said, that amendment is not a "second class right." *McDonald*, 561 U.S. at 780. That means that the Supreme Court's entire incorporation jurisprudence would have to be overturned for *all* provisions of the Bill of Rights, and *all* decisions regarding the original meaning of those provisions would have to be revisited, with an allegedly different understanding from 1868 substituted for the original understanding of 1791.

Needless to say, that has not happened, and lower courts are bound by the decisions of the Supreme Court. Accordingly, talk about substituting an 1868 understanding for the original understanding of 1791 should be dismissed.

CONCLUSION

For the reasons stated above, the District Court's decision should be affirmed.

Respectfully submitted,

/s/ Stephen P. Halbrook
Stephen P. Halbrook
3925 Chain Bridge Road, Suite 403
Fairfax, Virginia 22030
Telephone: (703) 352-7276
protell@aol.com

Counsel of Record for *Amici Curiae*

/s/ Dan M. Peterson
Dan M. Peterson
Dan M. Peterson PLLC
3925 Chain Bridge Road, Suite 403
Fairfax, Virginia 22030
Telephone: (703) 352-7276
dan@danpetersonlaw.com

Counsel for *Amici Curiae*

Date: June 2, 2023

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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