STATE OF NEW JERSEY, Plaintiff-Appellant v. KYREED PINKETT & DEJOHN PRESTON, Defendants-Respondents	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-3121-23T2
STATE OF NEW JERSEY, Plaintiff-Appellant v. JERRON PHILLIPS, Defendant-Respondent.	DOCKET NO. A-3122-23T2 CRIMINAL ACTION On Leave to Appeal Orders Granting Defendants' Motions to Dismiss Counts of their Indictments, entered in the Superior Court, Law Division, Essex County. Sat Below: Hon. Christopher S. Romanyshyn, J.S.C.

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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Preliminary Statement

N.J.S.A. 2C:39-5b criminalizes possession of a handgun without a permit. N.J.S.A. 2C:58-6.1 limits possessing and carrying a handgun to those aged 21 or older. The issue of first impression presented in these appeals is whether the Second Amendment to the United States Constitution, as interpreted by N.Y. State Rifle & Pistol Ass'n Inc. v. Bruen, 597 U.S. 1 (2022), renders those statutes unconstitutional. The trial judge thought so. Our history and common sense say otherwise.

Defendants Jerron Phillips, Kyreed Pinkett, and Dejohn Preston never applied for a handgun permit. When they were 18, 19 and 20, respectively, they were arrested and charged with violating N.J.S.A. 2C:39-5b. Each sought to dismiss that charge based on Bruen, arguing that the age restriction in N.J.S.A. 2C:58-6.1 was unconstitutional, and therefore so was N.J.S.A. 2C:39-5b as applied to them. The trial judge agreed and dismissed the charges against each defendant, concluding that because he could find no "historical analogue" to the present under-21 prohibition, those statutes lacked the "historical tradition of firearm regulation" necessary to sustain it under the Second Amendment as interpreted by Bruen.

The judge's orders cannot stand for at least two reasons. First, because defendants never applied for a carry permit, they lacked standing to challenge

the constitutionality of those statutes. In an opinion issued just last year that was binding on the trial court, this Court made the common-sense observation that "law-abiding citizens are not free to ignore a statute and presume that they would have been granted a permit but for one potentially invalid provision of a permit statute." State v. Wade, 476 N.J. Super. 490, 500 (App. Div.), lv. to app. denied, 255 N.J. 492 (2023). That's exactly what defendants did when they unlawfully carried their handguns in Essex County, and their failure to seek a permit through proper channels before carrying rendered their constitutional challenge dead on arrival.

Second, though the issue remains unsettled by the United States Supreme Court, many courts, resting on the weight of history, have held that the ability of 18-to-20-year-olds to lawfully carry handguns in public falls outside the Second Amendment's protection—both because persons of that age are not part of "the people" envisioned by the Second Amendment, and because minimum age requirements on the carrying of handguns are consistent with this Nation's historical tradition of firearm regulation. Thus, both statutes are constitutional on their face, and as applied to these defendants.

For these reasons, this Court must reverse the orders striking down defendants' unlawful-possession-of-a-weapon charges and two sensible, duly enacted statutes aimed at promoting and enhancing public safety.

Statement of Procedural History and Facts[1]

When defendants were 18 to 20 years old, each had in his possession a handgun equipped with a large-capacity magazine. No defendant had ever applied for a permit to carry a handgun pursuant to our State's licensing scheme. Instead, they chose to unlawfully possess their weapons until apprehended by law enforcement.

Phillips was 18 years old on August 13, 2021, when Newark police arrested him after he fled from a command to stop. Police quickly found the fully loaded .9 mm Springfield Armory handgun with a large-capacity magazine that he ditched in a flowerpot while running from them. (Pa58-59).

Pinkett was 19 years old and Preston was 20 when, on January 13, 2022, they were in a motor vehicle that was stopped by West Orange police. During the stop, police found two .9 mm handguns—one Smith & Wesson and one Taraus—inside the vehicle. Both handguns were affixed with large-capacity magazines of 12 and 16 rounds, respectively. (Pa40-41; Pa42-43).

On March 9, 2022, Phillips was indicted for several offenses, including unlawful possession of a weapon ("UPW"), a handgun, in violation of N.J.S.A. 2C:39-5b (count one). (Pa61). Later that year, on October 20, Pinkett and Preston were also indicted for several offenses, including two counts of UPW

[1] Because the relevant facts are few and undisputed, these have been combined for the Court's convenience.

(counts one and five). (Pa45; Pa49).

On February 22, 2023, Phillips moved to dismiss the UPW count against him. (Pa2-3; Pa64-68). In April 2023, Pinkett moved for the same relief. (Pa2-3; Pa51-55).

The cases were assigned to the Honorable Christopher S. Romanyshyn, J.S.C., who consolidated the cases and heard oral argument on the defendants' motions on April 1, 2024. (1T).[2] During that proceeding, Preston joined in Pinkett's motion. (1T3-11 to 22). At the conclusion of the argument, the judge indicated he was reserving decision and was giving the State time to do additional research. The parties were to return to court on April 29. (1T17-5 to 10; 1T18-19 to 19-7).

On April 29, the parties returned. Judge Romanyshyn acknowledged he was already "working on [his] opinion" and was already "30 pages in[,]" and if the State wanted to file a supplemental brief it would, according to the judge, have to be "fast because chances are I'm going to beat you to it." (2T3-14 to 19). The State asked for additional time—until May 10—to complete the task of compiling a historical record to answer the judge's inquiries. The judge agreed and set the next court date for May 17. (2T4-6 to 25).

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[2] "1T" refers to the oral argument transcript dated April 1, 2024.
"2T" refers to the oral argument transcript dated April 29, 2024.

Two days before the State's supplemental brief was due, the court, on May 8, released its 37-page written opinion granting defendants' motions to dismiss the UPW counts. (Pa1-37).

On May 10, 2024, the trial court issued orders consistent with its written opinion. (Pa38; Pa56). That same day, the court, at the State's request, issued orders staying its decision pending resolution of its motion for leave to appeal. (Pa39; Pa57).

The State sought leave to appeal in both cases on May 23, 2024. As part of those motions, the State also asked this Court to stay the trial court's opinion and orders. The State also asked, by way of separate motion, to consolidate the two cases. See (Pa69-73).

On June 11, 2024, this Court granted the State's motions in both cases for leave to appeal and to continue the stays issued by the trial court. (Pa69-70; Pa71-72). The Court also granted the State's motion to consolidate the appeals. (Pa73).

Legal Argument

Point I

The trial court's orders dismissing the UPW counts and holding N.J.S.A. 2C:39-5b and N.J.S.A. 2C:58-6.1 unconstitutional must be reversed. Defendants lacked standing to bring their Second Amendment challenges, that Amendment was never envisioned to encompass 18-to-20-year-olds, and a reasonable, well-defined age limit on the public carry of firearms is consistent with the Nation's historical tradition of firearm regulation. (Pa1-37; Pa38; Pa56).

None of the defendants in these appeals have ever applied for a handgun carry permit. Their failure to do so means that each of them lacked standing to bring the sweeping constitutional challenge to the UPW statute sustained by the trial court.

But, even if they did have standing, persons as young as the defendants here were not within the class of "the people" envisioned by the Second Amendment. And, even if they were, a sensible age limit on the public carry of handguns is consistent with our Nation's historical tradition of firearm regulation, and therefore is consistent with the Second Amendment as interpreted by Bruen.

For any of these reasons, this Court must reverse the trial court's orders dismissing the UPW counts and vacate the decision nullifying as unconstitutional two duly enacted firearm statutes.

A. Governing Principles

i. Constitutional Challenges and Standing

This Court's review of both the trial court's interpretation of the United States Constitution, and its decision to dismiss counts of an indictment on that basis, is de novo. See State v. Fair, 256 N.J. 213, 227-28 (2024); State v. Twiggs, 233 N.J. 513, 532 (2018).

A Grand Jury's indictment is presumptively valid. State v. Feliciano, 224 N.J. 351, 380 (2016); Wade, 476 N.J. Super. at 500. Only the "clearest and plainest ground[s]" establishing an indictment is "deficient or palpably defective" warrants dismissing an indictment or any count therein. State v. Bell, 241 N.J. 552, 560 (2020); Wade, 476 N.J. Super. at 500.

Even more embedded in our legal tradition is the principle that statutes are presumed constitutional. State v. Comer, 249 N.J. 359, 384 (2022). The burden of establishing otherwise rests "on the party challenging [the statute's] validity." State v. Auringer, 335 N.J. Super. 94, 99-100 (App. Div. 2000) (citations omitted).

This is no easy feat. See Williams v. State, 375 N.J. Super. 485, 506 (App. Div. 2005) (describing the burden as "onerous."), aff'd sub nom. In re P.L. 2001, C. 362, 186 N.J. 368 (2006). Our Supreme Court has explained that this is "a heavy burden" to bear; "Indeed, from the time of Chief Justice

Marshall, case law has steadfastly held to the principle that every possible presumption favors the validity of an act of the Legislature." State v. Buckner, 223 N.J. 1, 14 (2015) (citations and marking omitted). The reason is "solid and clear: the challenged law represents the considered action of a body composed of popularly elected representatives," and so "courts exercise the power to invalidate a statute on constitutional grounds with extreme self restraint." Ibid. (internal markings and citations omitted).

For a court to cast aside such restraint and strike down considered action by the people's body, the challenger must show "unmistakably" that the enactment's "repugnancy" to the Constitution is "clear beyond reasonable doubt." Ibid. (citations omitted). If reasonable people "might differ," the challenge fails, and the will of the citizenry, as announced by their representatives, prevails. Id. at 15 (internal markings and citation omitted). As the Supreme Court has recognized, "[w]hen legislation and the Constitution brush up against each other," a court's "task is to seek harmony, not to manufacture conflict." United States v. Hansen, 599 U.S. 762, 781 (2023).

Criminal defendants may challenge a pending charge on the basis that the charged statute is unconstitutional. R. 3:10-2(d). But, to do so, "'the defendant must have standing to raise the constitutional objection.'" Wade, 476 N.J. Super. at 505 (quoting State v. Saunders, 75 N.J. 200, 208-09 (1977)).

"Accordingly, the defendant 'must show sufficient injury before his [or her challenge] will be heard.'" Ibid. (citation omitted). That defendants may only raise "constitutional claims related to his [or her] own conduct rests on the principle that legislative acts are presumptively valid and will not be overturned on the basis of hypothetical cases not actually before the court.'" Ibid. (quoting Saunders, 75 N.J. at 208-09).

To have standing to challenge the constitutionality of a permitting or licensing scheme, the defendant "must have applied for a permit or license under the statute." Id. at 505-06; accord Bruen, 597 U.S. at 15-16. A narrow exception to this rule exists if a defendant can "'make a substantial showing that submitting to the government policy would [have been] futile.'" Wade, 476 N.J. Super. at 506 (quoting Kendrick v. Bruck, 586 F. Supp. 3d 300, 308 (D.N.J. 2022)) (emphasis added).

What a challenger may not do, however, is take the law into his or her own hands, disregard the permitting or licensing scheme and engage in the conduct for which the permit or license is a prerequisite, and then, after being criminally charged, mount some post hoc constitutional attack on the scheme itself. Such "collateral attacks" on permitting schemes have long been prohibited. See, e.g., Poulos v. New Hampshire, 345 U.S. 395, 409 (1953); Borough of Collingswood v. Ringgold, 66 N.J. 350, 364 (1975). Simply put,

"a motion to dismiss criminal charges is not the proper venue for demonstrating that defendants would have been granted [the] permit but for the [challenged] requirement." Wade, 476 N.J. Super. at 507.

ii. The Second Amendment and New Jersey's Firearm Statutes

The Second Amendment to the United States Constitution provides, in pertinent part, that, "the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. Amend. 2. That amendment applies to the States by way of the Fourteenth Amendment. McDonald v. City of Chicago, 561 U.S. 742, 749-50 (2010). Together, these two Amendments "protect an individual right to keep and bear arms for self-defense." Bruen, 597 U.S. at 17 (citing McDonald and District of Columbia v. Heller, 554 U.S. 570, 626 (2008)).

The public carry of handguns has long been "the most closely-regulated aspect of" New Jersey's firearm statutes. In re Preis, 118 N.J. 564, 568 (1990). "'[A]s early as'" 1882, New Jersey has regulated the carrying of handguns, and since 1905 it has required private citizens to obtain a permit before carrying firearms in public. Wade, 476 N.J. Super. at 503 (quoting Siccardi v. State, 59 N.J. 545, 553 (1971), and citing L. 1905, c. 172).

To obtain a permit to carry a handgun in public, applicants must meet several criteria. See N.J.S.A. 2C:58-4; N.J.S.A. 2C:58-3c; see also N.J.A.C. 13:54-2.1 to 2.10; Matter of M.U.'s Appl'n for a Handgun Purchase Permit,

475 N.J. Super. 148, 171-72, 178-80 (App. Div. 2023) (detailing statutory scheme and disqualifications). This Court summarized some of them in Wade:

> An applicant must not be subject to any of the disabilities set forth in N.J.S.A. 2C:58-3(c), which consider the applicant's age, mental and physical health, criminal history, and potential danger to public safety. N.J.S.A. 2C:58-4(c); see also N.J.S.A. 2C:58-3(c). The applicant must also demonstrate familiarity with the safe handling and use of handguns, evidenced by certified completion of a training course, submission of scores, or passage of a test. N.J.S.A. 2C:58-4(c); see also N.J.A.C. 13:54-2.4(b) and (c). [476 N.J. Super. at 504 (internal markings omitted; emphasis added).]

"Age" here means that the applicant has to be at least 21 years old. N.J.S.A. 2C:58-6.1; see also N.J.S.A. 2C:58-3c(4).

Other requirements include the applicant demonstrating that he or she: has no juvenile adjudications for certain weapons offenses; is not the subject of a domestic violence restraining order; has not violated certain types of court orders; has not been committed due to mental health issues; is not a fugitive or the subject of an open warrant; and has complied with liability insurance requirements. See N.J.S.A. 2C:58-3c(7), (6), (10-15); N.J.S.A. 2C:58-4d(4); N.J.S.A. 2C:58-4.3.

Before Bruen, an applicant also had to establish "a justifiable need to carry a handgun" based on an "urgent necessity for self-protection." N.J.S.A. 2C:58-4c (repealed version). Bruen's holding that New Yorks's subjective "good cause" requirement was unconstitutional rendered New Jersey's similar

"justifiable need" provision invalid, but the balance of New Jersey's scheme survived. See Wade, 476 N.J. Super. at 509 (noting our "gun-permit statutes were not dependent on the justifiable need provision"); M.U., 475 N.J. Super. at 192 n.11 ("Bruen emphasized that its holding did not effectuate a wholesale invalidation of the various states' gun licensing and permit systems.").

In fact, Bruen itself is clear that States remain free to continue to impose and enforce "reasonable, well-defined restrictions" on the carrying of handguns in public. 597 U.S. at 70; see also id. at 72-73 (Alito, J., concurring) ("Our holding decides nothing about who may lawfully possess a firearm or the requirements that must be met to buy a gun…"); id. at 79-80 (Kavanaugh, J., concurring) ("[T]he Court's decision does not prohibit States from imposing licensing requirements for carrying a handgun for self-defense…so long as those States employ objective licensing requirements like those used by the 43" States whose schemes remained valid after Bruen) (emphasis added). Indeed, one of these—age—was specifically cited by a concurring Justice to stress the point that Bruen's holding "does not expand the categories of people who may lawfully possess a gun….") id. at 72-73 (Alito, J., concurring) (citing federal age limitations) (emphasis added).

The Court in Bruen announced a test to determine whether State regulations on firearms comport with the Second and Fourteenth Amendments.

The first step requires a court reviewing a firearm regulation to first consider whether the Second Amendment's plain text "covers an individual's conduct[.]" 597 U.S. at 24. This step has "two components." NRA v. Bondi, 61 F.4th 1317, 1324, op. vacated and en banc granted, 72 F.4th 1346 (11th Cir. 2023). The first is whether the individual is among "'the people' whom the Second Amendment protects." Ibid. (quoting Bruen, 597 U.S. at 31-32). The second is "'whether the plain text of the Second Amendment protects' that individual's 'proposed course of conduct[.]'" Ibid. (quoting Bruen, 597 U.S. at 32).

If the answer to both questions is "yes," then the burden shifts to the State in the second step. Ibid. "To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, [it] must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." Bruen, 597 U.S. at 17. But the State need not identify a "historical twin" for its regulation to survive; a historical "analogue" will suffice. Id. at 30; see ibid. ("[E]ven if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster.").

Recently, in United States v. Rahimi, 219 L. Ed. 2d 351, 363 (2024), the Court took issue with how some lower courts were applying Bruen's

methodology. Bruen and the Second Amendment cases preceding it—namely Heller and McDonald—the Court explained, "were not meant to suggest a law trapped in amber." Rahimi, 219 L. Ed. 2d at 363. Indeed, "the Second Amendment permits more than just those regulations identical to ones that could be found in 1791." Ibid. "To be consistent with historical limits, a challenged regulation need not be an updated model of a historical counterpart…. 'Analogical reasoning' under Bruen demands a wider lens: Historical regulations reveal a principle, not a mold." Id. at 395 (Barrett, J., concurring) (emphasis added).

The appropriate analysis therefore focuses on "whether the challenged regulation is consistent with the principles that underpin our regulatory tradition." Id. at 363. To this end, courts "must ascertain whether the new law is 'relevantly similar' to laws that our tradition is understood to permit, 'apply[ing] faithfully the balance struck by the founding generation to modern circumstances.'" Ibid. (quoting Bruen, 529 U.S. at 29, n. 7) (emphasis added).

"Why and how the regulation burdens the right are central to this inquiry." Ibid. (emphasis added). As an example, the Court noted that if a law regulated firearm use to address a particular problem, "that will be a strong indicator that contemporary laws imposing similar restrictions for similar reasons fall within a permissible category of regulations." Id. at 363-64

(internal citation omitted). "And when a challenged regulation does not precisely match its historical precursors, 'it still may be analogous enough to pass constitutional muster.' The law must comport with the principles underlying the Second Amendment, but it need not be a 'dead ringer' or a 'historical twin.'" Id. at 364 (quoting Bruen, 597 U.S. at 30).

The defendant in Rahimi was charged with violating 18 U.S.C. §922(g)(8), a federal statute which "prohibits an individual subject to a domestic violence restraining order from possessing a firearm if that order includes a finding that he 'represents a credible threat to the physical safety of [an] intimate partner,' or a child of the partner or individual." 219 L. Ed. 2d at 360. Such an order was issued against Rahimi by a state court following a hearing, and the question was whether the Second Amendment permits enforcement of the federal statute. Ibid.

The Court held that it does. Id. at 362. Since our Nation's founding, our laws have permitted disarming those "who pose a credible threat to the physical safety of others." Id. at 364. After surveying the legal landscape "[f]rom the earliest days of the common law," the Court found that our legal history, particularly the "surety and going armed laws" that were prevalent at and around the time of the Founding, "confirm[s] what common sense suggests: When an individual poses a clear threat of physical violence to

another, the threatening individual may be disarmed." Id. at 367. And while the federal statute at issue "is by no means identical to these founding era regimes, [] it does not need to be." Ibid. (citing Bruen, 597 U.S. at 30). It is "relevantly similar…in both why and how it burdens the Second Amendment right." Ibid. "Section 922(g)(8) restricts gun use to mitigate demonstrated threats of physical violence, just as the surety and going armed laws do." Ibid. Put differently, "[a]lthough §922(g)(8) is by no means identical to the surety or going armed laws, it restricts gun use to mitigate demonstrated threats of physical violence, just as the surety and going armed laws did. That shared principle is sufficient." Id. at 371 (Sotomayor, J., concurring) (internal citations and markings omitted).

So, to summarize: To bring a Second Amendment challenge to New Jersey's firearm statutes, defendant must show first that they have standing to bring such a challenge. Then they must show that they are within the class of persons protected by the plain language of the Second Amendment. And then, only if they satisfy both of those prerequisites, then their challenge still fails if the State can point to a relevantly similar principle that is consistent with our Nation's historical regulation of firearms. As will now be explained, defendants' challenge fails because they have not carried their burden as to the first two steps, and the State has sufficiently carried its burden as to the third.

B. Defendants lacked standing.

Defendants' constitutional challenge presents a threshold inquiry: Do they even have standing to bring such a challenge in the first place? The answer is no, they don't. It is undisputed that none of these defendants ever applied for a permit to carry a handgun, a fact fatal to their constitutional challenge to New Jersey's firearm statutes.

This Court in Wade addressed the standing issue in circumstances almost identical to those here. There, defendants Wade and Stringer challenged their charges under the UPW statute on the ground that Bruen had invalidated New Jersey's justifiable-need requirement in then-N.J.S.A. 2C:58-4c. Wade, 476 N.J. Super. at 495. But, at the outset, this Court found the defendants lacked standing to bring their challenge "because neither defendant had applied for a permit to carry a handgun." Ibid.

"Wade's counsel submitted a certification representing that Wade had no other disqualifying factors and that he would have qualified to receive a permit but for the justifiable need requirement[, and] Stringer and his counsel did not submit a certification concerning Stringer's qualifications for a permit" at all. Id. at 506. As such, neither defendant "established the factual basis for challenging New Jersey's gun-permit statutes. Stringer has provided no factual basis whatsoever. The certification submitted by Wade's counsel is not based

on counsel's personal knowledge; rather, it is based on information received from his client and, therefore, is insufficient to establish facts in dispute." Id. at 506 (citing, among other things, R. 1:6-6). Since "[n]othing in the record establishes that Wade [or Stringer] would have been able to comply with [all of the other statutory] requirements….the record does not reflect that it would have been futile for Wade to have applied for a permit even in the absence of a justifiable need provision." Id. at 506-07.

Defendants' claims fail for the same reason: the record here lacks any proof, and certainly not a "substantial showing[,]" Wade, 476 N.J. Super. at 506; Bruck, 586 F. Supp. 3d at 308, that had any defendant applied for a permit, he would have satisfied every other statutory requirement.

On this score, the menial (and largely irrelevant) certification submitted by defendant Phillips's counsel with his motion to dismiss, (Pa67-68), falls woefully short. The same is true of Pinkett's, which seems to be a copy of the one submitted for Phillips (even the caption is the same). (Pa54-55). Those documents, besides being hearsay, Wade, 476 N.J. Super. at 506, say nothing at all about any of the other requirements governing handgun permits, let alone all of them. And Preston, like Stringer, never submitted anything at all. Given the unmistakable parallels here between these cases and Wade, the motion judge had an "obligation to follow" that decision. State v. Farmer, 48 N.J.

145, 183 (1966); see also State v. Reece, 222 N.J. 154, 166, 171 (2015) (reaching same conclusion as prior decision when "[t]he facts presented here are strikingly similar to those present in [precedent]"); Macchi v. Conn. Gen. Ins. Co., 354 N.J. Super. 64, 71-72 (App. Div.) (holding "the motion judge erred" by deviating from appellate precedent as the facts were "indistinguishable"), certif. denied, 175 N.J. 79 (2002).

Defendants' claims—and the judge's finding—of futility seems to have been based on the defendants ages alone. But the only "quintessential showing of futility" here is these defendants' efforts to compile the necessary record to sustain their burden to establish standing. (Pa13). Not one of the defendants here has produced a single piece of evidence that would constitute "a substantial showing" that, age aside, each would have no doubt received a carry permit. They have thus failed to "establish[] the factual basis for challenging New Jersey's gun-permit statutes." Wade, 476 N.J. Super. at 506. "Nothing in the record establishes that [defendants here] would have been able to comply with those [other statutory] requirements"—like mental and physical health requirements, no criminal history, a familiarity with the safe handling and use of handguns, or compliance with the liability insurance requirement, just to name a few—and so "the record does not reflect that it

would have been futile for them to have applied for a permit even in the absence of the [21-or-over] provision." Id. at 506-07.

Moreover, allowing criminal defendants like these to challenge aspects of the civil scheme as invalid after flouting its requirements outright is inconsistent with Bruen's promise that States can maintain a permitting process with "narrow, objective, and definite standards" like age restrictions. 597 U.S. at 38 n. 9. To ignore the scheme and carry an unlicensed and thus unknown and untraceable firearm, and only bring a challenge later once arrested, would be to in effect abolish the scheme altogether and leave it to individual defendants and trial courts to sort out later who should and should not have been able to carry a handgun. "[I]n the fair administration of justice no man can be judge in his own case." Walker v. City of Birmingham, 388 U.S. 307, 320-21 (1967). The effects would be disastrous and, in many instances, fatal.

At bottom, defendants were free to bring their constitutional challenge just as the challengers in Bruen did—by applying for a carry permit and, if denied on the sole basis of age, raising the issue on appeal. 597 U.S. at 15-16. They failed to do so, and instead took the law into their own hands and carried loaded handguns with extended magazines on the streets of Essex County. As a result, each lacked standing to raise the challenge sustained by the trial court.

C. Defendants are not part of "the people" envisioned by the Second Amendment, and a minimum age limit on the public carry of handguns is a reasonable, well-defined objective criterion that is consistent with this Nation's historical tradition of firearm regulation.

The Second Amendment protects "the right of the people to keep and bear Arms…." U.S. Const. Amend. 2. Yet, "[d]espite its unqualified text, the Second Amendment is not absolute." Rahimi, 219 L. Ed. 2d at 393 (Barrett, J., concurring). It has never been "unlimited[,]" Heller, 554 U.S. at 626, nor has it ever been "thought to sweep indiscriminately[,]" Rahimi, 219 L. Ed. 2d at 363. As such, the right to keep and bear Arms is "subject to certain reasonable, well-defined restrictions[,]" Bruen, 597 U.S. at 70, such as "objective licensing requirement[s,]" id. at 80 (Kavanaugh, J., concurring). Once such reasonable, well-defined, and objective licensing requirement is that persons reach a certain age before they can publicly carry a handgun.

As discussed above, Bruen imposes a two-step test. The first step requires a court reviewing a firearm regulation to first consider whether the Second Amendment's plain text "covers an individual's conduct[.]" Bruen, 597 U.S. at 24. This step has "two components." Bondi, 61 F.4th at 1324. The first is whether the individual is among "'the people' whom the Second Amendment protects." Ibid. (quoting Bruen, 597 U.S. at 31-32). The second is "'whether the plain text of the Second Amendment protects' that individual's 'proposed course of conduct[.]'" Ibid. (quoting Bruen, 597 U.S.

at 32). If the answer to both questions is "yes," then the burden shifts to the State in the second step "to demonstrate that its regulation 'is consistent with the Nation's historical tradition of firearm regulation.'" Ibid. (quoting Bruen, 597 U.S. at 24).

Here, the answer to the first question is "no," persons under 21 are not among "the people" who are covered by the Second Amendment. And even if they were, a reasonable, objective minimum age requirement is consistent with America's historical tradition of firearm regulation. Defendants' constitutional challenge to New Jersey's scheme therefore fails under both steps of Bruen.

i. Persons under 21 are not among "the people" whom the Second Amendment protects.

It is no doubt true that the "plain text" of the Second Amendment protects the proposed course of conduct here: carrying a handgun in public. Bruen, 597 U.S. at 32; Bondi, 61 F.4th at 1324. But the question of whether 18-to-20-year-olds like the defendants here are part of "the people" envisioned by the Second Amendment is not as simple. Courts after Bruen[3] should not

[3] There was no dispute that the challengers in Bruen, "law-abiding, adult citizens[,]" were part of the "the people" protected by the Second Amendment. 597 U.S. at 15; see Md. Shall Issue, Inc. v. Moore, 86 F.4th 1038, 1042-43 (4th Cir. 2023) (noting there was "little room for debate" on this question where the plaintiff-challengers were "adult citizens who are legally eligible to own firearms.") (citing Bruen, 597 U.S. at 31-32 (emphasis added), rev. granted, No. 21-2017 (4th Cir. 2024) (en banc).

just "simply assume that a regulated person is part of 'the people.'" United States v. Sitladeen, 64 F.4th 978, 987 (8th Cir. 2023) (citing Bruen, 597 U.S. at 24).

The historical evidence strongly suggests that 18-to-20-year-olds were not part of the "the people" envisioned by the Second Amendment. In his thorough dissenting opinion in Lara v. Comm'r, Pa. State Police, Judge Restrepo of the Third Circuit Court of Appeals catalogued the historical evidence that "[a]t the Founding, people under 21 lacked full legal personhood[,]" and so those youth are not among "the people" protected by the Second Amendment's text. 91 F.4th 122, 142 (3d Cir. 2024) (Restrepo, J., dissenting). Indeed, even the majority conceded that, "from before the founding and through Reconstruction, those under the age of 21 were considered minors." Id. at 131. In language well worth repeating, Judge Restrepo explained:

> [T]here is no disagreement that at the time of the Founding, people under 21 were considered "infants" in the eyes of the law. Nor is there serious debate that the conception of adulthood beginning at age 18 is relatively new to American law.[4] But to understand the significance of the historical-legal conception of infant status, one must understand its predicate presumption of incapacity.

[4] See Mitchell v. Atkins, 483 F. Supp. 3d 985, 992 (W.D. Wash. 2020) ("It was not until the 1970s that states lowered the age of majority to 18.") (citations omitted), vacated without opp. in light of Bruen, No. 20-35827 (9th Cir. 2022).

> The Founding-era generation inherited the common-law presumption that persons who lacked rationality or moral responsibility could not exercise a full suite of rights. This idea has its roots in the Enlightenment conception of rights as being endowed only to those "with discernment to know good from evil, and with power of choosing those measures which appear…to be more desirable." In other words, those whom society considered to be rational.
>
> Both at English common law and in eighteenth-century American law, infants were universally believed to lack such rationality. Infants were viewed as requiring the protection of a guardian in the management of their affairs. James Kent, a respected contemporary scholar of American constitutional law, said "[t]he necessity of guardians results from the inability of infants to take care of themselves; and this inability continues, in contemplation of law, until the infant has attained the age of twenty-one years." Moreover, Blackstone referred to infancy as "a defect of the understanding."
>
> A consequence of this legal presumption was that at the Founding, infants had few independent rights. Blackstone explains that, because of infants' inherent incapacity, parents had the power to limit their children's rights of association, to control their estates during infancy, and to profit from their labor. Infants could not marry without their father's consent. Fathers had a right to the profits of their infants' labor. Even the right to contract, which the Framers thought to enshrine in the body of the Constitution, was greatly abridged for infants. Blackstone went so far as to say that it was "generally true, that an infant could do no legal act." It was not until the infant reached the age of 21 that "they [were] then enfranchised by arriving at the years of discretion…when the empire of the father, or other guardian, gives place to the empire of reason." [Lara, 91 F.4th at 142-43 (cleaned up).]

Because Heller did not create a new right but codified an existing one, "common-law principles are crucial to answering whether the right in question extends to people under the age of 21." Id. at 144. Besides those related to

infants, discussed above, Second Amendment rights were also linked with property rights, which included laws that required "dependents [like infants] be armed by their guardians." Ibid. Even going to college did not free such young individuals, as "representatives of the college stood *in loco parentis*…which allowed them to exercise full legal power over the infants as though they were in fact the youths' parents." Ibid. And at the Founding these colleges "could and did prohibit possession of firearms by students" both on- and sometimes even off-campus. Ibid.

Judge Restrepo summarized his findings on this point like this:

> The totality of this evidence demonstrates that the public during the Founding-era understood the plain text of the Second Amendment did not cover individuals under the age of 21. At the Founding, those under 21 were considered infants, a status that was a result of the presumption that people under the age of 21 lacked sufficient cognitive and moral faculties to govern themselves. The consequences of this presumption were profound: infants had very little independent ability to exercise fundamental rights, including those of contract and property. Indeed, except in a few narrow circumstances, infants could not seek redress in the courts except through their parents. Moreover, in one historical context, history suggests that any right that an infant may have had to bear arms could be abrogated in its entirety at the pleasure of the infant's parent or an authority standing in loco parentis. In light of such evidence, the conclusion that infants during the Founding-era were not meant to be protected under the Second Amendment seems clear. [Id. at 145.]

And, ironically, the very people "from whom [the constitutional challengers] may have begged relief would not have permitted them to [even] bring their

claim" to court in the first place. Id. at 146.

It is worth noting that while Judge Restrepo wrote for himself on the panel that decided Lara, that case went on to sharply divide the en banc court by a vote of 7 to 6, with the dissenters passionately "urg[ing] the Supreme Court" "to correct our own error[.]" Lara v. Comm'r, Pa. State Police, 97 F.4th 156, 166 (3d Cir.) (en banc) (Krause, J., dissenting), pet. for cert. pending sub nom., Paris, Comm'r, Pa. State Police v. Lara, No. 24-93 (2024).

In her dissent on behalf of six jurists, Judge Krause joined Judge Restrepo's conclusion that the historical evidence establishes that, at the Founding, 18-to-20-year-olds "lacked full legal personhood and so, at the first step of the Bruen test, those youth are not among 'the people' protected by the Second Amendment." Id. at 161 (citation and marks omitted). After collecting additional pre- and post-Ratification sources, she added that even "'the most famous' voice on the Second Amendment at the time, explained that states 'may prohibit the sale of arms to minors[.]'" Ibid. (quoting Heller, 554 U.S. at 616, and Thomas M. Cooley, Treatise on Constitutional Limitations 740 n.4 (5th ed. 1883)). And so, "[b]y broadly criminalizing any attempt to convey a firearm to those under the age of 21, these statutes effectively prevented young citizens not just from carrying publicly in times of emergency [the statute at issue in Lara], but from possessing firearms at all."

Ibid. (emphasis added).

Judge Krause also explained that it is "now well established that…'founding-era legislatures categorically disarmed groups whom they judged to be a threat to the public safety.'" Id. at 163 (quoting Kanter v. Barr, 919 F.3d 437, 458 (7th Cir. 2019) (Barrett, J., dissenting)).[5] Persons 18 to 20 fell—and so fall—within such a group. See ibid. (and sources cited therein). Thus, it was within a Founding-era's legislative judgment to determine whether certain "groups posed sufficient risk to justify categorial disarmament." Ibid.; accord Blocher & Carberry, Historical Gun Laws Targeting "Dangerous" Groups and Outsiders 12, in New Histories of Gun Rights and Regulation: Essays on the Place of Guns in American Law and Society (Blocher, Charles, & Miller, eds., 2023) ("One can accept that the Framers denied firearms to groups they thought to be particularly dangerous (or unvirtuous, or irresponsible) without sharing their conclusion about which groups qualify as such.").

Judge Krause then explained why Pennsylvania reasonably exercised

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[5] Rahimi now confirms this. There, the Court held that when persons are deemed to "pose[] a credible threat to the physical safety of an intimate partner," such individuals "may—consistent with the Second Amendment—be banned from possessing firearms while the order is in effect. Since the founding, our Nation's firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms." 219 L. Ed. 2d at 362.

such judgment when it enacted its current objective, well-defined ban, in language equally compelling to New Jersey's scheme at issue here:

> Modern crime statistics, of which we can take judicial notice, confirm that youth under 21 commit violent gun crimes at a far disproportionate rate. In 2019, for example, although 18-to 20-year-olds made up less than 4% of the U.S. population, they accounted for more than 15% of all homicide and manslaughter arrests. National data collected by the Federal Bureau of Investigation (FBI) also confirms that homicide rates peak between the ages of 18 and 20. Indeed, that age group commits gun homicides at a rate three times higher than adults aged 21 or older. And additional studies show that at least one in eight victims of mass shootings from 1992 to 2018 were killed by an 18 to 20-year-old….[6]
>
> While the scarcity and limited lethality of their weapons gave our Founding generation little reason to fear the danger of youth gun violence, today's legislatures have good reason to do so. And because that group is especially prone to impulsive, violent behavior, Pennsylvania's legislature reasonably decided that allowing them to carry firearms in public during statewide emergencies, when emotions already run high and violence may be

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[6] Defendants may argue that such modern societal concerns are irrelevant when analyzing statutes under the Second Amendment post-Bruen. But Bruen itself teaches that "[t]he Second Amendment was 'intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs,' not to force on modern-day legislatures the fiction that we live in 1791 or to preclude reasonable responses to problems of gun violence that were unfathomable when the Bill of Rights was ratified." Lara, 97 F.4th at 166 (Krause, J., dissenting) (quoting Bruen, 597 U.S. at 28); see also id. at 161 n. 13 ("Although Bruen eschewed a free-standing 'means-end scrutiny' or 'interest-balancing inquiry' for modern-day regulations, it embraced a comparative means-end analysis by directing us to look to 'how' (the means) and 'why' (the end) historical 'regulations burden a law-abiding citizen's right to armed self-defense' and then to consider whether the 'modern…regulation[] impose[s] a comparable burden…[that] is comparably justified….'") (quoting Bruen, 597 U.S. at 22-23, 29).

> widespread, would pose a particular danger to public safety. That judgment reflects precisely the type of determination that led our Founders to categorically disarm other groups they deemed to be dangerous and puts Pennsylvania's statute comfortably within the Nation's historical tradition even at the "First Founding." [97 F.4th at 163-64 (cleaned up).]

Other courts have agreed with the six dissenting judges in Lara. For example, in Bondi, a panel of the Eleventh Circuit Court of Appeals observed that "the historical record reveals that 18-to-20-year-olds did not enjoy the full range of civil and political rights that adults did[.]" See 61 F.4th at 1324. The court rejected a challenge to a Florida law precluding those younger than 21 from purchasing firearms, "distill[ing] two key points" from the historical record:

> First, several states burdened 18-to-20-year-olds' rights to keep and bear arms—both before and after the Fourteenth Amendment's ratification—by making it unlawful even to give or lend handguns and other deadly weapons to minors. In total, at least nineteen states and the District of Columbia banned the sale and even the giving or loaning of handguns and other deadly weapons to 18-to-20-year-olds by the close of the nineteenth century. Second, those states did so to enhance public safety. [Id. at 1330-31.]

Similarly, in NRA v. Bureau of ATF&E, 700 F.3d 185, 199-204 (5th Cir. 2012), rev. denied, 714 F.3d 334 (5th Cir. 2013) (en banc), cert. denied, 571 U.S. 1196 (2014), the Fifth Circuit reached the same conclusion after making similar findings based on the historical record.

> [A]t the time of the founding, the right to arms was inextricably and multifariously linked to that of civic virtu (i.e., the virtuous

> citizenry), and that one implication of this emphasis on the virtuous citizen is that the right to arms does not preclude laws disarming the unvirtuous citizens (i.e., criminals) or those who, like children or the mentally imbalanced, are deemed incapable of virtue. This theory suggests that the Founders would have supported limiting or banning the ownership of firearms by minors, felons, and the mentally impaired. See also United States v. Emerson, 270 F.3d 203, 261 (5th Cir. 2001) (inferring from scholarly sources that "it is clear that felons, infants and those of unsound mind may be prohibited from possessing firearms."). [Id. at 201 (cleaned up) (first emphasis added).]

The Fifth Circuit went on to observe that, based on that record, "[i]f a representative citizen of the founding era conceived of a 'minor' as an individual who was unworthy of the Second Amendment guarantee, and conceived of 18-to-20-year-olds as 'minors,' then it stands to reason that the citizen would have supported restricting an 18-to-20-year-old's right to keep and bear arms." Id. at 202.

And, in Reese v. Bureau of ATF&E, 647 F. Supp. 3d 508, 524 (W.D. La. 2022), app. docketed, No. 23-30033 (5th Cir.), a District Court in that circuit accepted the NRA panel's pre-Bruen analysis of the historical record as satisfying Bruen's second step, concluding that "the Founders likely would not have been of the opinion that minors enjoy the full scope of rights encompassed in the Second Amendment." See also United States v. Rene E., 583 F.3d 8, 14-15 (1st Cir. 2009) (collecting historical sources to show that long before Congress began regulating firearms in the 1930's, "the states were

engaged in regulating firearms, including their transfer to, and possession by, juveniles[,]…reflect[ing] concerns that juveniles lacked the judgment necessary to safely possess deadly weapons, and that juvenile access to such weapons would increase crime."); accord State v. Callicutt, 69 Tenn. 714, 716-17 (1878) ("[W]e do not deem it necessary to do more than say that we regard the acts to prevent the sale, gift, or loan of a pistol or other like dangerous weapon to a minor, not only constitutional as tending to prevent crime, but wise and salutary in all its provisions."); Coleman v. State, 32 Ala. 581, 582-83 (1858) (analyzing an 1856 law making it a misdemeanor to "sell, or give, or lend" minors pistols).

In sum, the historical evidence collected by these courts leads to the conclusion that 18-to-20-year-olds like the defendants here are not part of "the people" envisioned by the Second Amendment. Thus, under the first component of Bruen's first step, their constitutional challenge fails.

ii. Prohibiting those under 21 from carrying a firearm is consistent with the Nation's historical tradition of restricting access to handguns to those who have reached a suitable age.

Given that the defendants here lack standing, see Point I-B., ante, and are not among "the people" whom the Second Amendment protects, see Point I-C.-i., ante, "the government does not have a burden to identify a founding-era historical analogue to the modern firearm regulation." Lara, 91 F.4th at

147 (Restrepo, J., dissenting) (cleaned up).

But even if the State had that burden here, sufficient historical analogues exist to render New Jersey's scheme prohibiting 18-to-20-year-olds from carrying a handgun consistent with the Second Amendment. As noted above, "the Second Amendment permits more than just those regulations identical to ones that could be found in 1791." Rahimi, 219 L. Ed. 2d at 363. "To be consistent with historical limits, a challenged regulation need not be an updated model of a historical counterpart…. 'Analogical reasoning' under Bruen demands a wider lens: Historical regulations reveal a principle, not a mold." Id. at 395 (Barrett, J., concurring). To this end, courts "must ascertain whether the new law is 'relevantly similar' to laws that our tradition is understood to permit, 'apply[ing] faithfully the balance struck by the founding generation to modern circumstances.'" Id. at 363 (quoting Bruen, 529 U.S. at 29, n. 7) (emphasis added).

Between 1856 and 1897, 20 jurisdictions had laws on the books limiting the gun rights of those under 21. See Megan Walsh & Saul Cornell, Age Restrictions and the Right to Keep and Bear Arms, 1791-1868, 108 Minn. L. Rev. 3049, 3092 (2024) (collecting statutes). Simply put, the "proliferation of guns in the decades after the adoption of the Second Amendment…produced an expansion of regulation to address a range of problems that did not exist in

1791." Id. at 3087. This time period is particularly instructive given that it was in 1868 that the States ratified the Fourteenth Amendment, and "'[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them.'" Bruen, 597 U.S. at 34 (quoting Heller, 554 U. S. at 634-635) (emphasis omitted).

Judge Restrepo's opinion is insightful on this score as well. At common law, since persons under 21 had almost no legal rights of their own, and "[l]egislatures tend not to enact laws to address problems that do not exist[,]" the absence of Founding-era statutes is not necessarily determinative of whether the challenged regulation is "consistent" with American tradition. Lara, 91 F.4th at 147 (Restrepo, J., dissenting). That being said,

> [b]etween 1856 and 1893, at least 17 states passed laws restricting the sale of firearms to people under 21. Some restricted non-sale transfers. Many included provisions expressly putting the gun rights of minors at the discretion of authority figures. These laws demonstrate that, at least as early as the mid-nineteenth century, legislatures believed they could qualify and, in some cases, abrogate the arms privileges of infants. While these laws cannot independently prove the constitutionality of the challenged laws, they certainly seem to be consistent with the challenged statutory scheme here in that they regulate arms privileges of "infants." But again, the 1791 meaning of the Second Amendment controls, and it appears that the challenged statutory scheme is not inconsistent (and thus is consistent) with this Nation's historical tradition. [Ibid.]

Judge Restrepo's dissenting opinion takes on added constitutional significance after Rahimi. As discussed above, that decision announced that

the Second Amendment is not "trapped in amber." 219 L. Ed. 2d at 363. It "permits more than just those regulations identical to ones that could be found in 1791[,]" ibid., or even "updated model[s] of a historical counterpart…. 'Analogical reasoning' under Bruen demands a wider lens: Historical regulations reveal a principle, not a mold[,]" id. at 395 (Barrett, J., concurring). The appropriate analysis therefore focuses on "whether the challenged regulation is consistent with the principles that underpin our regulatory tradition." Id. at 363.

Here, historical regulations reveal the common-sense principle that states may restrict access to handguns to those who have reached a suitable age. "[T]here is no dispute that there is some age threshold before which the protection of the Second Amendment does not apply." Lara, 91 F.4th at 142 (Restrepo, J., dissenting).[7] New Jersey's scheme requiring those who wish to carry a handgun in public reach the age of 21 is consistent with that principle.

In Bondi, the Eleventh Circuit looked at a Florida law that banned selling handguns to those who were not yet 21. 61 F.4th at 1320. Assuming (because Florida didn't argue it) that persons aged 18 to 20 are among "the

[7] On this point the judge below would apparently go even farther. See (Pa30) (stating, without citation, that "there is no serious argument today that those younger than eighteen are protected by the Second Amendment…."). The State could not disagree more with this dictum, but need not attack it further since the issues in this case are limited to those ages 18 to 20.

people" whom the Second Amendment protects, the court went on to conclude that such a restriction "is consistent with this Nation's relevant historical tradition of firearm regulation." Id. at 1324-25. Based upon its considered historical analysis, the court "distill[ed] two key points" from the historical record:

> First, several states burdened 18-to-20-year-olds' rights to keep and bear arms—both before and after the Fourteenth Amendment's ratification—by making it unlawful even to give or lend handguns and other deadly weapons to minors. In total, at least nineteen states and the District of Columbia banned the sale and even the giving or loaning of handguns and other deadly weapons to 18-to-20-year-olds by the close of the nineteenth century. Second, those states did so to enhance public safety. [Id. at 1330-31 (emphases added).]

Thus, while the issue in Bondi was limited to the buying of handguns, the historical record the court compiled shows that around the time the States adopted the Second Amendment by way of incorporation through the Fourteenth Amendment, a great many States were limiting access to handguns by those under 21. See id. at 1331 (noting that the Florida law before it was even less restrictive than "its Reconstruction-Era analogues"). In an appendix, the court cataloged laws from 19 States and the District of Columbia limiting 18-to-20-year-olds' access to handguns. Id. at 1333. And "[b]y the early twentieth century, three more states had restricted the purchase or use of particular firearms by persons under 21. Thus by 1923, over half the states

then in the union had set 21 as the minimum age for purchase or use of particular firearms." Mitchell, 483 F. Supp. 3d at 993 (citing NRA, 700 F.3d at 202).

Judge Krause, on behalf of six members of the Third Circuit, summed up the historical tradition in this way:

> By broadly criminalizing any attempt to convey a firearm to those under the age of 21, these statutes effectively prevented young citizens not just from carrying publicly in times of emergency, but from possessing firearms at all. Thus, as to "how" these prohibitions burdened the right to bear arms, the 18th-century laws were far more onerous than Pennsylvania's, which prohibits such youth only from carrying publicly during statewide emergencies. If the generation that incorporated the Bill of Rights against the states believed that states could constitutionally impose more burdensome gun regulations on this age group, a fortiori it would have viewed Pennsylvania's more limited prohibition as constitutional. [Lara, 97 F.4th at 162 (Krause, J., dissenting) (internal citation omitted; emphases added).]

So, "[a]s our history shows, the states have never been without power to regulate 18-to-20-year-olds' access to firearms…. Indeed, many states, when the Fourteenth Amendment was ratified, banned 18-to-20-year-olds from buying and sometimes even possessing firearms." Bondi, 61 F.4th at 1332 (emphases added).[8] It thus follows, i.e. is consistent with this Nation's historic

[8] To be sure, some courts have disagreed. See, e.g., Worth v. Harrington, 666 F. Supp. 3d 902 (D. Minn. 2023), aff'd sub. nom, Worth v. Jacobson, ___ F.4th ___ (8th Cir. 2024); Fraser v. Bureau of ATF& E, 672 F. Supp. 3d 118, stayed pending app. and app. filed, No. 23-2085 (4th Cir. 2023); Firearms Policy Coalition, Inc. v. McCraw, 623 F. Supp. 3d 740 (N.D. Tex.), app.

tradition of firearms regulations, that States may, as New Jersey does, limit the public carry of handguns to those who reach a suitable age.[9]

Not only does New Jersey's 21-and-over rule comport with historical traditions of "how" firearms are regulated—by limiting handgun possession to those who have reached a certain age—but also "why" they are regulated in that way. See Rahimi, 219 L. Ed. 2d at 363, 367; Lara, 97 F.4th at 161 n. 13

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dismissed, No. 22-10898 (5th Cir. 2022); see also (Pa33) (cataloguing decisions). Ultimately, the United States Supreme Court will have to settle this issue, but for now the responsibility of deciding this important constitutional question rests with this Court.

[9] Besides New Jersey, 31 other states have laws establishing 21 as the minimum age for certain gun rights. See Alaska Stat. §§ 11.61.220(a)(6), 18.65.705; Ariz. Rev. Stat. §§ 13-3102(A)(2), 13-3112(E); Ark. Code § 5-73-309; Cal. Penal Code §§ 26150(a)(2), 26155(a)(2); Colo. Rev. Stat. § 18-12-203(1)(b); Conn. Gen. Stat. §§ 29-28(b), 29-35(a); Del. Code Ann. tit. 11, § 1448(a)(5); Fla. Stat. §§ 790.06(1), (2)(b), 790.053(1); Ga. Code §§ 16-11-125.1(2.1), 16-11-126(g)(1), 16-11-129(b)(2)(A); Haw. Rev. Stat. § 134-9(a)(6); 430 Ill. Comp. Stat. 66/25(1); 720 Ill. Comp. Stat. 5/24-1(a)(10); Ky. Rev. Stat. § 237.110(4)(c); La. Rev. Stat. § 40:1379.3(C)(4); Md. Public Safety Code § 5-133(d); Mass. Gen. Laws ch. 140, § 131(d)(iv); Mich. Comp. Laws § 28.425b(7)(a); Minn. Stat. § 624.714; Neb. Rev. Stat. § 69-2433(1); Nev. Rev. Stat. § 202.3657(3)(a)(1); N.M. Stat. § 29-19-4(A)(3); N.Y. Penal Law § 400.00(1); N.C. Gen. Stat. § 14-415.12(a)(2); Ohio Rev. Code § 2923.125(D)(1)(b); Okla. Stat. tit. 21 § 1272(A)(6); Or. Rev. Stat. § 166.291(1)(b); R.I. Gen. Laws §§ 11-47-11, 11-47-18; Utah Code §§ 76-10-505, 76-10-523(5); Va. Code § 18.2-308.02(A); Wash. Rev. Code § 9.41.070(1)(c); Wis. Stat. § 175.60(3)(a); Wyo. Stat. § 6-8-104(a)(iv), (b)(ii). And all States except Montana impose some restrictions on firearms based on age. See Walsh & Cornell, Age Restrictions, 108 Minn. L. Rev. at 3052 n. 1 (citing, among others, Minimum Age to Purchase & Possess, Giffords L. Ctr., https://giffords.org/lawcenter/gun-laws/policy-areas/who-can-have-a-gun/minimum-age [https://perma.cc/N5Z9-EEKC] (summarizing federal and state laws regulating firearms on the basis of age) (last accessed Jul 31, 2024).

(Krause, J., dissenting) (quoting Bruen, 597 U.S. at 22-23, 29). While interpersonal gun violence was much less of a problem at the Founding and thus warranted little legislative attention, that was so because, as Judge Krause explained,

> the firearms that our Founders possessed simply lacked the capacity of those today to inflict mass casualties in a matter of seconds.[10] By the late 19th century, however, gun violence had emerged as a serious problem in American life. This development was fueled by the mass production of firearms that began during the wave of American industrialization in the mid-19th century, and it was accompanied by renewed efforts to market gun ownership to the average American consumer. It was also driven by the trauma of the Civil War and the enormous increase in the production of guns necessary to supply two opposing armies, which intensified the problem posed by firearms violence and gave a new impetus to regulation.
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> In this changed America, interpersonal gun violence and the collective terrorist violence perpetuated by groups such as the Ku Klux Klan replaced the ancient fears of tyrannical Stuart monarchs and standing armies that preoccupied the Founding generation. Those same concerns about public safety apply to today's America, where increasingly deadly firearms are mass-produced at an unprecedented rate, and have motivated states like Pennsylvania to regulate the ability of still-maturing young people to carry firearms. [Lara, 97 F.4th at 162-63 (Krause, J., dissenting) (cleaned up).]

See also id. at 165-66 (detailing "particularly troubling" statistics of modern-

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[10] In fact, "at the time of the Second Amendment, handguns were owned by a tiny fraction of the population." Walsh & Cornell, Age Restrictions, 108 Minn. L. Rev. at 3088. As such, "there was little need to enact modern-style gun regulations aimed at restricting access to weapons. There were limited gun homicides in urban areas in 1791, and family and household homicides were largely not perpetrated by firearms." Ibid.

day gun violence that present a "new social concern that our Founders had no reason to contemplate.").

That is not to say Reconstruction-era handgun violence by 18-to-20-year-olds did not exist. It did. The Eleventh Circuit in Bondi compiled some Reconstruction-era stories that could have been ripped from today's headlines:

> In Ohio, a 19-year-old son shoots and kills his father to avenge the wrongs of his mother. In Philadelphia, an 18-year-old youth shoots a 14-year-old girl before turning the gun on himself because she would not love him. In New York, a 20-year-old shoots and kills his lover out of jealousy. In Washington, D.C., a 19-year-old shoots and kills his mother, marking another death due to the careless use of firearms. In Texas, a 19-year-old shoots a police officer because of an old feud between the police officer and the 19-year-old's father. [61 F.4th at 1319 (cleaned up).]

And it's only getting worse. "Even though 18-to-20-year-olds now account for less than 4% of the population, they are responsible for more than 15% of homicide and manslaughter arrests."[11] Ibid.

> And in the more than 150 years since Reconstruction began, guns have gotten only deadlier: automatic assault rifles can shoot sixty rounds per minute with enough force to liquefy organs. Tragically, under-21-year-old gunmen continue to intentionally target others—now, with disturbing regularity, in schools. So along with math, English, and science, schoolchildren must become proficient in running, hiding, and fighting armed gunmen in schools. Their lives depend upon it.

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[11] Suicides among this group have also "reached an apex in recent years, and the firearm suicide rate among eighteen-to-twenty-year-olds increased fifty-one percent over the last decade, which is faster than the rates of older adults." Walsh & Cornell, Age Restrictions, 108 Minn. L. Rev. at 3052-53.

> But State governments have never been required to stand idly by and watch the carnage rage. In fact, during the Reconstruction Era—when the people adopted the Fourteenth Amendment, thereby making the Second Amendment applicable to the States—many States responded to gun violence by 18-to-20-year-olds by prohibiting that age group from even possessing deadly weapons like pistols. [Id. at 1319-20 (emphasis added).]

New Jersey's 21-and-over limitation on the public carry of firearms continues this tradition. While now on the books for over a century, (Pa31-32), this reasonable and never-challenged provision has served this State well. As the late Lieutenant Governor Sheila Oliver observed in 2022:

> In New Jersey we understand what it takes to actually stop the vicious cycle of mass shootings and everyday gun violence in New Jersey. We do it by passing common sense gun safety laws that work. We cannot continue repeating the sentiment that there is nothing that can be done to end this scourge of gun violence. There is and we owe it to the next generation to sign common sense gun safety laws that cut the problem off at the source.[12]

At bottom, New Jersey's restricting those under the age of 21 from publicly carrying a handgun is a reasonable, objective limitation that is "[i]n conformity with founding-era thinking, and in conformity with the views of various 19th-century legislators and courts," since both found such individuals "tend to be relatively immature and that denying them easy access to handguns would deter violent crime." Reese, 647 F. Supp. 3d at 523 (quoting NRA, 700

[12] "Governor Murphy Signs Sweeping Gun Safety Package 3.0 to Continue the Fight Against Gun Violence" (Jul. 5, 2022), available at: https://nj.gov/governor/news/news/562022/approved/20220705a.shtml (last accessed Jul. 29, 2024).

F.3d at 203-04). It also conforms to common sense and good government, the most basic function of which is to protect its citizenry, especially its most vulnerable, from attack both without and within. See United States v. U.S. Dist. Court, 407 U.S. 297, 312 (1972) ("'[T]he most basic function of any government is to provide for the security of the individual and of his property.' And unless Government safeguards its own capacity to function and to preserve the security of its people, society itself could become so disordered that all rights and liberties would be endangered.") (citation omitted); Kanter, 919 F.3d at 451 (Barrett, J., dissenting) ("History is consistent with common sense: it demonstrates that legislatures have the power to prohibit dangerous people from possessing guns").

New Jersey's age limit is just that—sensible, reasonable, and constitutional. It's not some "judge-empowering interest-balancing inquiry" like the one rejected in Bruen and predecessor cases. 597 U.S. at 22. It is an "objective licensing requirement" with strong, historical moorings. Id. at 80 (Kavanaugh, J., concurring). And, to the extent "reasonable people might differ" about the historical record, Buckner, 223 N.J. at 15, the above discussion demonstrates sufficient historical support for New Jersey's reasonable age limit on the public carry of handguns. As such, the constitutional challenge fails, and the statutes must stand.

Conclusion

In sum, defendants lacked standing to bring their constitutional challenge, and so their motions should have been dismissed on that basis. But even if they did have standing, defendants are not among "the people" whom the Second Amendment protects, and, even if they were, sufficient historical analogues exist to render New Jersey's scheme prohibiting 18-to-20-year-olds from carrying a handgun consistent with this Nation's historical tradition of firearm regulation, and thus the Second Amendment.

Accordingly, this Court should reverse the orders under review and remand this case for trial.

Respectfully submitted,

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

STATE OF NEW JERSEY, Plaintiff-Appellant, v. KYREED PINKETT & DEJOHN PRESTON, Defendant-Respondents.	:	CRIMINAL ACTION DOCKET NO. A-3121-23T2 Ind. No. 22-10-2698-I
STATE OF NEW JERSEY, Plaintiff-Appellant, v. JERRON PHILLIPS, Defendant-Respondent.	:	DOCKET NO. A-3122-23T2 Ind. No. 22-03-534-I
	:	On Leave to Appeal from Orders of the Superior Court of New Jersey, Law Division, Essex County. Sat Below: Hon. Christopher S. Romanyshyn, J.S.C.

BRIEF AND APPENDIX ON BEHALF OF KYREED PINKETT AND JERRON PHILLIPS

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DEFENDANTS ARE NOT CONFINED

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PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

Respondents rely on the State's procedural history and statement of facts. (Pb3-5)[2]

LEGAL ARGUMENT

POINT I

THIS COURT SHOULD AFFIRM THE DISMISSAL OF THE COUNTS OF THE INDICTMENTS CHARGING DEFENDANTS WITH UNLAWFUL POSSESSION OF A FIREARM BECAUSE DEFENDANTS HAD STANDING TO CHALLENGE NEW JERSEY'S PROHIBITION ON THE PUBLIC CARRY OF HANDGUNS BY PERSONS YOUNGER THAN TWENTY-ONE YEARS AND THIS AGE RESTRICTION VIOLATES THE SECOND AMENDMENT.

The Second Amendment of the United States Constitution states, "A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const.

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[1] Because Respondents rely on Appellant's recitation of the Procedural History and Statement of Facts, Respondents have combined these into one section as did Appellant.

[2] The following abbreviations will be used:
Da – Defendant-Respondent's Appendix
Pb – State's Brief
Pa – State's Appendix
1T – April 1, 2024 (oral argument)
2T – April 29, 2024 (oral argument)

amend. II. The United States Supreme Court has held that this amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation[,]" District of Columbia v. Heller, 554 U.S. 570, 592 (2008), and protects citizens from infringements on this right by either the federal or state governments. McDonald v. City of Chicago, 561 U.S. 742, 750 (2010). In N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 10 (2022), the Supreme Court clarified that, "consistent with Heller and McDonald, . . . the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home."

In Bruen, the Court specifically struck down New York's "proper cause" requirement for obtaining a carry permit because it "prevent[ed] law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms." Id. at 71. The Court also articulated a test for evaluating firearms restrictions against the Second Amendment: "When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." Id. at 24. This test has been described as a twostep inquiry, where step one is assessing the conduct against the plain text of the Second Amendment, and step two is assessing the challenged regulation

against proposed historical analogues. See Lara v. Comm'r Pennsylvania State Police, 91 F.4th 122, 129 (3d Cir.), reh'g en banc denied, 97 F.4th 156 (3d Cir.), petition filed, No. 24-93 (U.S. July 25, 2024).

In this case, Pinkett and Phillips were both prosecuted for possessing a handgun in public without a permit—Pinkett was in a vehicle on a public road, and Phillips was walking on a public sidewalk. (Pa40; Pa58) N.J.S.A. 2C:39-5(b)(1) criminalizes possessing a handgun without a carry permit, but Pinkett and Phillips were legally barred from obtaining a carry permit because they were under twenty-one years old (the "age restriction"). N.J.S.A. 2C:58-3 (c)(4). Because the State has failed to meet its burden to demonstrate that prohibiting eighteen- to twenty-year-olds from publicly carrying handguns for self-defense is consistent with the Nation's historical tradition of firearm regulation, New Jersey's age restriction violates the Second Amendment. (Point I.A) Pinkett and Phillips have suffered an injury from the age restriction because it directly led to the criminal prosecution in this case when they exercised their Second Amendment right to bear arms in public for self-defense. They have also established that applying for a carry permit would have been futile because any application would have inevitably been denied in light of their ages. Thus, Pinkett and Phillips have standing to challenge the age requirement. (Point I.B) Because Pinkett and Phillips were prosecuted for

exercising a constitutional right in violation of an unconstitutional permitting regime that made it impossible for them to obtain a permit, this Court should affirm the dismissal of the counts of the indictments charging them with N.J.S.A. 2C:39-5(b)(1). In the alterative, this Court should remand for a hearing to determine whether Pinkett and Phillis were otherwise eligible for a handgun carry permit under N.J.S.A. 2C:58-3 and 2C:58-4. (Point I.C)

A. The Motion Court Correctly Held That The Confluence Of New Jersey's Laws Prohibiting The Carrying Of A Handgun Without A Permit And Prohibiting Eighteen-To-Twenty-Year-Olds From Obtaining Carry Permits Violates The Second Amendment.

The statutes at issue in this case criminalize possessing a handgun without a carry permit while barring persons under twenty-one years old from obtaining a carry permit. All post-Bruen courts that have considered similar regulations in other states have held that these regulations violate the Second Amendment. (Point I.A.1) At Bruen step one, eighteen-to-twenty-year-olds are clearly included among "the people" protected by the Second Amendment, and the conduct for which they are prosecuted—public possession of a handgun—is covered by the plain text of the Second Amendment. (Point I.A.2) The burden thus shifts to the State to demonstrate that its categorical ban on public carry by eighteen- to twenty-year olds is consistent with the Nation's historical tradition of firearm regulation—specifically looking to founding era regulations. Because the State failed to identify any analogous founding era

regulations—and because no courts to consider the issue has been able to identify any analogous regulations either—the State has failed to carry its burden. (Point I.A.3) Thus, New Jersey's carry permit requirement coupled with its prohibition on issuing carry permits to eighteen- to twenty-year-olds violates the Second Amendment.

1. The confluence of New Jersey's permit requirement to publicly carry a handgun and the prohibition on issuing carry permits to persons under twenty-one years of age operates to categorically bar eighteen-to-twenty-year-olds from publicly carrying a handgun for self-defense.

The regulation in this case that the Court must analyze under the Bruen test is New Jersey's prohibition on carrying a handgun without a permit combined with its categorical prohibition on issuing handgun carry permits to eighteen-, nineteen-, and twenty-year-olds.

First, N.J.S.A. 2C:39-5(b)(1) requires that "[i]ndividuals who wish to carry a handgun in public for self-defense must first obtain a license." Drake v. Filko, 724 F.3d 426, 428 (3d Cir. 2013). There are a handful of employment-based exemptions not applicable here that apply to, inter alia, government employees in law enforcement or the military. In re Wheeler, 433 N.J. Super. 560, 577 (App. Div. 2013) (citing N.J.S.A. 2C:39-6(a), (c)). A person without a carry permit may transport the handgun only between his home and place of

business, a handgun repair shop, or a firing range, N.J.S.A. 2C:39-6(e), (f), and must transport it locked and unloaded, N.J.S.A 2C:39-6(g). This requirement "infringes on the . . . right to armed self-defense in public because the law requires [handgun owners] . . . to render their handguns inoperable when traveling." Koons v. Platkin, 673 F. Supp. 3d 515, 653 (D.N.J.), stay denied, Koons v. N.J. Att'y Gen., No. 23-1900 (3d Cir. Jun. 20, 2023) (denying the request to stay the District Court's injunction against N.J.S.A. 2C:58-4.6(b)(1), the requirement that all handgun owners to keep handguns locked and unloaded when traveling in a vehicle). (Da2) New Jersey has made it a second-degree crime for anyone without a carry permit to possess a handgun in public outside of these extremely limited parameters. N.J.S.A. 2C:39-5(b)(1).

Second, a person under the age of twenty-one may not obtain a handgun carry permit purchase permit. N.J.S.A. 2C:58-4(c); N.J.S.A. 2C:58-3(c)(4). This is because a person may not obtain a handgun carry permit unless he is eligible to obtain a permit to purchase a handgun, and a person under the age of twenty-one may not receive a handgun purchase permit. Ibid. It is the confluence of N.J.S.A. 2C:39-5(b)(1), N.J.S.A. 2C:58-4(c), and N.J.S.A. 2C:58-3(c)(4) that categorically bars eighteen-to-twenty-year-olds from carrying handguns in public for self-defense and subjects them to criminal

prosecution should they attempt to do so.[3]

Subsequent to Bruen, all three courts that have heard challenges to similar laws prohibiting the carrying of firearms by eighteen-to-twenty-year-olds have held that these laws violate the Second Amendment. Worth v. Jacobson, 108 F.4th 677, 683 (8th Cir.) (affirming district court's judgment that Minnesota's statutory scheme prohibiting eighteen-to-twenty-year-olds from obtaining handgun carry permits violated the Second Amendment), reh'g en banc denied, 2024 WL 3892865 (8th Cir. Aug. 21, 2024) (Da4); Lara, 91 F.4th at 140 (directing district court to enjoin Pennsylvania "from arresting law-abiding 18-to-20-year-olds who openly carry firearms during a state of emergency"); Firearms Pol'y Coal., Inc. v. McCraw, 623 F. Supp. 3d 740, 758 (N.D. Tex.) (enjoining Texas from enforcing its statutory scheme that prohibits law-abiding eighteen-to-twenty-year-olds from carrying a handgun for self-

[3] The motion court correctly observed that New Jersey "categorically prohibits an entire class of adults based on their age, under twenty-one, from obtaining a permit regardless of whether they meet the other requirements under N.J.S.A. 2C:58-4," but erroneously focused on N.J.S.A. 2C:58-6.1 as the source of this categorical prohibition rather than the interaction between N.J.S.A. 2C:58-4(c) and N.J.S.A. 2C:58-3(c)(4). (Pa4, 11) The mistaken citation to N.J.S.A. 2C:58-6.1 rather than N.J.S.A. 2C:58-3(c)(4) is immaterial, as all parties agree that a person under the age of twenty-one is ineligible for a permit (Pb11), and the motion court's analysis correctly assessed the Second Amendment implications of requiring a carry permit to publicly carry a handgun for self-defense while categorically prohibiting eighteen-to-twenty-year-olds from obtaining carry permits. (Pa11-37)

defense outside the home), appeal dismissed sub nom., Andrews v. McCraw, 2022 WL 19730492 (5th Cir. Dec. 21, 2022) (Da5); see also Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco & Explosives, 5 F.4th 407, 410 (4th Cir.) (same result prior to Bruen), vacated as moot, 14 F.4th 322, 421 (4th Cir. 2021).

Five other courts have assessed the constitutionality of laws prohibiting eighteen-, nineteen- and twenty-year-olds from purchasing, as opposed to carrying, firearms. Of these, three courts found that the restrictions were unconstitutional. Brown v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 704 F. Supp. 3d 687, 706 (N.D.W. Va. 2023) (holding that federal statutes that made it illegal to sell firearms and ammunition to anyone under age twenty-one violated the Second Amendment); Rocky Mountain Gun Owners v. Polis, 685 F. Supp. 3d 1033, 1062 (D. Colo 2023) (enjoining Colorado law prohibiting persons under twenty-one years old from purchasing a firearm); Fraser v. Bureau of Alcohol Tobacco Firearms & Explosives, 672 F. Supp. 3d 118, 147 (E.D. Va. 2023) (holding that federal statutes and regulations that prevented eighteen-to-twenty-year-olds from purchasing handguns from federal firearm licensed dealers violated the Second Amendment). Two courts held that laws preventing only those under twenty-one-years-old from buying firearms do not violate the Second Amendment,

one of which was vacated upon rehearing en banc, and the other of which is presently on appeal before the Fifth Circuit. Nat'l Rifle Ass'n v. Bondi, 61 F.4th 1317 (11th Cir.), vacated & reh'g en banc granted, 72 F.4th 1346 (11th Cir. 2023); Reese v. Bureau of Alcohol Tobacco Firearms & Explosives, 647 F. Supp. 3d 508 (W.D. La. 2022), appeal filed, No. 23-30033 (5th Cir. Jan. 13, 2023).

This Court should follow the holdings in Lara, Worth, and Firearms Pol'y Coal., and hold that New Jersey's carry permit requirement coupled with its prohibition on issuing carry permits to eighteen- to twenty-year-olds violates the Second Amendment.

2. The motion court correctly decided that the conduct in question—the carrying of a handgun in public by an eighteen-to-twenty-year-olds—is covered by the plain text of the Second Amendment because eighteen-to-twenty-year-olds are part of "the people" referenced in the Second Amendment.

At Bruen step one, the question is whether the plain text of the Second Amendment covers the conduct in this case—publicly carrying a handgun by an eighteen-, nineteen-, or twenty-year old. Bruen held that "the plain text of the Second Amendment protects [plaintiffs'] proposed course of conduct—carrying handguns publicly for self-defense." 597 U.S. at 32. The Court based this conclusion on its explanation in Heller that "the 'textual elements' of the

Second Amendment's operative clause— 'the right of the people to keep and bear Arms, shall not be infringed'—'guarantee the individual right to possess and carry weapons in case of confrontation.'" Ibid. (quoting Heller, 554 U.S. at 592). The Court noted that no party disputed "that handguns are weapons 'in common use' today for self-defense." Ibid. Additionally, in Bruen, it was undisputed that the petitioners in that case— "two ordinary, law-abiding, adult citizens—are part of 'the people' whom the Second Amendment protects." Ibid.

Because the conduct in this case is also publicly carrying a handgun, the only difference between this case and Bruen with respect to the conduct is the age of the defendants—that they are under twenty-one years old. Thus, the question is whether people under twenty-one are part of "the people" referenced in the Second Amendment. Consistent with the holdings of all federal courts to have considered the issue, the motion court here correctly concluded that eighteen-to-twenty-year-olds are part of "the people" mentioned in the Second Amendment. Lara, 91 F.4th at 130-32; Worth, 108 F.4th at 689; Hirschfeld, 5 F.4th at 422-30; Brown, 704 F. Supp. 3d at 701; Rocky Mountain Gun Owners, 685 F. Supp. 3d at 1050; Fraser, 672 F. Supp. 3d at 130-36; Firearms Pol'y Coal., 623 F. Supp. 3d at 748-51; cf. Bondi, 61 F.4th at 1324 ("[W]e assume without deciding that the Second Amendment's

plain text covers persons between eighteen and twenty years old when they seek to buy a firearm."); Reese, 647 F. Supp. 3d at 521 (appearing to assume that 18-to-20-year olds are part of "the people" mentioned in the Second Amendment without explicitly analyzing this question). (Pa20-23)

The State, largely relying on Judge Restrepo's dissent in Lara, argues that because people under twenty-one "lacked full legal personhood" at the time of the founding, they are not among "the people" protected by the Second Amendment. (Pb23) This is wrong for several reasons.

First, Heller explained that "the people" "unambiguously refers to all members of the political community, not an unspecified subset." 554 U.S. at 580; see also Lara, 91 F.4th at 130; Worth, 108 F.4th at 689. "Accordingly, there is 'a strong presumption that the Second Amendment right . . . belongs to all Americans.'" Lara, 91 F.4th at 130. The courts also noted that "the term 'the people' is defined consistently throughout the Constitution," and that the First and Fourth Amendments "apply to all persons, even those under the age of 18." Firearms Pol'y Coal., 623 F. Supp. 3d at 748-49; see also Lara, 91 F.4th at 131-32; Worth, 108 F.4th at 691; Hirschfeld, 5 F.4th at 421-22; Brown, 704 F. Supp. 3d at 703; Rocky Mountain Gun Owners, 685 F. Supp. 3d at 1051; Fraser, 672 F. Supp. 3d at 130, 132.

The "normal and ordinary" meaning of the term "the people" has been

understood since the founding to refer to "'the whole Body of Persons who live in a Country[ ] or make up a Nation'"—not only those members who have voting rights. Worth, 108 F.4th at 689 (quoting N. Bailey, An Universal Etymological English Dictionary 601-02 (1770)); see also 1 Dictionary of the English Language (4th ed.) (reprinted 1978) (the 1773 edition of Samuel Johnson's dictionary defining people as "A nation; these who compose a community."). "[T]he political community is not confined to those with political rights (eligible voters) at the founding." Worth, 108 F.4th at 690; see also United States v. Cruikshank, 92 U.S. 542, 549 (1875) (defining "members of the political community" as "the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a government").

Second, "founding era militia laws lend support to the understanding that 'the people' referred to in the Second Amendment includes 18-to-20-year-olds." Worth v. Harrington, 666 F. Supp. 3d 902, 914 (D. Minn. 2023), aff'd sub nom., Worth v. Jacobson, 108 F.4th 677. "At the time of the ratification of the Second Amendment in 1791, eighteen (18) was the age of majority for militia service throughout the nation." Brown, 704 F. Supp. 3d at 704; see also Lara, 91 F.4th at 137 ("At the time of the Second Amendment's passage, or shortly thereafter, the minimum age for militia service in every state became

eighteen."); Hirschfield, 5 F.4th at 421 ("The militia laws in force at the time of ratification uniformly required those 18 and older to join the militia and bring their own arms."); Rocky Mountain Gun Owners, 685 F. Supp. 3d at 1051; Firearms Pol'y Coal., 623 F. Supp. 3d at 750-51. Hirschfeld concluded:

> Those excluded from the militia were not excluded from the Second Amendment, but those included in the militia were surely covered by the Second Amendment. So because the militia is a subset of "the people," those in the militia share the same rights as "the people."
>
> [5 F.4th at 427.]

Third, as noted by the majority in Lara, while a search for a historical analogue comes into play at the second step of Bruen, the first step of Bruen—asking whether the conduct is covered by the plain text of the amendment—does not handcuff courts to the historical scope of that text at the time of the founding. Lara, 91 F.4th at 131. The Supreme Court made this clear in Heller:

> Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search, the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.
>
> [554 U.S. at 582 (internal citations omitted).]

After all, if "the people" "were rigidly limited by eighteenth century

conceptual boundaries, 'the people' would consist of white, landed men, and that is obviously not the state of the law." Lara, 91 F.4th at 131. Even if the State were correct about the meaning of "the people" at the time of the founding, "the contents of ["the people"] have changed . . . [s]ince the founding." Worth, 108 F.4th at 691. "Reading the Second Amendment in the context of the Twenty-Sixth Amendment"—which extended the right to vote to persons 18 or older—"unambiguously places 18 to 20-year-olds within the national political community." Ibid. "Even if the 18 to 20-year-olds were not members of the 'political community' at common law, they are today." Ibid.

Also unavailing is the State's secondary argument, citing Judge Krause's dissent from the Third Circuit's decision to deny rehearing en banc in Lara, that eighteen-to-twenty-year-olds are not part of the "people" because "'founding-era legislatures categorically disarmed groups whom they judged to be a threat to the public safety.'" Lara, 97 F.4th at 163 (Krause, J., dissenting) (quoting Kanter v. Barr, 919 F.3d 437, 458 (7th Cir. 2019) (Barrett, J., dissenting)). (Pb27) But this quote from Judge Krause's dissent concerned step two of Bruen regarding historical analogues for the regulation and was not cited as evidence that eighteen-to-twenty-year-olds are not part of "the people." Ibid. Moreover, Judge Barrett's dissent in Kanter, quoted by Judge Krause, plainly dispels the notion that people thought to be a threat to public

safety are not part of "the people" covered by the Second Amendment:

> Neither felons nor the mentally ill are categorically excluded from our national community[, the people]. That does not mean that the government cannot prevent them from possessing guns. Instead, it means that the question is whether the government has the power to disable the exercise of a right that they otherwise possess, rather than whether they possess the right at all.
>
> [Kanter, 919 F.3d at 453 (Barrett, J., dissenting).]

Thus, while the question of whether the Nation's historical tradition of firearm regulation contains examples of restricting the firearm rights of eighteen-to-twenty-year-olds is relevant to Bruen's step two, it is relevant to determining whether eighteen-to-twenty-year-olds are part of "the people" protected by the Second Amendment.

This conclusion is made even clearer by the Supreme Court's most recent decision on the Second Amendment, United States v. Rahimi, 144 S. Ct. 1889 (2024). This case concerned a challenge to, which "prohibits an individual subject to a domestic violence restraining order from possessing a firearm if that order includes a finding that he 'represents a credible threat to the physical safety of'" a protected person. Id. at 1894 (quoting 18 U.S.C. § 922(g)(8)). In upholding § 922(g)(8), the Court did not find that individuals found to pose a credible threat to the physical safety of an another are not part of "the people" protected by the Second Amendment; rather, after analyzing

the historical analogues under Bruen step two, the Court concluded that "[s]ince the founding, our Nation's firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms." Id. at 1896. Thus, the State's second argument for why eighteen-to-twenty-year-olds are not protected by the Second Amendment also fails.

As eighteen-to-twenty-year-olds are part of "the people" covered by the Second Amendment, New Jersey's categorical ban on issuing carry permits to eighteen- to twenty-year-olds reaches conduct protected by the plain text of the Second Amendment. See Firearms Pol'y Coal., 623 F. Supp. 3d at 751 ("[T]he plain text of the Second Amendment, as informed by Founding-Era history and tradition, covers the proposed course of conduct and permits law-abiding 18-to-20-year-olds to carry a handgun for self-defense outside the home."); Worth, 666 F. Supp. 3d at 916 ("[T]he Second Amendment's text presumptively guarantees Plaintiffs' right to publicly carry a handgun for self-defense."). "Because the plain text of the Second Amendment covers [defendants] and [their] conduct, it is presumptively constitutionally protected and requires [New Jersey] to proffer an adequate historical analogue consistent with the Nation's historical tradition of firearm regulation. Worth, 108 F.4th at 692 (citing Bruen, 597 U.S. at 19).

3. The State has not met its burden to demonstrate that its categorical prohibition on the carrying of a handgun in public by an eighteen-to-twenty-year-olds is consistent with the Nation's historical tradition of firearm regulation.

In turning to Bruen step two, the Court in Rahimi explained the standard for evaluating whether a historical firearm regulation is a close-enough analogue to uphold the present-day regulation. Although the State need not identify "regulations identical to ones that could be found in 1791," "[a] court must ascertain whether the new law is 'relevantly similar' to laws that our tradition is understood to permit." Rahimi, 144 S. Ct. at 1898 (quoting Bruen, 597 U.S. at 29). The reviewing court must look at "[w]hy and how the regulation burdens the right." Ibid. The "why" considers whether "laws at the founding regulated firearm use to address particular problems." Ibid. The "how" considers the extent of the restriction on the right to bear arms. Ibid.

Before looking at the laws proffered by the State, the initial question is whether the relevant historical frame of reference is the founding era or the Reconstruction era. The Third Circuit in Lara correctly held "that the Second Amendment should be understood according to its public meaning in 1791." 91 F.4th at 134. While Lara noted that "Bruen declined to resolve this timeframe question," it also noted that Bruen "gave a strong hint when it observed . . . 'that the scope of the protection applicable to the Federal

Government and States [under the Bill of Rights] is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791.'" Id. at 133 (quoting Bruen, 142 S. Ct. at 2137). Indeed, the Supreme Court stated in Bruen that, "because post-Civil War discussions of the right to keep and bear arms '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.'" 142 S. Ct. at 2137 (quoting Heller, 554 U.S. at 614). And in Rahimi, "the surety and going armed laws" the Court relied on to uphold § 922(g)(8) were all founding-era laws. 144 S. Ct. at 1899-1901.

There are also several additional reasons for focusing on 1791 as the relevant time frame. First, even though it was the Fourteenth Amendment that made the Second Amendment applicable to the States, the Supreme Court has "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." Ibid. (citations omitted). If courts were constrained to founding-era historical analogues when evaluating the constitutionality of federal firearms regulations but permitted to consider Reconstruction-era analogues when evaluating state regulations, the Second Amendment would have a different scope against the States from its scope against the Federal government. Worth, 108 F.4th at 693.

Second, "because the states initially were not restricted by the" Second Amendment, "state laws are less illuminating the further one moves from ratification." Hirschfeld, 5 F.4th at 420. Third, after failing to successfully secure the rights of freed slaves (such as the right to bear arms) through legislation, Congress determined "that a constitutional amendment [the Fourteenth] was necessary to provide full protection for the rights of blacks." McDonald, 561 U.S. at 775. One purpose of the Fourteenth Amendment was to override many of the state laws that had been enacted to restrict the rights of black people from bearing arms. Id. at 771, 775-76. "So we should hesitate to look to Civil-War-era state laws that restricted the right to bear arms as evidence of the scope of the Second Amendment right at the time of the Founding." Hirschfeld, 5 F.4th at 421.

In searching for historical analogues, the State does not cite a single founding-era source. (Pb32-41) Instead, the State points to laws enacted "[b]etween 1856 and 1897." (Pb32) Judge Restrepo's dissent in Lara, cited in the State's brief (Pb33), similarly points to laws enacted "between 1856 and 1893." 91 F.4th at 147 (Restrepo, J., dissenting). The historical analysis in Bondi, also cited by the State, similarly begins no earlier than 1855. 61 F.4th at 1325. (Pb34-35) Finally, Judge Krause's dissent in Lara, cited by the State, notes only that "it was the legislatures of the Founding generation that

determined—consistent with the Second Amendment—which groups posed sufficient risk to justify categorical disarmament." 97 F.4th at 163 (Krause, J., dissenting). (Pb36) But Judge Krause does not cite any founding era laws categorically disarming people under twenty-one.

The State's failure to find a founding-era historical analogue is not surprising, as no other state has been able to do so either. In Lara, the Third Circuit noted "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." 91 F.4th at 137. In Hirschfeld, the Fourth Circuit observed, "[w]hile some gun regulations existed at the Founding, there were no regulations restricting minors' ability to possess or purchase weapons until two states adopted such laws in 1856." 5 F.4th at 437. There, the list of historical laws and sources cited by the government "reveal[ed] that near the time of ratification there were no laws restricting the sale of firearms to 18-year-olds" and that "[t]he earliest laws cited were passed over 60 years after ratification, and most were enacted after the Civil War." Ibid.

In Firearms Pol'y Coal., Texas attempted to justify its similar prohibition by pointing to founding-era "'laws regulating the store of gun powder,' 'administering gun use in the context of militia service,' and 'prohibiting the use of firearms on certain occasions and in certain places.'"

623 F. Supp. 3d at 754 (quoting Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185, 199 (5th Cir. 2012)). The District Court held that those regulations were "not sufficient historical analogs to Texas's statutory scheme that prohibits law-abiding 18-to-20-year-olds from carrying a handgun for self-defense outside the home." Ibid. (citing Heller, 554 U.S. at 632). The District Court also found that "laws that targeted particular groups for public safety reasons"— namely the "longstanding prohibitions on the possession of firearms by felons and the mentally ill"— were insufficient analogs; while those prohibitions were triggered by some fact specific to the individual related to public safety—i.e. that a specific person had committed a felony or suffered from a mental illness that made him dangerous—the age-based restriction disqualified all persons under twenty-one years of age without reference to any specific dangerousness-related facts about an individual. Id. at 754-55 (internal quotations omitted).

In Worth, Minnesota first cited "college rules restricting students from possessing guns on campus." 108 F.4th at 695. The Eighth Circuit rejected the proposed analogy to Minnesota's statewide categorical ban because (1) "universities had guardianship authority in loco parentis" and (2) "[u]niversities had many practices that if compelled by the government, would have violated students' constitutional rights" and (3) "a restriction on the

possession of firearms in a school (a sensitive place) is much different in scope than a blanket ban on public carry." Id. at 695-96. Minnesota also cited three municipal ordinances, two of which "fine[d] anyone who discharges a weapon within the city" regardless of age but had enhanced penalties for minors of an increased fine or seizure of the weapon. Id. at 696. "The third ordinance prohibited the sale of gunpowder (but not firearms) to minors" but was "enacted more than 60 years after 1791." Ibid. The Eighth Circuit found that these ordinances were all different from the "how" of Minnesota's categorical carry ban. Ibid.

Finally, the Commissioner of the Pennsylvania State Police attempted to analogize Pennsylvania's ban to a 1721 Pennsylvania law that "prohibited carry[ing] any gun or hunt[ing] on the improved or inclosed lands of any plantation other than his own." Lara, 91 F.4th at 135 (alterations in original) (internal quotation marks omitted). The Third Circuit noted that this law differed from the "why" of Pennsylvania's age restriction because "the 1721 statute appears to be primarily focused on preventing Pennsylvanians from hunting on their neighbors' land, not on restricting the right to publicly carry a gun." Ibid. The Court also noted that the 1760 statute which superseded the 1721 statute "prevented fir[ing] a gun on or near any of the King's highways, which indicates that carrying a firearm in public places was generally not

restricted," and neither law "singl[ed] out 18-to-20-year-olds, or any other subset of the Pennsylvania population." Ibid. (alterations in original) (internal quotation marks omitted).

It appears that the most relevant founding-era law is actually the Militia Act of 1792, in which Congress "required all able-bodied men to enroll in the militia and to arm themselves upon turning 18." Lara, 91 F.4th at 136. "A mandate to acquire a firearm is hardly 'evidence' that one was previously prohibited from owning one." Worth, 108 F.4th at 695. Rather, "the Second Militia Act is good circumstantial evidence of the public understanding at the Second Amendment's ratification as to whether 18-to-20-year-olds could be armed" and that they were allowed to be so armed. Lara, 91 F.4th at 137. Thus, there are no founding era sources that demonstrate a historical tradition of firearm regulation consistent with New Jersey's categorical age restriction on public carry of handguns by eighteen-to-twenty-year-olds, and the most relevant historical source is strong evidence that New Jersey's age restriction runs afoul of the Nation's tradition of firearms regulation.

Even if this Court were to look at the Nineteenth Century laws cited by the State (it should not), the Eighth Circuit in Worth explained why they too fail to provide an adequate historical analogy for New Jersey's categorical ban on the public carrying of handguns by eighteen-to-twenty-year-olds. 108 F.4th

at 697. Of the twenty laws, few actually regulated the carrying of firearms by persons under twenty-one years old; seventeen laws regulated only the furnishing of firearms to persons under twenty-one. Ibid. And among the states regulating the carrying of firearms, for example, Nevada prohibited only concealed carry of a pistol by persons under twenty-one but did not similarly prohibit open carry. 1885 Nev. Stat. 51. As noted by Bruen, when looking at historical restrictions on concealed-carry without respect to age limitations, "concealed-carry prohibitions were constitutional only if they did not similarly prohibit open carry." 597 U.S. at 53. Thus, Nevada's statute, which prohibited only concealed carry for persons under twenty-one, is not analogous to New Jersey's, which "ban[s] public carry altogether." Ibid.

The other seventeen states only "criminalized the sale or furnishing of weapons to minors,[4] meaning [persons under twenty-one] could publicly bear arms subject to generally applicable concealed-carry rules." Worth, 108 F.4th at 697. And among the states that prohibited the sale or furnishing of pistols to persons under twenty-one, almost all had some exception or limitation: (1) a limitation to weapons that were or could be concealed[5]; (2) an exception

[4] "Minors" here refers to persons under twenty-one rather than eighteen.
[5] Pub. L. No. 52-159, 27 Stat. 116 (1892) (D.C.); 1875 Ind. Acts 59; 1890 La. Acts. 39; 1878 Miss. Laws 175-76; 1890 Wyo. Sess. Laws. 140.

allowing a parent of the minor to furnish a firearm to the minor[6]; or (3) an exception for hunting, traveling, and/or self-defense.[7] See Worth, 108 F.4th at 697. These laws restricting the furnishing of handguns to eighteen-to-twenty-year-olds with exceptions and limitations thus differ dramatically in the "how" from New Jersey's scheme of categorically barring the carrying of handguns by eighteen-to-twenty-year-olds without any limitations or exceptions. Rahimi, 144 S. Ct. at 1898. Thus, "'[n]one of these historical limitations on the right to bear arms approach' the burden of [New Jersey's] Carry Ban." Id. at 697-98.

Therefore, even if this Court were to look at these Reconstruction-era laws as relevant—which it should not—this Court should conclude that "these laws cannot sufficiently establish that a prohibition on law-abiding 18-to-20-year-olds carrying a handgun in public for self-defense is consistent with this Nation's historical tradition of firearm regulation." Firearms Pol'y Coal., 623 F. Supp. 3d at 756 (emphasis in original). Thus, this Court should conclude that because the permit requirement of N.J.S.A. 2C:39-5(b)(1) in combination with the twenty-one-year-old age requirement to receive a permit "prohibits law-abiding 18-to-20-year-olds from carrying handguns for self-defense outside the home based solely on their age," this statutory scheme violates the

[6] 1859 Ky. Acts 245; 1881 Ill. Laws 73; Mo. Rev. Stat. § 1274 (1879); 1878 Miss. Laws 175-76; 1897 Tex. Gen. Laws 221-22.
[7] 1876 Ga. Laws. 112; 1855 Tenn. Pub. Acts 92.

Second Amendment, as incorporated against the States via the Fourteenth Amendment. Id. at 758.

B. The Motion Court Correctly Held That Defendants Have Standing To Challenge Their Prosecutions For Possession Of A Handgun Without A Permit Because They Were Statutorily Prohibited From Receiving A Permit Under the Unconstitutional Age Requirement So It Would Have Been Futile For Them To Apply For a License.

It is undisputed that both Pinkett and Phillips were under the age of twenty-one at the time of the offense, and that all persons under twenty-one will be denied a handgun carry permit under N.J.S.A. 2C:58-3(c)(4) if they apply for one. (Pb3; Pb11) Because defendants' applications for carry permits would have inevitably been denied by virtue of their age, any attempt to do apply for a permit would have been futile. Accordingly, defendants satisfy the so-called "futility exception" to the general requirement that, in order to establish standing, a challenger to a permitting scheme must have applied for and then been denied a permit prior to challenging the scheme. Because any application by defendants would have been futile, they have standing to challenge the constitutionality of N.J.S.A. 2C:58-3(c)(4) even though they never applied for handgun carry permits. (1T5-21 to 25) (Pb17)

Under Rule 3:10-2(d), a criminal defendant may "raise a defense that the crime charged in an indictment or accusation is based on a statute or regulation . . . which is unconstitutional or invalid in whole or in part." State v. Wade,

476 N.J. Super. 490, 505 (App. Div. 2023), leave to appeal denied, 255 N.J. 492 (2023). To do so, however, a defendant "must have standing to raise th[at] constitutional objection." Ibid. (quoting State v. Saunders, 75 N.J. 200, 208-09 (1977)). Under federal standing jurisprudence, the United States Constitution limits the power of the federal judiciary "to the resolution of cases and controversies." Jackson-Bey v. Hanslmaier, 115 F.3d 1091, 1095 (2d Cir. 1997) (citing U.S. Const. art. III, § 2). Unlike the U.S. Constitution, however the New Jersey "State Constitution contains no provision limiting the judicial power to cases or controversies," Saunders, 74 N.J. at 208, and thus "New Jersey cases have historically taken a more liberal approach on the issue of standing than have federal cases." Crescent Park Tenants Ass'n v. Realty Equities Corp., 58 N.J. 98, 101 (1971).

As a general matter, whenever a party seeks "to establish standing to challenge an allegedly unconstitutional policy," that party "must submit to the challenged policy." Jackson-Bey, 115 F.3d at 1096. Where, as here, the provision being challenged is an "allegedly unconstitutional permit statute, then the challenger must have applied for [the] permit or license under the statute" in order to establish standing. Wade, 476 N.J. Super. at 505 (internal citations omitted). There is, however a "recognized exception to the submission requirement if the challenger can 'make a substantial showing that

submitting to the government policy would [have been] futile.'" Ibid. (citing Kendrick v. Bruck, 586 F. Supp. 3d 300, 308 (D.N.J. 2022)); see also Carney v. Adams, 141 S. Ct. 493, 503 (2020) (finding that a party may establish standing despite not having applied if "that application would be merely a 'futile gesture'") (quoting Teamsters v. United States, 431 U.S. 324, 365-66 (1977)).

The futility exception to the application requirement to establish standing applies with equal force in the context of a challenge to a firearm permit scheme. That is, a party seeking to challenge the constitutionality of a provision within a firearm permitting scheme, but who has never applied for a firearm permit, may still establish standing if applying for a license would have been "a futile gesture." Bach v. Pataki, 408 F.3d 75, 83 (2d Cir. 2005) (quoting Williams v. Lambert, 46 F.3d 1275, 1280 (2d Cir.1995)); see also Kendrick, 586 F. Supp. 3d at 308; Worth, 666 F. Supp. 3d at 928 (plaintiff had standing to challenge Minnesota's age requirement for a carry permit without first applying because "submission of such an application would have been futile"). A party can demonstrate that an application for a permit would have been futile where the party "was statutorily ineligible for a carry license." Bach, 408 F.3d at 82. For example, the Second Circuit found that a plaintiff had standing to challenge New York's carry license regime because he was

"neither a New York resident nor worker," which made him statutorily ineligible for a New York carry license. Id. at 83.

Following Bach, the Second Circuit has affirmed that the futility exception is equally sufficient to establish standing to challenge the constitutionality of a licensing scheme upon which a criminal charge is based, even if the defendant never applied for that license. United States v. Decastro, 682 F.3d 160, 164 (2nd Cir. 2012). Decastro was convicted of violating 18 U.S.C. § 922(a)(3) by transporting into New York (his state of residence) a firearm he purchased in Florida. Id. at 161. He argued that New York's restrictive licensing scheme in combination with the prohibition in 922(a)(3) on transporting into New York a firearm acquired elsewhere made it virtually impossible for him to obtain a handgun for self-defense. Ibid.

While the Court found that Decastro's failure to apply for a license deprived him of standing to challenge New York's licensing scheme in his particular case, it noted that "[f]ailure to apply for a license would not preclude Decastro's challenge if he made a 'substantial showing' that submitting an application 'would have been futile.'" Id. at 164 (quoting Jackson-Bey, 115 F.3d at 1096). The Court found that Decastro had failed to make a substantial showing of futility because the only evidence of futility he offered was a "hearsay statement of an unidentified police desk officer who

had no apparent connection to the licensing process, and whose view [wa]s incompatible with the NYPD report that Decastro submitted." Ibid. The Court also reiterated Bach's conclusion that a party may demonstrate futility if "he was statutorily ineligible for a license." Ibid. (citing Bach, 408 F.3d at 82-83).

Here, the motion court correctly applied the test for futility and was correct to find that the defendants made a sufficient showing. In its written opinion, the motion court found that "even if the defendants had applied for permits and met all remaining N.J.S.A. 2C:58-4 requirements, they would have been categorically denied . . . based solely on their ages without consideration of any of the other permitting requirements." (Pa13) Because defendants would have "fac[ed] summary denial based on age alone," the court appropriately "conclude[d] that defendants have properly shown that applying for permits would have been futile." (Pa13) The court's ruling was correct: it is undisputed that defendants were under 21 years old and that any application for a handgun carry permit would have been denied, thereby rendering their would-be applications futile. Because futility has been established, Pinkett and Phillips have standing to challenge the age restriction.

The State now argues on appeal that the defendants in this case failed to establish futility because "[n]ot one of the defendants here has produced a single piece of evidence that would constitute a 'substantial showing' that, age

aside, each would have no doubt received a carry permit." (Pb19) (emphasis added) This argument, however, relies upon an incorrect application of the futility test. The federal futility exception does not ask whether an application would have been granted in the absence of the challenged provision, but rather whether the application would have been denied because of the challenged provision. Antonyuk v. Chiumento, 89 F.4th 271, 309 (2d Cir. 2023), judgment vacated sub nom. Antonyuk v. James, 144 S. Ct. 2709 (2024). Thus, a party can establish futility even if removal of the challenged permitting provision "would not 'guarantee' [their] success" upon application. Lane v. Rocah, No. 22-CV-10989, 2024 WL 54237 (S.D.N.Y. Jan. 4, 2024) (quoting Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 261 (1977)) (emphasis added). (Da12) Thus, under federal standing law, the State is simply wrong in asserting that defendants need to prove they would have received a carry permit in the absence of the age restriction in order to demonstrate futility.

Moreover, the State's mistaken application of the futility test is not redeemed by its reliance upon the decision in State v. Wade, 476 N.J. Super. at 504. (Pb19) There, the defendant argued that his charge for unlawful possession of a handgun without a permit under N.J.S.A. 2C:39-5(b)(1)) should be dismissed because the handgun permitting scheme upon which his

charge was based contained a requirement that was rendered unconstitutional by Bruen. Ibid. The permitting provision being challenged in Wade was the "justifiable need" requirement under which an applicant for a permit was required to demonstrate an "urgent necessity for self-protection, as evidenced by specific threats or previous attacks which demonstrate a special danger to the applicant's life that cannot be avoided by means other than by issuance of a permit to carry a handgun." Ibid. N.J.S.A. 2C:58-4(c).

In its consideration of the challenge, the Court first recognized that criminal defendants can establish standing to challenge their prosecution for unlawful possession of a handgun as unconstitutional under Bruen—even if they did not apply for a carry permit—so long they can show that their application for that permit "would [have been] futile." Id. at 506. (internal citations omitted) (alteration in original). After applying the futility test, the Court ultimately held, correctly, that the defendant in Wade had failed to establish futility. Id. at 507.

Wade's holding that the defendants in that case failed to establish futility was correct because unlike the age requirement at issue in this case—where a person could know with 100 percent certainty that he was ineligible for a permit because he was under twenty-one years of age—the question of whether a person has a sufficient "urgent need for self-protection" to qualify as a

"justifiable need" is not immediately ascertainable without first submitting a permit application to the authority who would evaluate this requirement. Additionally, the totality of the factual record in Wade was a hearsay certification submitted by Wade's attorney which did not even certify that Wade lacked a justifiable need. Id. at 497-98, 506. Thus, while the denial of any permit applications submitted by defendants in this case would be "preordained" because of their age, the denial of any permit application submitted by Wade was uncertain. Antonyuk, 89 F.4th at 310. Accordingly, the Wade Court was correct to conclude that, just as in Decastro, the hearsay certification in Wade "was insufficient to make a substantial showing of futility." Id. at 506 (citing Decastro, 682 F.3d at 164).

While the Wade panel correctly recognized the applicability of the futility exception in the context of criminal prosecution of possession of a firearm without a permit, the manner in which the Wade Court defined and applied the test for futility was mistaken. The Court concluded that defendants failed to make a substantial showing of futility because they failed to establish that they "would have qualified for a gun-carry permit excluding the justifiable need requirement." Id. at 506. While it was certainly true that the Wade defendants failed to show they were otherwise qualified for a permit, that is not the relevant question when deciding futility. Rather, as discussed, the

proper question for establishing futility is whether the application for a permit "would have been denied" due to the challenged requirement—not whether it would be granted in the absence of the challenged requirement. Antonyuk, 89 F.4th at 307-11.

Thus, the Court in Wade applied a test for futility that was more restrictive than the one employed in federal law, and thereby violated the principle that New Jersey cases "tak[e] a more liberal approach on the issue of standing than [] federal cases." Crescent Park Tenants Ass'n, 58 N.J. at 101. Because application of the futility exception in Wade and the State's brief is contradicted by the very federal cases it cites, this Court should depart from Wade's definition of futility and instead apply the definition very clearly established by federal law. See State v. Harrell, 475 N.J. Super. 545, 564 (App. Div. 2023) ("[U]nlike the trial court, 'we are not bound by our earlier decisions because we do not sit en banc.'") (citing *inter alia*, Pressler and Verniero, Current N.J. Court Rules, cmt. 3.3 on R. 1:36-3 (2023) ("[N]oting this court's 'opinions clearly are binding on all [trial] courts' but they do not bind 'other panels of the Appellate Division.").

While the arguments above are sufficient to establish defendants' standing, it is worth responding to the State's reference to Poulos v. New Hampshire, 345 U.S. 395 (1953), and Borough of Collingswood v. Ringgold,

66 N.J. 350 (1975), for the proposition that a challenger to a licensing scheme may not "disregard the permitting or licensing scheme and engage in the conduct for which the permit or license is a prerequisite" and then challenge the scheme "after being criminally charged." (Pb9) These cases are clearly distinguishable from the challenge that defendants raised here. First, Ringgold did not involve any allegation that the defendants in that case were statutorily ineligible for a permit. The relevant law in Ringgold prohibited door-to-door solicitation without first registering with the Chief of Police. 66 N.J. at 355. This Court held that the ordinance was not unduly burdensome because "no fee is involved, no fingerprinting is necessary, and no investigatory period is established." Id. at 361-62. The Court held invalid the provision of the ordinance allowing the Chief of Police to deny an application based on the applicant's prior conviction or reported unethical business practices because the provision contained no standards to guide the Chief's discretion, but there was no evidence that this provision would have prevented Ringgold from receiving permission to solicit. Id. at 367.

Ringgold cites a number of Supreme Court cases that distinguish between (1) licensing schemes that are themselves constitutional but applied in violation of an individual's constitutional right and (2) licensing schemes that are unconstitutional on the face of their own language. The Supreme Court

explained this distinction in Smith v. Cahoon, 283 U.S. 553, 562 (1931):

> [T]he principle is well established that, when a statute, valid upon its face, requires the issue of a license or certificate as a condition precedent to carrying on a business or following a vocation, one who is within the terms of the statute, but has failed to make the required application, is not at liberty to complain because of his anticipation of improper or invalid action in administration. This principle, however, is not applicable where a statute is invalid upon its face and an attempt is made to enforce its penalties in violation of constitutional right.
>
> [283 U.S. at 562 (emphasis added).]

Thus, in Poulos, where the ordinance at issue was constitutional on its face but the City Council wrongly refused to issue Poulos a license to hold a public meeting, the Court held that Poulos was required to judicially appeal the denial rather than ignoring it and proceeding with the meeting anyway. 345 U.S. at 408-09. By contrast, in Smith, where the terms of the licensing statute itself imposed an unconstitutional requirement on applicants, the Court held that Smith could challenge the constitutionality of the statute as a defense to his prosecution for failing to obtain a license. 238 U.S. at 562, 565. In a subsequent case, Lovell v. City of Griffin, 303 U.S. 444 (1939), the Court summarized the rule as follows: "[When] the ordinance is void on its face, it [is] not necessary for appellant to seek a permit under it. She [is] entitled to

contest its validity in answer to the charge against her." 303 U.S. at 452-53 (emphasis added) (citing Smith, 283 U.S. at 562).

The D.C. Court of Appeals applied these principles to find that a criminal defendant had standing to challenge the constitutionality of the firearm permitting scheme in Plummer v. United States, 983 A.2d 323 (D.C. 2009). There, the Court first noted that "[i]n light of the handgun registration and licensing scheme in effect at the time of the incident in this case, Mr. Plummer could not have registered his handgun, but registration was a prerequisite to obtaining a license." Id. at 341. The Court then rejected the government's argument that in order to establish standing, Plummer was required to first seek a license and then challenge the denial of that license. Id. at 340-42. Because D.C. had made it impossible for Plummer to obtain a license, the Court found that Plummer "had standing to raise the Second Amendment issue as a defense to the criminal charges against him by moving to dismiss the indictment, even though he did not attempt to obtain a registration certificate and license for his handgun prior to his arrest." Id. at 341-42.

The circumstances of the prosecution of Pinkett and Phillips is analogous to Plummer while unlike that of Ringgold or Poulos. Like in Plummer, New Jersey made obtaining a carry permit a prerequisite to the

exercise of the Second Amendment right to public carry, but statutorily prohibited Pinkett and Phillips from obtaining carry permits through its unconstitutional age restriction. Their situation stands in contrast to Ringgold or Poulos, where the permitting schemes did not include any provisions that categorically barred the defendants from obtaining permits. Thus, like Plummer, Pinkett and Phillips had standing to "raise the Second Amendment issue as a defense to the criminal charges against [th]em by moving to dismiss the indictment, even though [t]he[y] did not attempt to obtain a [carry permit] prior to [their] arrest[s]." Id. at 341-42.

In light of the futility doctrine as set forth in Bach and Decastro, as well as the principles of Smith v. Cahoon, Lovell, and Plummer, this Court should affirm the motion court's finding that Pinkett and Phillips have standing to raise a Second Amendment challenge to their prosecution.

C. This Court Should Affirm The Dismissal Of The Counts Of The Indictment Charging Defendants With N.J.S.A. 2C:39-5(b)(1), Or, In The Alternative, Remand For A Hearing To Determine Whether Defendants Were Otherwise Eligible For A Handgun Carry Permit Under N.J.S.A. 2C:58-3 and 2C:58-4.

Because Pinkett and Phillips were prosecuted for exercising a constitutional right in violation of an unconstitutional permitting regime that made it impossible for them to obtain a permit, this Court should affirm the dismissal of the counts of the indictments charging them with N.J.S.A. 2C:39-

5(b)(1). As demonstrated in Point I.A, New Jersey's scheme of criminally punishing the carrying of a handgun without a permit while categorically barring eighteen-to-twenty-year-olds from obtaining permit is unconstitutional. "An unconstitutional law is void, and is as no law. An offence created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment." Ex parte Siebold, 100 U.S. 371, 376-77 (1879); see also Montgomery v. Louisiana, 577 U.S. 190, 203 (2016) ("A conviction or sentence imposed in violation of a substantive rule is not just erroneous but contrary to law and, as a result, void.") (citing Siebold, 100 U.S., at 376). Accordingly, this Court should affirm the trial court's order dismissing the counts of unlawful possession of a handgun.

We acknowledge, however, that certain jurisdictions considering analogous Second Amendment challenges have ordered remands for additional limited evidentiary hearings even after finding that a party successfully established standing. In Plummer, after finding that Plummer had standing to raise a Second Amendment challenge to his prosecution due to "[t]he absolute prohibition on Mr. Plummer's application for a registration certificate in order to seek a license for his handgun," the Court acknowledged the registration certificate statute contained additional "qualifications for registration which could have been used to determine whether Mr. Plummer would have been

disqualified from obtaining a registration certificate," including "age, criminal history, mental capacity, and vision." 983 A.2d at 342. Because Plummer had not challenged those additional qualifications, the Court "remand[ed] th[e] case to the motion court with instructions to hold a hearing to determine whether Mr. Plummer would have satisfied" those licensing requirements. Ibid.

Several other courts confronted with similarly unconstitutional permitting schemes have also remanded for hearings to determine whether the defendant could have met the additional requirements for a permit. Jackson v. United States, 76 A.3d 920, 944 (D.C. 2013) (remanding "for further proceedings . . . to determine whether [defendant] could have qualified for registration of the pistol he possessed"); Golden v. United States, 248 A.3d 925, 948 (D.C. 2021) (finding that a remand was necessary "for further proceedings in the trial court to determine whether, but for the [challenged] requirement, [defendant] would have been eligible and able to register and obtain a license to carry his gun"); People v. Sovey, 179 N.Y.S. 3d 867, 871 (N.Y. Sup. Ct. 2022) (remanding for an additional evidentiary hearing, explaining that "[defendant] should not be prosecuted if he is able to demonstrate...he would have met the remaining constitutional standards for gun possession").

Thus, should this Court not agree that defendants are entitled to dismissal upon a finding that the age requirement is unconstitutional, then this Court should remand for a further evidentiary hearing consistent with the decisions in Plummer, Jackson, Golden, and Sovey. At that hearing, the motion court must "determine whether, prior to the imposition of charges in this case, [defendants] would have been able to satisfy the then existing and applicable statutory and regulatory requirements for obtaining" a permit to purchase and carry a handgun. Plummer, 983 A.2d at 342. If the defendants make a sufficient showing that they were otherwise eligible to obtain a permit, their charges for unlawful possession of a handgun without a permit under N.J.S.A. 2C:39-5(b)(1) must then be dismissed. Sovey, 179 N.Y.S.3d at 522.

CONCLUSION

For the aforementioned reasons, this Court should affirm the motion court's order dismissing the counts of the indictments charging Pinkett and Phillips with unlawful possession of a handgun. In the alternative, after affirming the motion court's holdings that (1) Pinkett and Phillips have standing to challenge New Jersey's age restriction on issuing handgun carry permits and (2) New Jersey's age restriction prohibiting persons under twenty-one years of age from publicly carrying handguns violates the Second Amendment, this Court should then remand for an evidentiary hearing at which the motion court must determine whether Pinkett and Phillips would have been able to satisfy the requirements for a handgun carry permit other than the age requirement.

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Date: September 16, 2024

Superior Court of New Jersey
APPELLATE DIVISION
DOCKET NOs. A-3121-23T2; A-3122-23T2

STATE OF NEW JERSEY, Plaintiff-Appellant, v. KYREED PINKETT & DEJOHN PRESTON, Defendants-Respondents.	
STATE OF NEW JERSEY, Plaintiff-Appellant v. JERRON PHILLIPS, Defendant-Respondent.	CRIMINAL ACTION On Appeal From an Interlocutory Order of the Superior Court of New Jersey, Essex County Dismissing Counts in the Indictment Sat Below: Hon. Christopher S. Romanyshyn, J.S.C.

BRIEF AND APPENDIX ON BEHALF OF THE ATTORNEY GENERAL OF NEW JERSEY, AMICUS CURIAE

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Other Authorities

PRELIMINARY STATEMENT

For over a century, New Jersey law has required individuals to seek and obtain a permit before they may publicly carry a firearm. For good reason: the permitting regime allows law enforcement to ensure that an individual does not threaten public safety and thus can be trusted to possess a firearm in public. But defendants violated that bedrock public-safety requirement; as they concede on appeal, they do not have and never sought a permit to carry. Instead, they simply chose to take the law into their own hands, as law enforcement discovered when they found defendants in public with handguns and large capacity magazines. The core question on appeal is therefore whether defendants can now collaterally attack one of the underlying criteria for a permit—that the applicant be 21 years of age or older—after being charged for carrying without one.

This Court answered that question in State v. Wade. There, the defendants (like the defendants here) never applied for a carry permit, but were nevertheless apprehended in public with firearms. After those defendants were arrested for carrying without a permit, they claimed that the United States Supreme Court's subsequent decision in New York State Rifle & Pistol Ass'n v. Bruen rendered their prosecutions unconstitutional. Central to their theory was that Bruen had rendered one of the underlying criteria for obtaining a permit—that the applicant had a "justifiable need" to carry—invalid under the Second Amendment. But

this Court explained that their challenge could not proceed: the defendants had never requested carry permits but instead took the law into their own hands and carried anyway. As a result, those defendants could not excuse their unlawful conduct on the grounds that Bruen had invalidated one of the underlying permit criteria, especially as the permitting criteria were severable. As Wade held, an individual who wishes to challenge parts of a permitting system may not simply ignore that system, wait until he has been arrested, and then seek to raise a collateral attack on the licensing criteria in order to avoid the consequences of his actions. That is dispositive in this identical case. This Court can and should stop there.

In any event, if this Court does consider the collateral attack on the permit criteria, defendants run into a second problem: the age requirement survives Second Amendment scrutiny because it comports with our Nation's historical tradition. As the United States Supreme Court explained most recently in United States v. Rahimi, States have considerable flexibility to address the problem of gun violence, so long as the measures the States adopt stay within the broad principles underlying the Nation's historical tradition. As relevant to this case, extraordinary historical evidence confirms that States can place limits on access to firearms by those under 21—evidence present at every period of this country's history. And that overwhelming evidence is consistent with the broad principles

allowing restrictions on firearms by those who present a public safety risk—a population that, modern evidence confirms, includes those under 21. Under any of these principles, the age requirement passes muster.

The motion court wrongly entertained defendants' collateral attacks and invalidated the longstanding age requirement. This Court should reverse.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

Amicus Attorney General relies on the Statement of Procedural History and Facts in the State's brief and highlights the following.

A. New Jersey's Public Carry Permitting Law.

1. Public carry of handguns has long been "the most closely-regulated aspect of [the State's] gun-control laws." In re Preis, 118 N.J. 564, 568 (1990). Since 1905, New Jersey has restricted the concealed carrying of firearms to individuals who had permits to do so. See 1905 N.J. Laws, ch. 172 at 324. That remains true today: any individual who wishes to carry a handgun in public must first obtain a permit. N.J.S.A. 2C:39-5 (b)(1). Knowingly possessing a handgun in public without such a permit is a second-degree crime. Ibid.

To obtain a permit, an applicant must follow a two-step process. First, the applicant must apply to the relevant law enforcement official—the chief police officer in the municipality, or the superintendent of the State Police. N.J.S.A. 2C:58-4(c). At the time of defendants' arrests (August 2021 and January 2022), the application required certain biographical information and the endorsement of "three reputable persons who have known the applicant for at least three years

[1] As they are closely related, the Attorney General has combined these sections for the Court's convenience.

preceding the date of application, and who shall certify ... that the applicant is a person of good moral character and behavior." N.J.S.A. 2C:58-4(b).

An applicant must also satisfy several substantive criteria, including the age requirement at issue here. Among other things, the applicant must "not [be] subject to any of the disabilities set forth in [2C:58-3(c)]." N.J.S.A. 2C:58-4(c). Those disqualifications turn on factors like the applicant's mental and physical health, criminal history, potential danger to public safety, and—relevant here—age. N.J.S.A. 2C:58-3(c). "Any person under the age of 21 years" must be denied a permit. N.J.S.A. 2C:58-3(c)(4).[2] The applicant must also show "that he is thoroughly familiar with the safe handling and use of handguns," N.J.S.A. 2C:58-4(c), which he can show by completing a training course, submitting qualification scores, or passing a use-of-force test, N.J.A.C. 13:54-2.4(b), (c).

[2] New Jersey law separately prohibits those under 21 from "purchas[ing] … or otherwise acquir[ing] a handgun, unless the person is authorized to possess the handgun in connection with the performance of official duties." N.J.S.A. 2C:58-6.1(a). And such persons cannot "possess, carry, fire or use a handgun except under" enumerated circumstances, including under a parent's supervision or for military training. N.J.S.A. 2C:58-6.1 (b). But as the motion court recognized, "[n]one of the defendants [were] charged with the fourth-degree crime under N.J.S.A. 2C:58-6.1," (Pa3), so those prohibitions should not be at issue here, as defendants Phillips and Pinkett concede (Db7 n.3).

Further, until Bruen, he had to establish "a justifiable need to carry a handgun" based on an "urgent necessity for self-protection." N.J.S.A. 2C:58-4(c).[3]

Second, after the application is submitted, the chief or the superintendent conducts the necessary background checks. Ibid. At the time of defendants' offenses, if the chief or superintendent approved the application, the applicant had to present it to the Superior Court for review. N.J.S.A. 2C:58-4(d). (Today, there is no such requirement—approval by the chief or superintendent is final.) If the Superior Court was likewise satisfied that all permit requirements were met, it issued an order granting the applicant a public carry permit. Ibid. If the court instead considered denying the permit, state law required it to first hold a hearing to allow the applicant "to proffer reasons why he satisfies the standard and respond to any questions from the judge." In re Carlstrom, 240 N.J. 563, 572 (2020). At the hearing, the court could take evidence and hear testimony to assess whether the applicant qualifies for a permit. Id. at 572-73.

If the chief police officer or superintendent instead denies the application, then the applicant may request a hearing in the Superior Court within 30 days of the denial. N.J.S.A. 2C:58-4(e). In any case, a permit applicant dissatisfied

[3] As noted below, N.J.S.A. 2C:58-3 and 58-4 were amended effective December 22, 2022. L. 2022, c. 131, §§ 2-3. These citations are to the statutes as they existed at the time of defendants' offenses.

with the decision of the Superior Court may appeal the decision "in accordance with law and the rules governing the courts of this State." Ibid.

2. New Jersey partially amended these laws after defendants' arrests, but the State retained the requirements that individuals must obtain a permit before carrying a gun in public and that those under 21 cannot acquire such permits. In June 2022, the United States Supreme Court issued Bruen, holding that New York's "proper cause" requirement to obtain a license to carry in public—which required individuals to establish a special self-defense need before they could publicly carry—violated the right of "ordinary, law-abiding citizens" to "carry handguns publicly for self-defense." 597 U.S. 1, 9-11 (2022). The Court noted that other States' analogous requirements to show "special need for self-protection" to get public-carry permits were also invalid. Id. at 12-15 & n.2.

But Bruen did not disturb other parts of the permitting laws. The majority in Bruen explicitly acknowledged that a wide range of States had "well-defined restrictions governing the intent for which one could carry arms, the manner of carry, or the exceptional circumstances under which one could not carry arms." Id. at 38. Beyond recognizing their existence, the Court made clear it had no doubt as to the validity of those "licensing regimes"—that is, while it found that States could not condition the grant of a carry license on a showing of a special self-defense need, it confirmed that States could require an individual to obtain

a permit to carry more generally. Id. at 38 n.9; see also id. at 80 (Kavanaugh, J., concurring) (confirming that "the 6 States . . . potentially affected by today's decision," including New Jersey, "may continue to require licenses for carrying handguns for self-defense" without the heightened self-defense requirement). That is, "Bruen['s] … holding did not effectuate a wholesale invalidation of the various states' gun licensing and permit systems." In re M.U.'s Application for a Handgun Purchase Permit, 475 N.J. Super. 148, 192 n.11 (App. Div. 2023).

The day after the Court issued Bruen, the New Jersey Attorney General issued a Law Enforcement Directive to implement the decision. See N.J. Att'y Gen. L. Enf't Dir. 2022-07 (June 24, 2022) (Aa1-3). The Directive underscored that "[w]hile Bruen impacts our justifiable need requirement, the ruling does not change any other aspect of New Jersey's public carry laws." (Aa1). The Directive further reminded residents that "carrying a handgun without a permit is still illegal in this state, and law enforcement agencies must consider all other [] mandatory requirements for obtaining a carry permit before granting an application." (Aa1-2). And it instructed that "the applicable law enforcement agency shall continue to ensure that the applicant satisfies all of the criteria of N.J.S.A. 2C:58-4d and N.J.A.C. 13:54-2.4, except that the applicant need not submit a written certification of justifiable need to carry a handgun." (Aa2).

In December 2022, the Legislature likewise amended the permitting laws in light of Bruen. Consistent with the Supreme Court's decision and Directive 2022-07, the statute formally eliminated the "justifiable need" requirement and revised a series of other requirements. See L. 2022, c. 131. But the amended statute did not change the basic requirement that a person in New Jersey obtain a permit before lawfully carrying a handgun in public, or that the person would need to satisfy a number of longstanding requirements before obtaining such a permit—including reaching the age of 21. See id.; N.J.S.A 2C:39-5(b). Chapter 131 retained the various disqualifications under N.J.S.A. 2C:58-3(c), and added that an applicant cannot receive a permit if he is subject to an outstanding arrest warrant or is a fugitive fleeing from another state. L. 2022, c.131, § 2. Further, the applicant must be endorsed by four reputable persons who certify that he "has not engaged in any acts or made any statements that suggest the applicant is likely to engage in conduct, other than lawful self-defense, that would pose a danger to the applicant or others." Id. § 3. The new statute also enumerated conditions for online instruction, in-person instruction, and target training. See id. § 3(d), (g). And it added requirements for how an individual who has obtained a permit may lawfully carry, such as requiring that the person carry the handgun in a holster. See id. §§ 2(d), 3, 4, 5.

B. Factual Background.

Defendants were all under the age of 21 when they were found in public with handguns equipped with large-capacity magazines (LCMs). None had ever applied for a permit.

In August 2021, Phillips—then 18—was arrested and found with a fully loaded handgun equipped with an LCM. (Pa58-59).[4] He was indicted in March 2022 for second-degree unlawful possession of a handgun, violating N.J.S.A. 2C:39-5(b); fourth-degree possession of hollow-point bullets, violating N.J.S.A. 2C:39-3(f); and fourth-degree possession of an LCM, violating N.J.S.A. 2C:39-3(j). (Pa2-3, 60-63).

In January 2022, Preston and Pinkett—then 19 and 20, respectively—were arrested and found with two handguns, both affixed with LCMs. (Pa40-43). They were indicted in October 2022 for second-degree unlawful possession of a handgun, fourth-degree possession of an LCM, and second-degree possession of a weapon for an unlawful purpose, violating N.J.S.A. 2C:39-4(a). (Pa44-50).

All three defendants separately moved to dismiss the unlawful handgun possession counts against them. Their cases were consolidated by the motion court, who heard oral argument. (Pa2-3).

[4] The Attorney General adopts the State's citations to the record: Pa refers to the State's Appendix, and Db refers to defendants' (Phillips and Pinkett) brief. Aa refers to the Attorney General's appendix.

The court granted defendants' motions. Although it acknowledged this Court's holding in State v. Wade, 476 N.J. Super. 490 (App. Div. 2023), leave to appeal denied, 255 N.J. 492 (2023), that defendants could not challenge their indictments for permitless carry when they had never previously applied for a permit, it determined that Wade was "not dispositive" in this case because it "implicates an entirely different section of the permitting statutes." (Pa11). The motion court thus concluded that "a criminal court is a proper venue to challenge the constitutionality of New Jersey gun permitting statutes" even if a defendant has failed to apply for a permit entirely. (Pa12).

Turning to the merits, the motion court examined the constitutionality of not just the permitting laws' age requirement, see N.J.S.A. 2C:58-4(c); 2C:58-3(c)(4), but also the separate statute generally prohibiting those under 21 from purchasing and possessing handguns, N.J.S.A. 2C:58-6.1—even though, as the court acknowledged, "[n]one of the defendants [we]re charged with the fourth-degree crime under N.J.S.A. 2C:58-6.1." (Pa3). Citing Bruen, the motion court asked whether the State had shown "that N.J.S.A. 2C:58-6.1 is consistent with the Nation's history and tradition of firearms regulation." (Pa14). Finding that the State had not done so, the Court facially invalidated N.J.S.A. 2C:58-6.1 and then declared that "N.J.S.A. 2C:39-5(b), operating through N.J.S.A. 2C:58-4, [is] unconstitutional as applied to these defendants." (Pa33-34).

On May 10, 2024, the motion court stayed its decision pending resolution of the State's motion for leave to appeal. (Pa39; Pa57). On June 11, 2024, this Court granted the State's motions for leave to appeal and to continue the stay. (Pa69-72). This Court also granted the State's motion to consolidate the three appeals. (Pa73). The Attorney General moved to appear as amicus curiae and to file this brief on October 3, 2024.

LEGAL ARGUMENT

POINT I

DEFENDANTS' COLLATERAL CHALLENGES ARE FORECLOSED BY WADE.

1. This appeal should begin and end with Wade—and the myriad decisions and principles on which that precedent relies. In Wade, defendants were arrested before Bruen for carrying without a permit, 476 N.J. Super. at 495, and it was undisputed that "neither defendant had applied for a permit" before, id. at 498. While defendants chose to challenge the constitutionality of the underlying permitting requirements only after they had been arrested for carrying in public without a permit, this Court explained that such challenges could not proceed.

As Wade explained, the challengers' failure to first seek a permit violated the longstanding concept that "to establish standing to challenge an allegedly unconstitutional permit statute, the challenger must have applied for a permit or license under the statute." Id. at 505-06 (collecting cases). That requirement is based on the bedrock principle that "law-abiding citizens are not free to ignore a statute and presume that they would have been granted a permit but for one potentially invalid provision of a permit statute." Id. at 507 (discussing Borough of Collingswood v. Ringgold, 66 N.J. 350 (1975)). Importantly, "even if [the challengers] had standing to make a constitutional challenge," the concededly unconstitutional justifiable-need provision was severable from the rest of the

permitting law. Id . at 508-10. So the "remaining provisions" of the permitting laws were "constitutional and enforceable at the time of [challengers'] arrest." Id. at 511. Said another way, even though one of the permitting criteria in effect at the time—justifiable need—was unconstitutional, multiple other criteria were still valid, and thus defendants still could not have carried a firearm in public without satisfying them first. There was, in short, no way for the defendants to get around their failure to seek a permit and to instead just carry unlawfully.

Wade also discussed in detail the precedents and principles that compelled this conclusion. As Wade explained, our Supreme Court confronted a similar situation in Collingswood v. Ringgold, involving a constitutional challenge to an ordinance requiring permits for door-to-door solicitations. See Wade, 476 N.J. Super. at 507-08 (citing 66 N.J. at 354, 364). There, the ordinance gave the local police chief discretion to reject door-to-door solicitation permits based on a criminal conviction or unethical business practices without "furnish[ing] any clue as to what standards the [c]hief may bring to bear on the issue of when to deny or when to grant a permit in the face of a conviction or reported unethical business practices." 66 N.J. at 366-67. Our Supreme Court agreed that such unfettered discretion was unconstitutional, but also held that the remainder of the scheme—including the requirement to obtain a permit in the first place—was valid. 66 N.J. at 366-67, 369. Because the defendants in Ringgold violated

that permit requirement altogether and never "attempted to register as required," the Court held their "conduct clearly f[ell] within the proscription of this ordinance" and "could not properly be ignored with impunity." Id. at 364. So even though part of the underlying permitting scheme was unlawful, the Court thus "affirmed defendant[s'] convictions." Wade, 476 N.J. Super. at 507.

There are good reasons for the rule adopted in Ringgold and Wade. For one, it is a matter of public safety: the very reason that States maintain licensing requirements is to ensure, in advance, that an individual is properly qualified to carry a firearm in public. See Poulos v. New Hampshire, 345 U.S. 395, 409 & n.13 (1953) (noting that the "valid requirements of license are for the good of the applicants and the public"); see also Bruen, 597 U.S. at 38 n.9 (discussing carry license regimes). But if the law "allow[s] applicants to proceed without the required permits to run businesses, erect structures, [or] purchase firearms," and then challenge the permitting requirements only once they have been caught, that "is apt to cause breaches of the peace or create public dangers." Poulos, 345 U.S. at 409 & n.13 (emphasis added). Nor is this unfair; individuals have "the choice of complying with the regulation, or not engaging in the regulated activity, or before they act, petitioning the appropriate civil tribunals for a modification of or exception from the regulation." Ibid. All they cannot choose is to go without a permit and then challenge part of the permitting process only

if caught. Ibid. After all, allowing persons to "ignore[]" a permitting process "with impunity," Ringgold, 66 N.J. at 364, based on their personal opinion that they would later win a challenge to some of its terms, would offend the principle that "no man can be judge in his own case," Walker v. City of Birmingham, 388 U.S. 307, 320-21 (1967), and undermine the incentive for anyone to comply.

For another, a contrary rule would be all but impossible to administer. In a case in which there are multiple valid permitting criteria, and only one criterion has been held unconstitutional, there would be a question whether the defendant would have sought a permit but for the unconstitutional criterion and would have been able to obtain one. See Wade, 476 N.J. Super. at 506 (emphasizing those defendants had not "established" that they "would have qualified for a gun-carry permit excluding the justifiable need requirement"). But "a motion to dismiss criminal charges is not the proper venue" to make permit-related challenges. Id. at 507. It would require the court overseeing a criminal prosecution to evaluate, among other things, whether (1) defendant would have applied for a permit had there been no justifiable-need provision or 21-year-old requirement; (2) could have shown he was thoroughly familiar with safe handling of handguns; (3) could have found individuals to endorse his application; and (4) could have satisfied the disqualification requirement, including showing that his application to carry in public was not contrary to public safety. See supra at 4-7, 9 (citing

other undisputed requirements). When an individual does not follow the law and first seek a permit, but instead raises a collateral challenge after an arrest, the Court is "left to speculate" whether he would have been "denied the permits" based on any of these separate requirements. Wade, 476 N.J. Super. at 507. A criminal prosecution is no place for such a permitting mini-trial.

Wade also explained why this approach applies to permitting laws that are only challenged or invalidated in part, rather than in their entirety. The Attorney General has consistently acknowledged that a challenger may collaterally attack a permitting law that is "completely invalid"—i.e., if all its criteria are unlawful. City of Chicago v. Atchison, T. & S. F. Ry. Co., 357 U.S. 77, 89 (1958) (citing Smith v. Cahoon, 283 U.S. 553, 562 (1931); Staub v. City of Baxley, 355 U.S. 313, 319 (1958)). That makes sense; if the entire permitting process is invalid, it is "as though the[law] did not exist." Poulos, 345 U.S. at 410-14 (discussing cases). There is no basis to require someone to seek a permit that is completely unlawful in all its criteria, as there is no part of the process to which they could still be subject. Indeed, that was the case in Plummer v. United States, 983 A.2d 323 (D.C. 2009), on which defendants rely. (Db37-39). In Plummer, the D.C. Court of Appeals allowed a defendant to invoke the unconstitutionality of D.C.'s "total ban on handgun possession" as a defense to his prosecution despite never

applying for a license, because that restriction was "completely invalid," not just invalid in part. 983 A.2d at 340-42 (quoting Chicago, 357 U.S. at 89).

But as Wade explains, that specific exception has no bearing here. Where only discrete portions of an overall permitting scheme are unconstitutional, then individuals are still required to seek a permit to show they satisfy the rest of the permitting criteria, and a decision to carry without any permit whatsoever may still be punished because it "clearly falls within the [scheme's] proscription"—the provisions still in effect. Ringgold, 66 N.J. at 364, 366-67; accord Wade, 476 N.J. Super. at 508-11. As Wade explained, that describes the State's public-carry law: even if the permit criteria included an "invalid provision," each of the permitting criteria was severable, leaving the ultimate requirement to obtain a permit before carrying a firearm "constitutional and enforceable at the time of defendants' arrest." 476 N.J. Super. at 507, 511. In other words, "carrying guns in public can still be regulated and subject to a permit requirement," and that permitting mandate can still be enforced against challengers who choose not to follow it. Id. at 508, 510; id. at 496 ("[E]ach defendant needed a permit to carry handguns outside their homes and if the State proves that they did not have permits, they will be guilty of a crime under N.J.S.A. 2C:39-5(b)(1).").

Given the wealth of precedents and principles on which Wade relied, it is no surprise that this Court has repeatedly foreclosed collateral challenges to the

State's public-carry permitting law before and after Wade, and that both the U.S. Supreme Court and our Supreme Court have rejected petitions to review these decisions. See Wade, 255 N.J. 492 (denying leave to appeal); State v. Reeves, No. A-0921-20, 2023 WL 2358676, at *3 (App. Div. Mar. 6, 2023) (Aa6)[5] ("agree[ing] with the Attorney General that a criminal prosecution is not the proper venue for demonstrating that defendant would have been granted an unrestricted permit if the justifiable-need requirement did not exist"), certif. denied, 254 N.J. 176 (2023), and cert. denied, No. 23-6521, 144 S. Ct. 2633 (Mem) (2024); State v. Hiraldo, No. A-2599-21, 2023 WL 7545161, at *6 (App. Div. Nov. 14, 2023) (Aa16-17) (following Wade). When an individual is arrested for carrying a firearm in public without a permit, he cannot collaterally challenge one of the underlying criteria in this severable permitting scheme.

2. Wade compels the outcome here. As in Wade, these defendants were arrested for possessing a handgun without a permit in contravention of N.J.S.A. 2C:39-5 (b)(1). (Pa2-3). As in Wade, defendants concededly never applied for a permit, yet carried firearms in public anyway. And as in Wade, defendants sought to leverage subsequent Supreme Court Second Amendment precedent to

[5] While unpublished opinions do not constitute precedent and are not binding on any court, they can serve as secondary authority. R. 1:36-3; Pressler & Verniero, Current N.J. Court Rules, comment 2 on R. 1:36-3, p. 337 (2023). The Attorney General is not aware of any contrary unpublished opinions. R. 1:36-3.

collaterally attack their charges. But as Wade held, such collateral challenges to this permitting law cannot proceed. See 476 N.J. Super. at 507 (emphasizing no one can "ignore" a permitting scheme on the assumption that he "would have been granted a permit but for one potentially invalid provision").

That should have been the end of this collateral attack. Given "the same or indistinguishable fact pattern" here, the motion court had an "obligation to follow" that decision and reject defendants' collateral attack. State v. Farmer, 48 N.J. 145, 183 (1966); see also Macchi v. Conn. Gen. Ins. Co., 354 N.J. Super. 64, 71-72 (App. Div. 2002) (holding "the motion judge erred" by deviating from appellate precedent as facts were "indistinguishable"); State v. Reece, 222 N.J. 154, 166, 171 (2015) (reaching same conclusion as prior decision when "[t]he facts presented here are strikingly similar to those present in [precedent]"). That is why, although the decision is unpublished, this Court already applied Wade to reject another defendant's collateral challenge to the permitting age criterion without having to reach the merits. See State v. Gilliard, No. A-1513-21, 2024 WL 502337, at *8 (App. Div. Feb. 9, 2024) (Aa26) (relying on Wade to conclude that "Gilliard does not have standing" and thus "reject[ing] Gilliard's argument that New Jersey's gun permit scheme was unconstitutional").

The motion court's effort to distinguish Wade was unavailing. The court acknowledged that the two cases were "similar in procedural presentation—via

a motion to dismiss counts of an indictment" by defendants who were charged with carrying firearms without a permit and who had never in fact sought a permit. (Pa11). The motion court, however, saw Wade as inapplicable just because the "challenge here implicates an entirely different section of the permitting statutes that the Wade panel had no occasion to address"—that is, this case involves the permitting law's age restriction rather than its justifiable need criterion. (Pa11). But that is a distinction without a difference. The point of Wade is that even if one portion of a permitting law is invalid, a citizen cannot "ignore" the rest of the permitting scheme on a mere assumption that he "would have been granted a permit but for [the] one potentially invalid provision." 476 N.J. Super. at 507. That is equally true of this case as that one: just as "carrying guns in public can still be regulated and subject to a permit requirement" without a justifiable need, id. at 510, so too can New Jersey enforce the remainder of its permitting criteria, regardless of the constitutionality of the age criterion. See (Pa34-35 (motion court admitting that, absent the age restriction, "nothing … prevents New Jersey from mandating that eighteen-to-twenty-year-olds apply for and obtain permits, just as older New Jerseyans must")). That the specific permit criterion being challenged has changed thus in no way impacts Wade's fundamental analysis.

Indeed, the reasoning that animates Wade and Ringgold applies neatly to this identical case. Although defendants repeatedly argue that they can mount their claims collaterally because the age requirement is unconstitutional "on its face," (Db35-39), they misunderstand the line Wade and Ringgold drew. As explained above, the question is whether a law is completely facially invalid (so applying for a permit is unnecessary because no criterion can be in effect) from those that are only partially invalid (where seeking a permit to comply with the rest of the valid criteria is still required). See supra at 17-18. As in Wade, there is no dispute that even if the age restriction is unconstitutional, but see Point II, infra, it remains "severable from the remainder of the [permitting] statute," and "eighteen-to-twenty-year-olds [must still] apply for and obtain permits" to fulfill the rest of the criteria—such as establishing an ability to safely handle firearms or showing that the applicant will not threaten public safety. (Pa34-35 (quoting Wade, 476 N.J. Super. at 509)); see also (Pa35-36 (admitting "the requirements as upheld in Wade … must be met for a permit to issue.")). In the language of Wade, "the remaining provisions" of the permitting scheme are "constitutional and enforceable." 476 N.J. Super. at 496, 511. That is likewise fatal here.

Moreover, as in Wade, a criminal prosecution is no place for a permitting mini-trial to determine whether defendants would have sought a permit to carry and would have obtained one but for the age requirement. There are compelling

reasons to believe they would not have obeyed the law and applied for a permit to carry, regardless of the age criterion: Pinkett and Preston were arrested for possessing guns "with a purpose to use [them] unlawfully against the person or property of another," N.J.S.A. 2C:39-4(a); Phillips was arrested for possessing prohibited hollow-nose bullets, N.J.S.A. 2C:39-3(f); and all three were arrested for possessing prohibited LCMs, N.J.S.A. 2C:39-3(j). (Pa44-50; Pa60-63). That is all evidence of their disinterest in following established state law, which only confirms that this criminal prosecution would be an inappropriate forum in which to test those counterfactual questions.

And even if they had sought a permit, there is no evidence that they would have received one but for the age criterion. Defendants offer no record evidence to support that they would have passed a background check, demonstrated that their application was inconsistent with public safety, and/or satisfied the safe-handling requirements. Compare Wade, 476 N.J. Super. at 506 (noting counsel had offered a "certification representing that Wade had no other disqualifying factors and that he would have qualified to receive a permit but for the justifiable need" criterion but still finding that "insufficient to establish facts in dispute"), with (Pa67-68 (certification of Phillips's lawyer not even trying to make such an effort to discuss Phillips's other qualifications)). Instead, defendants demand another bite at the apple via a "further evidentiary hearing" to demonstrate for

the first time "that they were otherwise eligible to obtain a permit." (Db41-42). But as explained above, the point of a permitting process is to make individuals establish all of this before they carry weapons, to best protect public safety. See supra at 15-17. That is why courts regularly refuse to test such counterfactuals belatedly and outside the context of an actual permitting proceeding. See Wade, 476 N.J. Super. at 507 (law does not leave individuals "free to ignore" permitting scheme, and then challenge part of that scheme in this forum only once they are caught carrying without a permit). This Court should do the same.

Although defendants complain that they could not have gotten a permit in light of the age restriction, that argument both fails and is indistinguishable from Wade. Defendants argue that there would have been no point to seeking a permit if "a person could know with 100 percent certainty that he was ineligible for a permit because he was under twenty-one years of age." (Db33 (arguing that, in Wade, it was "not immediately ascertainable" whether someone had a justifiable need to carry unless they first sought a permit)); see also (Pa13 (motion court speculating that "there is no way to know if an application would even have been accepted for consideration because of their ages")). But defendants and the court alike overlook another avenue that would have addressed this concern: they could have filed a civil suit challenging the age criterion, before choosing to disregard the entire permitting requirement outright. See Poulos, 345 U.S. at

409 n.13 (explaining that challengers, "before they act," can "petition[] the appropriate civil tribunals for a modification of or exception from the regulation"). Indeed, that is how Bruen and Heller themselves arose: through civil suits by individuals who complied with the law until they won their court judgments. And multiple pending challenges to other age restrictions arose in the same manner. See Point II, infra (citing various pre-enforcement challenges). If defendants viewed the age criterion as unlawful, they could have challenged it in civil proceedings in either state or federal court, and then applied for a permit to satisfy the remaining criteria if they prevailed. All they could not do is "ignore a statute and presume that they would have been granted a permit but for one potentially invalid provision of a permit statute," Wade, 476 N.J. Super. at 507 (emphasis added), regardless of either the clarity or invalidity of the one permitting criterion they challenge.[6]

* * *

Wade makes clear that "carrying guns in public can still be regulated and subject to a permit requirement." Wade, 476 N.J. Super. at 509-11 (citing Bruen,

[6] If anything, defendants' argument is weaker than the argument in Wade. Wade involved a situation in which one of the permitting criterion was unquestionably unconstitutional—Bruen itself had invalidated the justifiable-need restriction. Here, by contrast, defendants were presuming not only that they would satisfy the remaining permitting criteria, but also that their view of the age restriction's unconstitutionality was correct, despite no New Jersey or U.S. Supreme Court precedent endorsing their claim.

597 U.S. at 38 n.9). By refusing to seek permits, defendants refused to comply not just with the age criterion, but also the indisputably lawful aspects of New Jersey's law, taking the law into their own hands. Just as in Wade, they cannot now challenge one discrete aspect of the State's permitting scheme after their apprehension and arrest. See id. at 505-08. Said another way, regardless of the age restriction's constitutionality, "if the State proves that [defendants] did not have permits, they will be guilty of a crime under N.J.S.A. 2C:39-5 (b)(1)." Id. at 496. The motion court should have followed Wade and denied defendants' motions without reaching the merits of the collateral Second Amendment attacks on the age requirement. See Gilliard, 2024 WL 502337, at *8 (Aa26).

POINT II

THE PERMITTING STATUTES' 21-YEAR-OLD AGE MINIMUM IS CONSTITUTIONAL.

If this Court reaches the merits, but see supra Point I, it should uphold the age criterion. Although the Second Amendment protects the right to keep and bear arms, it is "not unlimited." District of Columbia v. Heller, 554 U.S. 570, 626 (2008). Instead, governments may still adopt firearms-related measures that are consistent with the Second Amendment's "text, as informed by history," or with "the Nation's historical tradition of firearm regulation." Bruen, 597 U.S. at 19, 24. In canvassing the historical tradition, the United States Supreme Court

recently emphasized that courts need not ask whether a modern firearms law is a "historical twin" or a "dead ringer" to prior firearms restrictions. United States v. Rahimi, 144 S. Ct. 1889, 1898 (2024). Instead, the question that courts must ask is "whether the challenged regulation is consistent with the principles that underpin our regulatory tradition." Ibid. (emphasis added); see also id. at 1904 (Sotomayor, J., concurring) (noting a "regulation 'must comport with the principles underlying the Second Amendment,' but need not have a precise historical match"); id. at 1925 (Barrett, J., concurring) ("Historical regulations reveal a principle, not a mold."). New Jersey law, which restricts "any person under the age of 21 years" from receiving a permit to purchase or publicly carry handguns, N.J.S.A. 2C:58-3(c); 2C:58-4(c), is consistent with that historical tradition. The trial court and defendants' contrary conclusions misunderstand the law and the history.

1. There is a longstanding historical tradition of restricting the access of firearms for those younger than 21.

At the Founding, "[t]he age of majority at common law was 21." Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185, 201 (5th Cir. 2012) ("NRA"), abrogated on other grounds by Bruen, 597 U.S. 1; see also 1 William Blackstone, Commentaries on the Laws of England 451 (1765) ("[F]ull age in male or female, is twenty one years, …

who till that time is an infant, and so styled in law."). This meant those under 21—"minors," or "infants"—were unable to exercise "the right of petition," vote, or serve on juries. Megan Walsh & Saul Cornell, Age Restrictions and the Right to Keep and Bear Arms, 1791-1868, 108 Minn. L. Rev. 3049, 3063-65 (2024). Similarly, "[t]heir ability to enter contracts was severely restricted," such that they could usually not enter into binding contracts. Id. at 3057, 3065; accord 1 Blackstone, Commentaries, at 453. And they were often grouped with "madmen," including in being deemed ineligible to serve as peace officers. See Walsh & Cornell, supra, at 3086.

To the Founders, minors suffered from an "inability … to take care of themselves; and this inability continue[d], in contemplation of law, until the infant ha[d] attained the age of twenty-one years." 2 James Kent, Commentaries on American Law 233 (2d ed. 1832). For instance, John Adams explained that those under 21 could not vote because they lack "[j]udgment and "[w]ill" and were not "fit to be trusted by the "[p]ublic." Letter from John Adams to James Sullivan, 26 May 1776, available at https://perma.cc/CE79-RA8K. Gouverneur Morris, a signer of the Constitution and drafter of its Preamble, similarly warned that minors "want[ed] prudence" and "ha[d] no will of their own." James Madison's Notes of the Constitutional Convention, August 7, 1787, Yale L. Sch. Avalon Project, available at https://perma.cc/QJ7B-D4J4. Given that

widespread social understanding, until minors reached 21 (the age of majority), "authority over their lives rested with other decision-makers," including parents, educators, and militia superiors. Walsh & Cornell, supra, at 3068.

That impacted the circumstances under which those under 21 could access firearms. The "total parental control over children's lives extended into the schools," Brown v. Entertainment Merchants Ass'n, 564 U.S. 786, 830 (2011) (Thomas, J., dissenting), included exercising power to forbid minors from possessing guns and other weapons on university campuses, see Walsh & Cornell, supra, at 3069-72. For instance, the University of Georgia (founded in 1785) decreed that "no student shall be allowed to keep any gun, pistol, Dagger, Dirk[,] sword cane[,] or any other offensive weapon in College or elsewhere, neither shall they or either of them be allowed to be possessed of the same out of the college in any case whatsoever." The Minutes of the Senate Academicus of the State of Georgia, 1799-1842, available at https://perma.cc/7RJR-9JYR; see also Acts of the General Assembly and Ordinances of the Trustees, for the Organization and Government of the University of North Carolina 15 (Raleigh, Off. of the Raleigh Reg. 1838) ("No Student shall keep … firearms, or gunpowder."), available at https://tinyurl.com/2p8mx5zr. Thomas Jefferson, an "ardent defen[der] of an expansive vision of the right to keep and bear arms," and James Madison, "the drafter of the Second Amendment," Walsh & Cornell,

supra at 3072, likewise forbade students at the University of Virginia from "keep[ing] or us[ing] weapons or arms of any kind," University of Virginia Board of Visitors Minutes (October 4-5, 1824), Encyclopedia Va. (Dec. 7, 2020), available at https://tinyurl.com/58kmj2tj. These "regulations of student gun ownership and possession during and after the Founding era confirm that the public understanding of the Second Amendment accepted age limitations." Jones v. Bonta, 705 F. Supp. 3d 1121, 1137 (S.D. Cal. 2023) (collecting other examples).

Founding Era militia laws similarly "underscore[d] minors' inability to act independently outside of the context of adult supervision." Walsh & Cornell, supra, at 3076. Several States excluded 18-to-20-year-olds from militia service entirely—including New Jersey. See id. at 3084 (citing Act of Nov. 6, 1829, § 1, 1829 N.J. Laws 3, 3; 1843 Ohio Acts 53, § 2); see also Opinion of the Justices, 39 Mass. (22 Pick.) 571, 576 (1838) ("[I]t is competent for the State legislature by law to exempt from enrolment in the militia, all persons under twenty-one."). Indeed, even when minors were allowed or required to enroll in State militias, they were often exempted from having to furnish their own arms. See Walsh & Cornell, supra, at 3080-84 (citing, e.g., 1792 N.H. Laws 436, 447; Act of Mar. 6, 1810, ch. CVII, § 28, 1810 Mass. Acts 151, 176; Act of Jun. 18, 1793, ch. XXXVI, § 2, II Del. Laws 1134, 1135 (1793)). Rather, "[p]arents, guardians,

or, at times, the local government were responsible in the event a minor appeared without sufficient weaponry." Ibid. If minors had an established right to keep and bear arms on the same terms as adults, it would be odd for these militia laws to require parents or guardians to instead obtain arms for them. In short, "the founding generation would have shared the view that public-safety-based limitations of juvenile possession of firearms were consistent with the right to keep and bear arms." United States v. Rene E., 583 F.3d 8, 15 (1st Cir. 2009).

Restrictions on firearms possession by persons under 21 continued—and expanded—in the nineteenth century. See Heller, 554 U.S. at 605 (describing sources in this period as "a critical tool of constitutional interpretation"). The increase in regulations on firearms possession were brought about by "dramatic technological changes," Bruen, 597 U.S. at 27, as by "the mid-19th century," "[i]mprovements in weapons technology contributed to [a] rise in interpersonal violence," Bianchi v. Brown, 111 F.4th 438, 464-65 (4th Cir. 2024) (en banc) (explaining that during the Founding era, "there was little regulation of firearms in America, as they were seldom used in homicides that grew out of the tensions of daily life"). Thus, "civilians"—including minors—"had easy access to more portable and precise firearms than ever before." Id. at 465. This "easier access and potential abuse of firearms by minors" led governments to respond, including restricting minors' access. Walsh & Cornell, supra, at 3088-89.

Even before the Civil War, Alabama, Tennessee, and Kentucky limited minors' access to firearms. See Act of Feb. 2, 1856, no. 26, § 1, 1856 Ala. Acts 17, 17 (prohibiting selling, giving, or lending "to any male minor, a bowie knife, … or air gun or pistol"), available at https://tinyurl.com/mr3kvnan; 1856 Tenn. Acts 92, 92 (similarly prohibiting selling, giving, or lending "to any minor a pistol, bowie-knife, dirk or Arkansas tooth-pick"), available at https://tinyurl.com/3e4nfn6n; Act of Jan. 12, § 23, 1860 Ky. Acts 241, 245 (prohibiting "any person, other than the parent or guardian" from selling, giving, or lending "any pistol, dirk, bowie-knife, … or other deadly weapon"), available at https://tinyurl.com/4awczbr6. Importantly, those three States understood "minors" to cover those under 21 at that time. See, e.g., Saltonstall v. Riley, 28 Ala. 164, 172 (1856) (describing "a minor under the age of twenty-one years"); Seay v. Bacon, 36 Tenn. 99, 102 (1856) (distinguishing "minors" from those that "had attained the age of twenty-one years"); Newland v. Gentry, 57 Ky. 666, 671 (1857) (explaining that an infant's "minority" lasted until "he attains the age of twenty-one"); see also NRA, 700 F.3d at 201 (explaining that "it was not until the 1970s that States enacted legislation to lower the age of majority to 18"). That is, were defendants correct, New Jersey could not restrict firearms in 2024 in the very manner multiple states restricted before the Civil War, precisely the opposite of what Bruen and Rahimi's methodology suggests.

The trend only intensified during Reconstruction—the period in which the States adopted the Fourteenth Amendment, which made the Second Amendment applicable to them for the first time. See McDonald v. City of Chicago, 561 U.S. 742, 758, 764-65 (2010) (plurality op.). During that period, "[t]he number of restrictions on minors' access to firearms increased dramatically." Walsh & Cornell, supra, at 3090-93 (collecting 14 such statutes enacted between 1875 and 1885). By "the end of the 19th century, nineteen States and the District of Columbia had enacted laws expressly restricting the ability of persons under 21 to purchase or use particular firearms, or restricting the ability of 'minors' to purchase or use particular firearms while the state age of majority was set at age 21." NRA, 700 F.3d at 202 & n.14 (citing 1856 Ala. Acts 17; 16 Del. Laws 716 (1881); 27 Stat. 116-17 (1892) (District of Columbia); 1876 Ga. Laws 112; 1881 Ill. Laws 73; 1875 Ind. Acts 86; 1884 Iowa Acts 86; 1883 Kan. Sess. Laws 159; 1873 Ky. Acts 359; 1890 La. Acts 39; 1882 Md. Laws 656; 1878 Miss. Laws 175–76; Mo.Rev.Stat. § 1274 (1879); 1885 Nev. Stat. 51; 1893 N.C. Sess. Laws 468–69; 1856 Tenn. Pub. Acts 92; 1897 Tex. Gen. Laws 221–22; 1882 W. Va. Acts 421–22; 1883 Wis. Sess. Laws 290; 1890 Wyo. Sess. Laws 1253).

Tellingly, these restrictions were seen as comfortably constitutional by those to consider the issue. Thomas Cooley, the author of a "massively popular" treatise, Heller, 554 U.S. at 616, concluded that "the State may prohibit the sale

of arms to minors." Thomas M. Cooley, Treatise on Constitutional Limitations 740 n.4 (5th ed. 1883). To support that view, Cooley cited the one constitutional challenge to such restrictions during that era: State v. Callicutt, 69 Tenn. 714 (1878). Callicutt resoundingly approved of a statute making it a crime "to sell, give, or loan a minor a pistol, or other dangerous weapon," noting such a law was "not only constitutional as tending to prevent crime but wise and salutary in all its provisions." Id. at 716-17. The State is unaware of any other constitutional challenge to these 19th-century restrictions; that the only such challenge was soundly rejected "settle[s]" that minors' access to firearms "could be prohibited consistent with the Second Amendment." Bruen, 597 U.S. at 30 (that there were "no disputes regarding the lawfulness of such prohibitions" counts strongly in favor of a modern analogue's constitutionality); cf. id. at 27 ("[I]f some jurisdictions actually attempted to enact analogous regulations during this timeframe, but those proposals were rejected on constitutional grounds, that rejection surely would provide some probative evidence of unconstitutionality." (emphasis added)).

The Nation's tradition continues to the present. Consider federal law. In the 1960s, Congress found minors' access to handguns was "a significant factor in the prevalence of lawlessness and violent crime." Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, tit. IV, § 901(a), 82 Stat. 197,

225-26 (finding "causal relationship between the easy availability of firearms other than a rifle or shotgun and juvenile and youthful criminal behavior"); see also 114 Cong. Rec. 12,309 (1968) (statement of Sen. Dodd) (noting "minors under the age of 21 years accounted for 35 percent of the arrests for the serious crimes of violence, including murder, rape, robbery, and aggravated assault," and 21 percent of the arrests for murder); Federal Firearms Act: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the S. Comm. On the Judiciary, 90th Cong. 57 (1967) (statement of Sheldon S. Cohen) (adding "[t]he easy availability of weapons make [minors'] tendency toward wild, and sometimes irrational behavior that much more violent, that much more deadly"). Congress sought to limit that availability by prohibiting commercial sale of handguns to 18-to-20-year olds across the country—a law still in effect. See 18 U.S.C. § 922(b)(1), (c)(1). And in 2022, concerned "the profile of the modern mass shooter is often in the 18-to-21-year-old range," 168 Cong. Rec. S3024 (statement of Sen. Murphy), Congress also required enhanced background checks for all persons under 21. See Bipartisan Safer Communities Act, Pub. L. No. 117-159, div. A, tit. II, § 12001(a)(1)(B)(i)(III), 136 Stat. 1313, 1323 (2022) (codified as amended at 18 U.S.C. § 922(t)(1)(C)).

That tradition is particularly pronounced among the States. A substantial majority of States and the District of Columbia today restrict access to firearms

by those under 21, just as States have done for centuries: at least 37 jurisdictions impose restrictions on the purchase, possession, or use of firearms by persons under 21. See, e.g., Alaska Stat. §§ 11.61.220(a)(6), 18.65.705; Ariz. Rev. Stat. §§ 13-3102(A)(2), 13-3112(E); Ark. Code § 5-73-309; Cal. Penal Code §§ 26150, 26155, 26170; Colo. Rev. Stat. § 18-12-203(1)(b); Conn. Gen. Stat. §§ 29-28(b), 29-35(a), 29-36f; D.C. Code §§ 7-2502.03(a)(1), 7-2509.02(a)(1); Del. Code Ann. tit. 11, § 1448(a)(5); Fla. Stat. §§ 790.06(1), (2)(b), 790.053(1); Ga. Code §§ 16-11-125.1(2.1), 16-11-126(g)(1), 16-11-129(b)(2)(A); Haw. Rev. Stat. §§ 134-2(a), 134-9(a); 430 Ill. Comp. Stat. 65/2(a)(1), 65/4(a)(2), 66/25(1); 720 Ill. Comp. Stat. 5/24-1(a)(10); Iowa Code § 724.22; Ky. Rev. Stat. § 237.110(4)(c); La. Rev. Stat. § 40:1379.3(C)(4); Mass. Gen. Laws ch. 140, § 131(d)(iv); Md. Code Ann., Pub. Safety §§ 5-101(r), 5-133(d); Mich. Comp. Laws § 28.425b(7)(a); Minn. Stat. § 624.714; Neb. Rev. Stat. § 69-2433; Nev. Rev. Stat. § 202.3657(3)(a)(1); N.J. Stat. §§ 2C:58-3(c)(4), 2C:58-4(c), 2C:58-6.1(b); N.M. Stat. § 29-19-4(A)(3); N.Y. Penal Law § 400.00(1); N.C. Gen. Stat. § 14-415.12(a)(2); Ohio Rev. Code § 2923.125(D)(1)(b); Okla. Stat. tit. 21 § 1272(A); Or. Rev. Stat. § 166.291(1)(b); 18 Pa. Cons. Stat. § 6109(b); R.I. Gen. Laws §§ 11-47-11, 11-47-18; S.C. Code § 23-31-215(A); Utah Code §§ 76-10-505, 76-10-523(5); Va. Code § 18.2-308.02(A); Wash. Rev. Code §§ 9.41.240(2),(3), 9.41.070; Wis. Stat. § 175.60(3)(a); Wyo. Stat. § 6-8-104(a)(iv), (b)(ii).

It is not difficult to see why so many States and the Federal Government have believed that imposing firearms restrictions on individuals under 21 is well within our Nation's tradition. See Rahimi, 144 S. Ct. at 1901 (asking whether a modern law is "relevantly similar" to historical laws "in both why and how it burdens the Second Amendment right"). Indeed, courts consistently hold that the Second Amendment, at a minimum, permits restrictions that "address a risk of dangerousness," because "[l]egislatures historically prohibited possession by categories of persons based on a conclusion that the category as a whole presented an unacceptable risk of danger if armed." United States v. Jackson, 110 F.4th 1120, 1127-28 (8th Cir. 2024); accord United States v. Perez-Garcia, 96 F.4th 1166, 1186 (9th Cir. 2024); United States v. Williams, 113 F.4th 637, 650, 657 (6th Cir. 2024); Kanter v. Barr, 919 F.3d 437, 464-65 (7th Cir. 2019) (Barrett, J., dissenting). This Court likewise has recognized the state Legislature's "broad discretion to determine when people's status or conduct indicate[s] a sufficient threat to warrant disarmament." M.U., 475 N.J. Super. at 189. Said another way, States remain free to make "present-day judgments about categories of people whose possession of guns would endanger the public safety," Kanter, 919 F.3d at 464-65 (Barrett, J., dissenting), consistent with that long and unbroken historical tradition.

The Legislature was free to determine that allowing persons under 21 to access firearms would present an unacceptable risk of danger—and thus regulate them. See, e.g., NRA, 700 F.3d at 203 (finding federal restrictions on "ability of 18-to-20-year-olds to purchase handguns" from retailers to be "consistent with a longstanding tradition of targeting select groups' ability to access and to use arms for the sake of public safety," including "a longstanding tradition of age- and safety-based restrictions on the ability to access arms"). As explained above, legislative findings across decades confirm that access to firearms by individuals under 21 is both "a significant factor in the prevalence of lawlessness and violent crime" and a driver of mass shootings. See supra at 34-35 (findings in 1968 and 2022 laws). The evidence bears those findings out: "The 18-to-20-year age group … has been identified as disproportionately prone to violence, including gun violence, compared to older age groups." Jones, 705 F.Supp.3d at 1134.

A range of statistics unfortunately substantiates the dangerousness of this age group. The group currently commits crimes at a disproportionate rate: 18-to-20-year-olds made up 15% of homicide and manslaughter arrests in 2019, despite constituting less than 4% of the U.S. population. Compare U.S. Dep't of Justice, Crime in the U.S., Arrests, by Age, 2019, Tbl. 38, available at https://tinyurl.com/a36b236v, with U.S. Census Bureau, Age and Sex

Composition in the U.S.: 2019, Tbl. 1, available at https://tinyurl.com/nhcyk3ap. Furthermore, FBI data "confirms that homicide rates peak between the ages of 18 and 20"; research shows this "age group commits gun homicides at a rate three times higher than adults aged 21 or older"; and "studies show that at least one in eight victims of mass shootings from 1992 to 2018 were killed by an 18 to 20-year-old." Lara v. Comm'r Pa. State Police, 97 F.4th 156, 164-65 & nn. 26-28 (Mem) (3d Cir. 2024) (Krause, J., dissenting from denial of rehearing en banc) (collecting sources).

Modern evidence helps explain the threat. As one federal court discussed, "studies have concluded individuals between the ages of 18 and 20 'are more impulsive, more likely to engage in risky and reckless behavior, unduly influenced by peer pressure, motivated more by rewards than costs or negative consequences, less likely to consider the future consequences of their actions and decisions, and less able to control themselves in emotionally arousing situations.'" Jones, 705 F.Supp.3d at 1134 (quoting report by developmental psychologist). This is at least in part due to "still-developing cognitive systems of 18-20-year-olds" leading to "increas[ed] risk of impulsive behavior." Ibid. Modern biology teaches that "[o]ne of the last parts of the brain to mature—and which continues to develop into the mid-twenties—is the prefrontal cortex, which supports self-control, including judgment, impulse control and inhibition,

and long-range planning." Ibid.; see also NRA, 700 F.3d at 210 & n.21 (noting "modern scientific research supports the commonsense notion that 18-to-20-year-olds tend to be more impulsive than young adults aged 21 and over"); Lara, 97 F.4th at 164 & nn. 30-31 (Krause, J., dissenting) (discussing, e.g., Mariam Arain et al., Maturation of the Adolescent Brain, 9 Neuropsychiatric Disease & Treatment 449, 453, 456 (2013), on adolescent development).[7]

This is all why several courts, before and after Bruen, detailed this clear historical tradition in upholding other restrictions on minors' access to firearms. See, e.g., NRA, 700 F.3d at 200-04 (discussing "considerable historical evidence of age- and safety-based restrictions on the ability to access arms" in upholding a federal statute restricting sale of handguns to individuals under 21); Rene E., 584 F.3d at 12 (relying on "existence of a longstanding tradition of prohibiting juveniles from both receiving and possessing handguns" to uphold a juvenile ban); Jones, 705 F. Supp. 3d at 1136 (in analogous lawsuit, relying on "historical

[7] At the Founding such persons were seen not only as dangerous, but as incapable of civic virtue. Beyond restricting firearms from categories considered dangerous, governments have limited the right to keep and bear arms to the "virtuous citizenry." M.U., 475 N.J. Super. at 184 & n.9 (collecting cases and sources). The Founders were "animated by a classical republican notion that only those with adequate civic 'virtue' could claim the right to arms," and believed individuals under 21 lacked civic virtue. NRA, 700 F.3d at 201-02 (acknowledging the Second Amendment allows for restrictions on "those who, like children or the mentally imbalanced, are deemed incapable of virtue"); Rene E., 583 F.3d at 15-16 (same).

regulations which limited the ability of 18-to-20-year-olds to purchase, acquire, and possess certain weapons" to uphold California law generally prohibiting the sale of long guns to individuals under 21). This Court should join them.

2. Defendants and the motion court's contrary positions fall short. Their central premise is that, to justify the permitting scheme's age criterion, the State must produce "founding era regulations" that "categorically disarm[ed] people under twenty-one." (Db4-5, 20); accord (Pa32 (recognizing the approach "relies only on prior laws on the books" during the Founding Era)). That view "misunderst[ands] the methodology" the Second Amendment analysis requires in multiple respects. Rahimi, 144 S. Ct. at 1897.

As an initial matter, defendants and the motion court err in demanding the modern law be a perfect match to its historical predecessors. The United States Supreme Court's decision in Rahimi is crystal clear that while a modern firearms "law must comport with the principles underlying the Second Amendment, … it need not be a dead ringer or a historical twin." Id. at 1898 (cleaned up). Said another way, the Second Amendment is "not meant to suggest a law trapped in amber": the Constitution "permits more than just those regulations identical to ones that could be found in 1791." Id. at 1897-98; see also id. at 1925 (Barrett, J., concurring) (agreeing that Second Amendment reasoning is not "a regulatory straightjacket"; that the "challenged regulation need not be an updated model of

a historical counterpart"; and that "imposing a test that demands overly specific analogues has serious problems"). The State has provided significant evidence from the Founding that individuals under 21 did not have the same unrestricted access to firearms as other adults, and illustrates the governing principles—including a risk of danger, and their status as infants—that explain why. See supra at 27-31, 37-40. In light of Rahimi, that is amply sufficient to uphold the restrictions.

Moreover, defendants' and the motion court's approach suffers a deeper error: our Nation's history is replete with identical age-based restrictions, and such history from the nineteenth century cannot be discounted. As noted above, from before the Civil War and continuing unbroken through the present, a wide range of States have restricted access to firearms by those under 21. See supra at 32-36 (cataloguing laws). Defendants and the motion court believed that New Jersey could not rely on such evidence because the State was limited to evidence from the Founding alone, but Rahimi is again to the contrary. As the lopsided majority explained, if there is a consistent tradition across time periods—even if the precise evidence available at the Founding or at Reconstruction differs—it is "unnecessary to decide" which takes precedence, and courts may consider sources from both eras. 144 S. Ct. at 1898 n.1; see id. at 1897-98 ("[T]he Second Amendment permits more than just those regulations identical to ones that could

be found in 1791."); id. at 1916 (Kavanaugh, J., concurring) (emphasizing need for judges to consider the broader tradition, "at least when reasonably consistent and longstanding," to interpret "vague constitutional text"). Indeed, in this case, the principle that States could restrict access to firearms by those under 21 was strikingly consistent across the Founding and Reconstruction, even if the precise approach to those restrictions developed across the 19th Century. Defendants and the motion court thus err in foreclosing this important source of history.

Indeed, discounting such voluminous evidence from the Reconstruction era is particularly untenable. Because the Fourteenth Amendment incorporated the Second Amendment against the States, Reconstruction-Era sources—which reflect how the ratifying States understood that Amendment—are "a critical tool of constitutional interpretation." Heller, 554 U.S. at 605-19 (evaluating "how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century"); McDonald, 561 U.S. at 770-78 (plurality) (citing sources showing the "ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty"); see also Rahimi, 144 S. Ct. at 1913 (Kavanaugh, J., concurring) ("The Court also looks to the understandings of the American people from the pertinent ratification era."); cf. Tyler v. Hennepin County, 598 U.S. 631, 641-42 (2023) (same approach for Takings Clause). This Court thus

has a responsibility to assess "the understanding of the right to bear arms both at the time of the ratification of the Second Amendment in 1791 and at the time of the ratification of the Fourteenth Amendment in 1868." Wolford v. Lopez, No. 23-16164, __ F.4th ___, 2024 WL 4097462, at *12 (9th Cir. Sept. 6, 2024); see also, e.g., Antonyuk v. Chiumento, 89 F.4th 271, 304-05 (2d Cir. 2023) ("[T]he prevailing understanding of the right to bear arms in 1868 and 1791 are both focal points of our analysis."), vacated in light of Rahimi, 144 S. Ct. 2709 (Mem) (2024). Given the originalist methodology governing this challenge, it would be a puzzling result indeed for the Fourteenth Amendment to foreclose state laws that the States had specifically maintained when ratifying it—as the decision below does.

Defendants and the motion court's reliance on two federal decisions—the Third Circuit's ruling in Lara, 91 F.4th 122 (2024), reh'g en banc denied, 97 F.4th 156 (2024), cert. pet'n pending, No. 24-93 (U.S.), and the Eighth Circuit's opinion in Worth v. Jacobson, 108 F.4th 677 (2024)—is unavailing. Those cases, to be sure, invalidated firearms restrictions on individuals under 21. But as an initial matter, those courts do not bind this one, see Ryan v. Am. Honda Motor Co., 186 N.J. 431, 436 (2006), and other cases and jurists have found to the contrary. See, e.g., Jones v. Bonta, 705 F. Supp. 3d 1121; NRA, 700 F.3d 185; Lara, 91 F.4th at 140-48 (Restrepo, J., dissenting); Lara, 97 F.4th at 156-

66 (Krause, J., dissenting from denial of rehearing en banc); Nat'l Rifle Ass'n v. Bondi, 61 F.4th 1317 (11th Cir. 2023), opinion vacated upon granting of re'hg en banc, 72 F.4th 1346 (11th Cir. 2023). This Court should instead adhere to Rahimi and the robust historical record—and principles the record illuminates—in this case.

Nor are they persuasive. Most crucially, Lara predates Rahimi, and may be vacated pursuant to a pending certiorari petition in light of that intervening decision. Lara, after all, demanded that the State be able to provide a precise "founding-era statute imposing restrictions on the freedom of 18-to-20-year-olds to carry guns." 91 F.4th at 137; see also id. at 134 ("set[ting] aside the … catalogue of statutes from the mid-to-late nineteenth century" entirely). But Rahimi since emphasized the importance of considering the "principles" behind our tradition rather than demanding precise fits between historical and modern laws, and noted that judges should not rule out evidence from Reconstruction if those principles are consistent. See 144 S. Ct. at 1897-98 & n.1; see also id. at 1925 (Barrett, J., concurring) (rejecting view that the "founding-era legislatures maximally exercised their power to regulate, thereby adopting a 'use it or lose it' view of legislative authority"). By correctly assessing the relevant historical

principles in light of Rahimi, rather than looking for a Founding Era twin, this Court does not have to disregard such a significant body of evidence.[8]

In addition to this central methodological error, defendants also challenge specific portions of the State's historical evidence, (see Db19-25), but none of their responses hold water. First, they rely on Worth to dismiss Founding-Era college restrictions as "much different in scope" than an age minimum to obtain a public-carry permit. (Db21-22 (quoting 108 F.4th at 695-96)). But such restrictions "illuminate broadly shared cultur[al] and legal values"—also known as the underlying historical principle—that support the understanding "that for individuals below the age of majority, there was no unfettered right to purchase, keep, or bear arms." Walsh & Cornell, supra, at 3073-75; accord Jones, 705 F. Supp. 3d at 1137 ("[U]niversity rules … demonstrate the general understanding during the historically relevant era that firearm regulation of 18-20-year-olds was well-established on numerous fronts and consistent with … state regulation in the first half of the nineteenth century"). Rahimi could hardly have been more

[8] And although Worth was decided after Rahimi, it gave the Supreme Court's instructions short shrift. The Eighth Circuit there "analyze[d] the government's identified historical analogues" without once asking what historical principle those analogues produced. 108 F.4th at 688 (emphasis added). In doing so, it applied a "divide-and-conquer approach to the historical evidence" that Rahimi and other circuits have repeatedly and squarely rejected. Perez-Garcia, 96 F.4th at 1191.

explicit that an analysis based on historical principles, rather than a demand for a historical dead ringer, properly reflects the Second Amendment's scope.

Second, defendants misunderstand the Founding era militia evidence on which they rely. Defendants claim that the Militia Act of 1792 supports their view because it "required all able-bodied men to enroll in the militia and to arm themselves upon turning 18." (Db23 (citing 1 Stat. 271)). But that claim runs into multiple independent problems. For one, "the 1792 Militia Act gave States discretion to impose age qualifications on service, and several States chose to enroll only persons age 21 or over, or required parental consent for persons under 21." NRA, 700 F.3d at 204 n.17 (debunking defendants' reliance on the Militia Act). Indeed, as recounted above, some States—including New Jersey—beginning eligibility at 21 (vitiating defendants' argument) and others allowing participating in a militia as young as 15 (even though no one would suggest 15-year-olds have a Second Amendment right to possess firearms). See ibid. ("Such fluctuation undermines [defendants'] militia-based claim that the right to purchase arms must fully vest precisely at age 18."). And other laws exempted those under 21 from having to furnish arms—and placed that responsibility with parents or guardians, given the Founding-era view that individuals remained infants. See supra at 27-31. The better reading of Founding-era militia laws is that they reinforced the historical understanding that minors lacked "an

independent, constitutional right to keep and bear arms outside of the militia context." Walsh & Cornell, supra, at 3086.

Moreover, the reliance on the Militia Act of 1792 suffers from a second problem: it wrongly conflates mandatory "militia service for individuals under the age of 21" with a "general right to independently commercially acquire [or publicly carry] firearms for individual use for any purpose." Jones v. Bonta, 705 F. Supp. 3d at 1138; accord Bondi, 61 F.4th at 1331; Walsh & Cornell, supra, at 3075-76. Indeed, the argument "that every citizen who is subject to military duty has the right to keep and bear arms, and that this right necessarily implies the right to buy or otherwise acquire, and the right in others to give, sell, or loan to him" was expressly rejected by a Reconstruction-era state high court in Callicutt, 69 Tenn. at 716-17, the case easily disposing of the sole Founding- or Reconstruction-era constitutional challenge to an age restriction. Citing the Militia Act of 1792 is hardly enough to undermine age-based firearms restrictions that have been widespread across the Nation for centuries.

Finally, defendants argue that even if this Court were to consider various 19th-century age restrictions, several restrictions are too different because they "regulated only the furnishing of firearms to persons under twenty-one" instead of regulating those persons' ability to carry arms in public. (Db23-24). But that response runs into three independent problems. For one, it overlooks that many

of the Reconstruction era sources are highly similar or even more capacious than the modern restriction they challenge. See, e.g., 1883 Wis. Sess. Laws 290 ("It shall be unlawful for any minor, within this state, to go armed with any pistol or revolver, and it shall be the duty of all sheriff's, constables, or other public police officers, to take from any minor, any pistol or revolver, found in his possession."), available at https://tinyurl.com/234xhbpr; 1883 Kan. Sess. Laws 159 ("Any minor who shall have in his possession any pistol, revolver … or other dangerous weapon, shall be deemed guilty of a misdemeanor."), available at https://tinyurl.com/mv2cdzn4. For another, defendants yet again demand the State produce a "dead ringer" or a "historical twin," contrary to the clear teachings of Rahimi, 144 S. Ct. at 1898. See also id. at 1901 (emphasizing that even if a State's law is "by no means identical" to these Reconstruction-era laws, "it does not need to be"). And finally, there has always been variation among States on the best way to protect individuals from firearms violence, including firearms violence by those under 21. See Bianchi, 111 F.4th at 447 (emphasizing that "States may take a variety of approaches to address" firearms violence, and that the Second Amendment has always coexisted with "the worthy virtues of federalism and democracy"); McDonald, 561 U.S. at 785 (plurality op.) (explaining that the Second Amendment "by no means eliminates" States' "ability to devise solutions to social problems that suit local

needs and values" such that "state and local experimentation with reasonable firearms regulations will [lawfully] continue"). By restricting minors' ability to carry firearms, New Jersey law clearly "comport[s] with the principles underlying the Second Amendment." Rahimi, 144 S. Ct. at 1898.

CONCLUSION

This Court should reverse and vacate the order dismissing the counts of the indictments charging defendants with unlawful possession of a handgun without a permit.

Respectfully submitted,

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October 3, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

STATE OF NEW JERSEY, Plaintiff-Appellant, v. KYREED PINKETT & DEJOHN PRESTON, Defendant-Respondents.	:	CRIMINAL ACTION
	:	DOCKET NO. A-3121-23T2
	:	Ind. No. 22-10-2698-I
	:	DOCKET NO. A-3122-23T2
	:	Ind. No. 22-03-534-I
STATE OF NEW JERSEY, Plaintiff-Appellant, v. JERRON PHILLIPS, Defendant-Respondent.	:	On Leave to Appeal from Orders of the Superior Court of New Jersey, Law Division, Essex County. Sat Below: Hon. Christopher S. Romanyshyn, J.S.C.

BRIEF OF RESPONDENTS IN RESPONSE TO THE AMICUS BRIEF OF THE ATTORNEY GENERAL

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DEFENDANTS ARE NOT CONFINED

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POINT I

THIS COURT SHOULD AFFIRM THE DISMISSAL OF THE COUNTS OF THE INDICTMENTS CHARGING DEFENDANTS WITH UNLAWFUL POSSESSION OF A FIREARM BECAUSE DEFENDANTS HAD STANDING TO CHALLENGE NEW JERSEY'S PROHIBITION ON THE PUBLIC CARRY OF HANDGUNS BY PERSONS YOUNGER THAN TWENTY-ONE YEARS AND THIS AGE RESTRICTION VIOLATES THE SECOND AMENDMENT.

Despite the Attorney General's (hereinafter "AG") attempt to marshal historical arguments beyond those made by the county prosecutor, the State has still failed to meet its burden to demonstrate that New Jersey's law prohibiting eighteen-to-twenty-year-olds from publicly carrying handguns for self-defense is consistent with the Nation's historical tradition of firearm regulation. (Point I.A) Likewise, the AG's argument that defendants' lack standing fails because it omits any discussion of the first basis for standing under the futility exception (Point I.B.1), and it relies on an erroneous reading of the controlling case law concerning the second basis for standing under the facial challenge exception. (Point I.B.2) And contrary to the AG's assertion that it would be unworkable to hold a hearing to determine could have counterfactually met the other requirements for a handgun carry permit at the

time of the offense, we routinely task courts with assessing counterfactual claims, such as in the inevitable discovery exception to the Fourth Amendment's exclusionary rule (Point I.C)

A. The State Has Failed To Meet Its Burden To Demonstrate That New Jersey's Law Prohibiting Eighteen-To-Twenty-Year-Olds From Publicly Carrying Handguns For Self-Defense Is Consistent With The Nation's Historical Tradition Of Firearm Regulation.

At the outset, it is noteworthy to point out the difference between the State's and AG's arguments on the merits. As explained in our initial brief, the Court in N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022) set forth a two-step test for assessing whether a firearms regulation comports with the Second Amendment. Step one asks whether "the Second Amendment's plain text covers an individual's conduct," and if it does, whether "the Constitution presumptively protects that conduct." Id. at 24. The burden then shifts to the government in step two to "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." Ibid.

The State spends nine pages arguing that defendants' Second Amendment argument fails at step one because persons under the age of twenty-one are not part of "the people" mentioned in the text of the Second Amendment. (Pb22-31)[1] The AG does not make this same argument,

[1] The following abbreviations will be used:

presumably because there is not a single post-Bruen opinion holding that eighteen-to-twenty-year-olds are not protected by the Second Amendment.

The AG focuses entirely on step two of Bruen, arguing that New Jersey's law of prohibiting anyone under twenty-one from carrying a handgun is consistent with our nation's historical tradition of firearm regulation. (AGb26-50) The AG proffers the following as historical analogues for New Jersey's carry permit age restriction: (1) the age of majority of twenty-one years at the Founding; (2) Founding-era university and college prohibitions on firearms; (3) several States' exclusion of eighteen-to-twenty-year-olds from militia service; (4) three pre-Civil War and numerous Reconstruction-era laws restricting the ability of persons under twenty-one to purchase or use particular firearms; (5) and one state court opinion deciding a constitutional challenge to an age restriction: State v. Callicutt, 69 Tenn. 714 (1878).

First, with respect to the age of majority of twenty-one years at the Founding, the AG argues this is relevant because it meant that persons under twenty-one were unable to exercise the right of petition, vote, serve on juries,

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Db – Defendant-Respondent's Response Brief (filed Sept. 16, 2024)
Pb – State's Brief
Pa – State's Appendix
AGb – Attorney General's Brief
1T – April 1, 2024 (oral argument)
2T – April 29, 2024 (oral argument)

or enter into binding contracts. (AGb27-28) But at the time of the Founding, women and black men were also widely prohibited from exercising any of these legal rights. Dred Scott v. Sandford, 60 U.S. 393, 421-27 (1857); Lucy Fowler, Gender and Jury Deliberations: The Contributions of Social Science, 12 Wm. & Mary J. Women & L. 1, 1 (2005); Nino C. Monea, Vanguards of Democracy: Juries As Forerunners of Representative Government, 28 UCLA Women's L.J. 169, 188, 202 (2021); Allison Anna Tait, The Beginning of the End of Coverture: A Reappraisal of the Married Woman's Separate Estate, 26 Yale J.L. & Feminism 165, 167 (2014). These historical exclusions obviously would not permit states to presently enact laws prohibiting women or African Americans from carrying handguns. Thus, historical exclusions of persons under twenty-one years old cannot serve to justify present restrictions on the Second Amendment rights of eighteen-to-twenty-year-olds.

Moreover, as explained by the Fourth Circuit:

> [T]he age of majority—even at the Founding—lacks meaning without reference to a particular right. As Blackstone's Commentaries makes clear, the relevant age of majority depended on the capacity or activity. 1 William Blackstone, Commentaries 463-64 (St. G. Tucker ed., 1803). . . . For example, a man could take an oath at age 12, be capitally punished in a criminal case at age 14, and serve as an executor at age 17. Id. at 463–64. . . . So while the full age of majority was 21, that only mattered for specific activities. Id. And even so, constitutional rights were not generally tied to an age of majority, as the First and Fourth Amendments

> applied to minors at the Founding as they do today. So the age of majority Blackstone identifies for different activities tells us little about the scope of the Second Amendment's protections.
>
> Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco & Explosives, 5 F.4th 407, 435 (4th Cir.), vacated as moot, 14 F.4th 322 (4th Cir. 2021).

Thus, the AG's citation to the age of majority at the time of the founding thus cannot dispositively justify New Jersey's absolute curtailment of the Second Amendment rights of eighteen-to-twenty-year-olds.

Regarding Founding-era college restrictions on the possession of firearms on campus by students, Defendants already pointed out in their initial response that these laws are not analogous to statewide categorical ban on handgun possession by eighteen-to-twenty-year-olds because they were the policies of institutions that had guardianship authority in loco parentis rather than statewide government statutes, and "a restriction on the possession of firearms in a school (a sensitive place) is much different in scope than a blanket ban on public carry." Worth v. Jacobson, 108 F.4th 677, 695-96 (8th Cir. 2024); see also Fraser v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 672 F. Supp. 3d 118, 144 (E.D. Va. 2023). (Db21-22) Moreover, "these regulations support the assumption that, outside of the public university setting, college-aged students could, and did, regularly possess firearms." Fraser, 672 F. Supp. 3d at 144.

Turning to the militia, the AG notes that in 1829 and 1843 New Jersey and Ohio exempted eighteen-to-twenty-year-olds from militia service. (AGb30) But these were exemptions from mandatory militia service rather than exclusions or prohibitions on militia service. Moreover, the earliest of these two laws, New Jersey's, was enacted thirty-eight years after the ratification of the Second Amendment. At the time of the ratification of the Second Amendment, New Jersey's minimum age for militia service was sixteen, 1780 N.J. Laws 42-43, which it raised to eighteen after the passage of the Milita Act of 1792. 1792 N.J. Laws 850-53. David B. Kopel & Joseph G.S. Greenlee, The Second Amendment Rights of Young Adults, 43 S. Ill. U. L.J. 495, 537-38 (2019). In fact, "18-to-20-year-olds were included in the federal militia and each state's militia at the time of the founding." Id. at 505, 579.

The Supreme Court was clear in District of Columbia v. Heller, 554 U.S. 570, 596 (2008), that "the ordinary definition of the militia [i]s all able-bodied men" and "[f]rom that pool, Congress has plenary power to organize the units that will make up an effective fighting force." The Court cited the Militia Act of 1792, which provided for the enrolment in the federally organized militia of "each and every free able-bodied white male . . . who is or shall be of the age of eighteen years, and under the age of forty-five years." Ibid. But the Court recognized that legislative enactments that conscripted only men of certain

ages did not themselves define the scope of the militia:

> To be sure, Congress need not conscript every able-bodied man into the militia, because nothing in Article I suggests that in exercising its power to organize, discipline, and arm the militia, Congress must focus upon the entire body. Although the militia consists of all able-bodied men, the federally organized militia may consist of a subset of them.
>
> [Ibid.]

Thus, any State's decision to exempt men below the age of twenty-one from militia service has no bearing on the "ordinary definition of the militia" that existed at the founding; the ordinary definition of the militia at the time of the founding clearly included men ages eighteen to twenty.

Additionally, Heller is clear that while the Second Amendment right to keep and bear arms was not limited to militiamen, all members of the militia enjoyed the right to keep and bear arms. Heller noted, "the conception of the militia at the time of the Second Amendment's ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty." Id. at 627. The core reason for the Second Amendment's enactment was to prevent "the threat that the new Federal Government would destroy the citizens' militia by taking away their arms"—the arms the militiamen possessed at home. Id. at 599. The AG tries to deflect the persuasive weight of this history by pointing to the laws of

three states that exempted persons under twenty-one from having to furnish their own arms. (AGb30) The AG fails again to note that an exemption from a requirement is not equivalent to a prohibition; moreover, the Supreme Court in Bruen flatly rejected the idea that "three colonial regulations could suffice to show a tradition of public-carry regulation." 597 U.S. at 46.

The AG next cites three pre-Civil War state statutes restricting access to firearms for persons under twenty-one years of age—those enacted by Alabama, Tennessee, and Kentucky—and twenty similar Reconstruction enactments. Defendants already addressed these laws in our initial response brief. (Db23-25) We respond here only to specifically address the AG's s focus on the three pre-Civil War statutes. All three governed the furnishing of pistols to persons under twenty-one rather than governing the right to public carry. Act of Feb. 2, 1856, no. 26, § 1, 1856 Ala. Acts 17; 1856 Tenn. Acts 92; Act of Jan. 12, § 23, 1860 Ky. Acts 241, 245. Kentucky's Act, however, did not prohibit parents from furnishing pistols to their children under twenty-one. 1860 Ky. Acts 241, 245. And Tennessee's Act did not apply to the provision of "a gun for hunting", nor did it prohibit the provision of a pistol to a person under twenty-one if he were "travelling on a journey." 1856 Tenn. Acts 92; Act of Jan. 12, § 23.

The AG erroneously argues that under United States v. Rahimi, 144 S.

Ct. 1889 (2024), these nineteenth century laws demonstrate a sufficient historical tradition to justify New Jersey's age restriction on carry permits. (AGb41-46) Although Rahimi, as Bruen, declined to hold definitively that Reconstruction-era regulations were irrelevant to determining the nation's historical tradition of firearms regulation, id. at 1898 n.1, Rahimi focused exclusively on—and explicitly prioritized—founding-era regulations. 144 S. Ct. at 1899-1901. The Court described the historical analogue test as "'apply[ing] faithfully the balance struck by the founding generation to modern circumstances.'" Id. at 1898 (emphasis added) (quoting Bruen, 597 U.S. at 29). The Court then pegged the "why" and "how" of the historical test to the founding era: the "why" requires looking at whether "laws at the founding regulated firearm use to address particular problems," and the "how" requires looking at whether the "law regulates arms-bearing . . . to an extent beyond what was done at the founding." Ibid. (emphasis added).

Rahimi makes clear that the AG's cited nineteenth century laws neither support the "why" nor the "how" of New Jersey's categorical age restriction. Although the usual explanation for the "why" legislatures may have historically placed some restrictions on minors' access to firearms is the view that minors were not "responsible" enough to be entrusted with firearms, Rahimi "reject[ed] the Government's contention that Rahimi may be disarmed

simply because he is not 'responsible.'" Id. at 1903. Nor does Rahimi provide support for the AG's alternative suggestion for "why"—that legislatures are free to disarm categories of people they deem to be "dangerous." (AGb37) Rahimi did not approve a law disarming an entire category people based on a legislature's determination that the category of people posed a danger; rather, Rahimi approved a law disarming an individual after a court had made an individualized "finding that [the] individual poses a credible threat to the physical safety of an intimate partner." Id. at 1891. New Jersey's categorical age restriction does not require any similar individualized finding of dangerousness. The actual "how" and "why" of the nineteenth century laws cited by the AGs reflects the judgment of legislatures that because parents maintain "authority over" minors' lives, parents should have a say in the firearms to which their children have access. Because New Jersey no longer affords parents any legal authority over their children once they reach the age of eighteen, the "how" and "why" of these nineteenth century laws do not support categorical prohibition on the carrying of firearms by eighteen-to-twenty-year-olds, who are presently legally adults.

Finally, the AG's reliance on the Tennessee Supreme Court decision Callicutt is likewise misplaced. Callicutt erroneously assumed that the Second Amendment protected only the right of the people to bear arms "for their

common defense" and did not protect the right "of individual members of society to carry arms, in times of public peace." 69 Tenn. at 716. This erroneous belief that the Second Amendment protected only the collective right of the militia to bear arms was obviously abrogated by Heller. 554 U.S. at 576, 579-81. Heller's abrogation of Callicutt is made clear by the fact that Callicutt relied on the interpretation of the Second Amendment by an earlier decision of the Tennessee Supreme Court, Aymette v. State, 21 Tenn. 154 (1840), which Heller explicitly denounced. Id. at 613 ("[Aymette's] odd reading of the right, to be sure, is not the one we adopt."). Thus, Callicutt thus has no persuasive force whatsoever.

Because the AG, as well as the Essex County Prosecutor, has failed to meet its burden to demonstrate that New Jersey's law prohibiting eighteen-to-twenty-year-olds from publicly carrying handguns for self-defense is consistent with the Nation's historical tradition of firearm regulation, this Court should conclude that the permit requirement of N.J.S.A. 2C:39-5(b)(1) in combination with the twenty-one-year-old age requirement to receive a permit violates the Second Amendment.

B. Defendants Have Standing To Challenge The Constitutionality Of New Jersey's Age Restriction On Carry Permits Without Having First Applied For Permits Because: (1) This Restriction Categorically Barred Them From Eligibility For Permits And Made It Futile To Apply; And (2) Defendants Brought A Facial Challenge To The Statutory Scheme.

Defendants have standing to raise this constitutional challenge on two different bases. First, they have standing under the futility exception: because "submitting an application" for a firearm permit "would have been futile"—in that the challenged criterion rendered them statutorily ineligible for a permit—their "[f]ailure to apply for a license" does not "preclude [their] challenge." United States v. Decastro, 682 F.3d 160, 164 (2nd Cir. 2012) (internal citation omitted); State v. Wade, 476 N.J. Super. 490, 506 (App. Div. 2023) (citing Decastro). Second, they have standing because they challenge the age restriction as void on its face: because "the ordinance is void on its face, it was not necessary for [the defendants] to seek a permit under it." Lovell v. City of Griffin, 303 U.S. 444, 452-53 (1938); see also City of Chicago v. Atchison, T. & S. F. Ry. Co., 357 U.S. 77, 89 (1958); Smith v. Cahoon, 283 U.S. 553, 562 (1931); Plummer v. United States, 983 A.2d 323, 342 (D.C. 2009) (holding that under Smith and Atchison a defendant charged with violating a firearm licensing scheme has standing to bring a facial challenge to the licensing scheme despite not having applied for a license).

The AG now argues that defendants lack standing because (1) Wade outright precludes defendant's standing; and (2) the cases that allow a defendant to challenge a permitting scheme after arrest for violating the scheme limit this defense to permitting laws that are invalid "in their entirety." (AGb13-17) The AG is incorrect on both points.

1. Defendants have standing under the futility exception to the application requirement.

The AG's brief first correctly quotes Wade's assertion that "to establish standing to challenge an allegedly unconstitutional permit statute, the challenger must have applied for a permit or license under the statute." 476 N.J. Super. at 505. (AGb13) But the AG completely omits any reference to Wade's following sentence: "there is a recognized exception to the submission requirement if the challenger can 'make a substantial showing that submitting to the government policy would [have been] futile.'" Id. at 506 (quoting Kendrick v. Bruck, 586 F. Supp. 3d 300, 308 (D.N.J. 2022)). In fact, the AG's brief fails to mention the futility exception to the application requirement even once. (AGb1-50) Even the State's brief acknowledged Wade's recognition that a criminal defendant has standing to challenge the constitutionality of a permitting scheme despite never having applied for a permit if he can show that applying would have been futile. (Sb9) Presumably, the AG does not mention the futility exception because, as set forth in Defendants' Response

Brief, it is clear that Defendants satisfy the futility exception by virtue of being "statutorily ineligible for a carry license" because of their age. Bach v. Pataki, 408 F.3d 75, 83 (2d Cir. 2005). (Db26-34)

Instead of attempting to rebut defendants' showing that they satisfy the futility exception, the AG offers only the following: "Although defendants complain that they could not have gotten a permit in light of the age restriction, that argument both fails and is indistinguishable from Wade" because "defendants . . . overlook another avenue that would have addressed [their] concern [on futility]: they could have filed a civil suit challenging the age criterion, before choosing to disregard the entire permitting requirement outright." (AGb24) But the existence of an alternative legal challenge in no way undermines the ability to raise the challenge as a defense to prosecution. See Plummer, 983 A.2d at 340 (rejecting the argument that Plummer was required to "file a civil judicial challenge to the licensing statute").

Because defendants meet the futility exception under federal law (Db26-34), they have standing to challenge their prosecution under New Jersey standing law. Wade, 476 N.J. Super. at 506 (recognizing an "exception to the submission requirement" based on futility in New Jersey). This Court should thus affirm the trial court's finding that defendants satisfied the futility

exception and have standing to challenge the constitutionality of the permitting scheme via their motion to dismiss. R. 3:10-2(d).

2. Defendants have standing because they challenge the handgun age restriction as invalid on its face.

In addition to the futility exception, defendants also have standing because their motion to dismiss constituted a facial challenge to the statutory scheme of prohibiting eighteen-to-twenty-year-olds from obtaining a handgun carry permit and then prosecuting them for publicly carrying a handgun without a permit. As noted in Defendants' original brief, the Supreme Court has distinguished between (1) licensing schemes that are facially constitutional but applied in violation of an individual's constitutional right—in which case a defendant may not raise an as applied challenge to his prosecution for having violated the scheme if he never applied for a license—and (2) licensing schemes that are facially unconstitutional—in which case the defendant may raise a facial challenge to the constitutionality of the licensing scheme as a defense to his prosecution despite never having applied for a license. Smith, 283 U.S. at 562 (1931). (Db35-37) In both the Fourteenth Amendment and First Amendment contexts, the Supreme Court has held when "the ordinance is void on its face, it [is] not necessary for appellant to seek a permit under it. She [is] entitled to contest its validity in answer to the charge against her." Lovell, 303 U.S. at 452-53 (emphasis added) (citing Smith, 283 U.S. at 562).

In Wade, this Court rejected the defendants' assertion that they had standing because they were bringing a facial challenge, quoting Kendrick, 586 F. Supp. 3d at 309: "While First Amendment cases have permitted standing for plaintiffs who have not sought permits, Second Amendment cases have not."[2] Wade, 476 N.J. Super. at 508. However, the reason that Kendrick found the plaintiffs in that case did not have standing to challenge New Jersey's Firearms Purchaser Identification Card ("FID") scheme without having first applied for an FID was that they did not establish—or even allege—"that such an application would be futile." 586 F. Supp. 3d at 308. Kendrick's holding on standing is thus quite narrow—it held only that the standing rule articulated in Smith and Lovell does not apply to firearms licensing schemes without a demonstration of futility. This is what Kendrick meant that it "decline[d] to import First Amendment case law wholesale" into Second Amendment jurisprudence—that it would not apply Smith and Lovell "wholesale" in a

[2] While Kendrick does not defeat Defendants' standing in this case, it should be noted that Kendrick's decision not "to import First Amendment case law wholesale" into Second Amendment jurisprudence came before Bruen. Bruen clearly held that the "Second Amendment standard accords with how we protect . . . . the freedom of speech in the First Amendment." 597 U.S. at 24. Bruen could not have been any clearer that the Second Amendment "is not 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees,'"—the Second Amendment must receive the same protection as the First Amendment. Id. at 70 (quoting McDonald v. City of Chicago, 561 U.S. 742, 780 (2010)).

Second Amendment challenge to the extent that one might read Smith and Lovell to permit standing absent a finding of futility.[3]

In contrast to the Kendrick plaintiffs, Defendants in this case have definitively established that it would have been futile for them to have applied for a carry permit because they were statutorily ineligible based on their age. Defendants here do not argue that Smith and Lovell would afford standing absent a showing of futility; Defendants embrace the futility requirement.

Both before and after Bruen, courts in several jurisdictions have held that mounting a facial challenge to a firearm permitting scheme under which a defendant is prosecuted gives the defendant standing to challenge the permitting scheme despite never having applied for a permit. See People v. Sovey, 179 N.Y.S.3d 867, 871 (N.Y. Sup. Ct. 2022); Golden v. United States, 248 A.3d 925, 948 (D.C. App. 2021); Jackson v. United States, 76 A.3d 920 (D.C. App. 2013); Magnus v. United States, 11 A.3d 237 (D.C. App. 2011); Plummer, 983 A.2d at 341.

The AG recognizes Plummer as articulating a legitimate basis for standing but attempts to distinguish it, arguing that Plummer involved a

[3] This is made even clearer by reading the Courts of Appeals opinions cited by Kendrick. Decastro, as noted, held that a defendant could establish standing "if he made a substantial showing that submitting an application would have been futile." 682 F.3d at 164, 167. And Libertarian Party of Erie Cnty. v. Cuomo, 970 F.3d 106, 121 (2d Cir. 2020) cites approvingly the Decastro futility rule.

permitting scheme which was "completely invalid"—i.e. "all its criteria are unlawful"—whereas Defendants here challenge "only discrete portions of an overall permitting scheme." (AGb17-18). This is an incorrect description of Plummer. The Court in Plummer indicated that the defendant had not challenged all the permitting provisions: "Plummer has not challenged [certain] qualifications [for registration] include[ing] age, criminal history, mental capacity and vision." 983 A.2d at 342. Despite this, the Court agreed with Plummer's argument that the confluence of several statutes operated as "an invalid and unlawful outright ban on the registration (and consequent licensing) of his handgun," thus giving Plummer "standing to raise the Second Amendment issue as a defense to the criminal charges against him by moving to dismiss the indictment, even though he did not attempt to obtain a registration certificate and license for his handgun prior to his arrest." Id. at 340-42. The Court addressed the licensing criteria that Plummer had not challenged by remanding for a hearing to determine whether Plummer would have been able to meet those other criteria prior to the imposition of the charges in his case. Id. at 342.

The actual line drawn by the Supreme Court for when a defendant can challenge a permitting scheme in defense to criminal prosecution despite not having applied for a permit is whether the scheme is facially invalid. See, e.g.,

Lovell, 303 U.S. at 452-53 ("As the ordinance is void on its face, it was not necessary for appellant to seek a permit under it. She was entitled to contest its validity in answer to the charge against her.") (emphasis added). If the statute is "valid upon its face," a person may not challenge the statute in "anticipation of improper or invalid action in administration" if the person "failed to make the required application." Smith, 283 U.S. at 562. But the person who is criminally prosecuted for failing to comply with a permitting scheme may "question of the validity of the statute, upon which the prosecution is based," if the "statute is invalid upon its face." Ibid. (emphasis added).

"A facial challenge to a legislative Act . . . . must establish that no set of circumstances exists under which the Act would be valid." United States v. Salerno, 481 U.S. 739, 745 (1987). Defendants in this case clearly raise a facial challenge by arguing that the confluence of N.J.S.A. 2C:39-5(b)(1), N.J.S.A. 2C:58-4(c), and N.J.S.A. 2C:58-3(c)(4) violates the Second Amendment by categorically baring eighteen-to-twenty-year-olds from carrying handguns in public for self-defense. Defendants argue this age-based restriction is "unconstitutional in all of its applications," Plummer, 983 A.2d at 338, because it "applies, without any stated exception to" every person between the ages of eighteen and twenty. Smith, 283 U.S. at 562. Defendants do not argue that the statute is merely unconstitutional "under some

conceivable set of circumstances," Salerno, 481 U.S. at 744, or that it is merely "possible" that the statute would be applied in a manner that is unconstitutional. Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 455 (2008) (emphasis added). Defendants argue that prohibiting eighteen-to-twenty-year-olds from carrying handguns based solely on their age is always unconstitutional.

The AG erroneously argues that a facial challenge to a licensing scheme is insufficient to establish standing where only one licensing provision is facially invalid—that a defendant has standing only where the licensing scheme is "completely facially invalid" because "all its criteria are unlawful." (AGb22, 17) (emphasis in original). But Plummer, applying federal standing law, makes clear that this is incorrect; Plummer challenged D.C.'s absolute prohibition on registering handguns under D.C. Code § 7–2502.02(a)(4) but did not challenge the general requirements for obtaining a registration certificate for other firearms under D.C. Code § 7–2502.03(a). 983 A.2d at 341-42. Although the Court held only that Section 7–2502.02(a)(4) was unconstitutional and did not strike down any of the other registration criteria under Section 7–2502.03(a), the Court nonetheless held that Plummer had "standing to raise the Second Amendment issue" in defense to his prosecution. Id. at 342.

The AG's proffered rule—that all criteria of a licensing scheme must be invalid in order for a defendant who did not apply for a license to have standing to challenge the scheme—would impose a much higher threshold for standing that the federal standard explained in Plummer. But applying a more stringent rule for standing under New Jersey law than federal law would violate the principle that New Jersey takes "a much more liberal approach on the issue of standing than have the federal cases." Crescent Park Tenants Ass'n v. Realty Equities Corp. of New York, 58 N.J. 98, 101 (1971).

The AG's citation to Borough of Collingswood v. Ringgold, 66 N.J. 350 (1975) is equally unavailing to defeat Defendants' standing. (AGb14-16, 18, 22) Defendants in Ringgold were convicted of violating "the Borough of Collingswood's Ordinance No. 601, prohibiting canvassing or soliciting without first registering with the Chief of Police." Id. at 354. Defendants had engaged in canvassing Collingswood residents to survey the residents' "preference for radio stations" without having first obtained a permit from the police chief. Ibid. On appeal, they argued that the ordinance violated the First Amendment because: (1) the First Amendment does not permit any "registration requirement whatsoever;" and (2) the ordinance was overbroad and permitted the denial of permission to canvass "for arbitrary or otherwise improper reasons." The Court held that registration requirement was

constitutional because it was limited to canvassing and did not give the Police Chief "virtually unbridled and absolute power to" deny a canvassing application; it provided that canvassers would be granted permission so long as they first identified themselves to the Police Chief. Id. at 365-66.

While Ringgold note "[p]arenthetically" that the ordinance was "sufficient on its face so that it could not properly be ignored with impunity by these defendants," citing Poulos v. New Hampshire, 345 U.S. 395 (1953), this passing reference does not in anyway articulate the rule of standing proffered by the AG in this case. Id. at 364. First, Ringgold did not hold that the defendants in that case lacked standing to bring their First Amendment challenge; it did not mention standing at all. Instead, the Court actually adjudicated—and rejected—the defendant's constitutional challenge on the merits—something it need not have done had it concluded they lacked standing to bring the challenge. Id. at 362-69. Ringgold did not state that it would have affirmed defendants' convictions even if had agreed with their First Amendment arguments. Thus, it clearly does not articulate the "completely facially invalid" standard for standing that the AG seems to suggest it does—nor does it articulate any standard for standing whatsoever. (AGb22)

Moreover, Ringgold is not at all analogous to this case. While the Ringgold defendants argued that it was unconstitutional to require them to

seek a permit altogether, Defendants here do not argue that the State may not require that persons obtain a handgun carry permit to be able to carry a handgun. While the Ringgold defendants incorrectly argued that the ordinance in that case gave unlimited discretion to the police chief to deny a request for a permit, they did not even argue that this supposed discretion would have led to a denial of a canvassing permit had they requested one. In contrast, Defendants here challenge a mandatory, non-discretionary provision that indisputably would have resulted in a rejection of their carry permit application.

In sum, the AG proposes a rule for standing that is more restrictive than federal law and is therefore inapplicable. And the AG offers no argument as to why defendants have failed to raise a facial challenge as properly understood under federal law. Accordingly, defendants have successfully shown that, by facially challenging the 18-20 age restriction as invalid on its face, they have "standing to raise the Second Amendment issue as a defense to [their] criminal charges against [them] by moving to dismiss the indictment, even though [they] did not attempt to obtain a [handgun] registration certificate and license . . . prior to [their] arrest[s]." Plummer, 983 A.2d at 341.

C. A Hearing To Determine Whether Defendants Were Otherwise Eligible For A Handgun Carry Permit Under N.J.S.A. 2C:58-3 and 2C:58-4 Would Not Be "All But Impossible To Administer."

The Attorney General argues that it would be "all but impossible to

administer" a rule that would require a criminal court to evaluate whether a defendant would have met all the criteria for a carry permit other than the one he challenged. (AGb16-17) To the contrary, criminal courts are charged with answering counterfactuals in a number of different scenarios. For example, when a defendant files a motion to suppress the fruits of an unreasonable warrantless search under the Fourth Amendment, the State can attempt to avoid suppression by proving that the evidence would have inevitably been discovered. To prove the inevitable discovery exception, the State must prove:

> (1) proper, normal and specific investigatory procedures would have been pursued in order to complete the investigation of the case; (2) under all of the surrounding relevant circumstances the pursuit of those procedures would have inevitably resulted in the discovery of the evidence; and (3) the discovery of the evidence through the use of such procedures would have occurred wholly independently of the discovery of such evidence by unlawful means.
>
> [State v. Sugar, 100 N.J. 214, 238 (1985).]

If a criminal court can make those counterfactual determinations, surely it can also determine in this case whether:

> (1) defendant would have applied for a permit had there been no justifiable-need provision or 21-year-old requirement; (2) could have shown he was thoroughly familiar with safe handling of handguns; (3) could have found individuals to endorse his application; and (4) could have satisfied the disqualification requirement, including showing that his application to carry in public was not contrary to public safety.

[(AGb16)]

CONCLUSION

For the aforementioned reasons, this Court should affirm the motion court's order dismissing the counts of the indictments charging Pinkett, Preston, and Phillips with unlawful possession of a handgun. In the alternative, after affirming the motion court's holdings that (1) Pinkett, Preston, and Phillips have standing to challenge New Jersey's age restriction on issuing handgun carry permits and (2) New Jersey's age restriction prohibiting persons under twenty-one years of age from publicly carrying handguns violates the Second Amendment, this Court should then remand for an evidentiary hearing at which the motion court must determine whether Pinkett, Preston, and Phillips would have been able to satisfy the requirements for a handgun carry permit other than the age requirement.

Respectfully submitted,

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Superior Court of New Jersey
APPELLATE DIVISION
DOCKET NOs. A-3121-23T2; A-3122-23T2

STATE OF NEW JERSEY, Plaintiff-Appellant, v. KYREED PINKETT & DEJOHN PRESTON, Defendants-Respondents.	
STATE OF NEW JERSEY, Plaintiff-Appellant v. JERRON PHILLIPS, Defendant-Respondent.	CRIMINAL ACTION On Appeal From an Interlocutory Order of the Superior Court of New Jersey, Essex County Dismissing Counts in the Indictment Sat Below: Hon. Christopher S. Romanyshyn, J.S.C.

BRIEF AND APPENDIX ON BEHALF OF THE ATTORNEY GENERAL OF NEW JERSEY, AMICUS CURIAE

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PRELIMINARY STATEMENT

For over a century, New Jersey law has required individuals to seek and obtain a permit before they may publicly carry a firearm. For good reason: the permitting regime allows law enforcement to ensure that an individual does not threaten public safety and thus can be trusted to possess a firearm in public. But defendants violated that bedrock public-safety requirement; as they concede on appeal, they do not have and never sought a permit to carry. Instead, they simply chose to take the law into their own hands, as law enforcement discovered when they found defendants in public with handguns and large capacity magazines. The core question on appeal is therefore whether defendants can now collaterally attack one of the underlying criteria for a permit—that the applicant be 21 years of age or older—after being charged for carrying without one.

This Court answered that question in State v. Wade. There, the defendants (like the defendants here) never applied for a carry permit, but were nevertheless apprehended in public with firearms. After those defendants were arrested for carrying without a permit, they claimed that the United States Supreme Court's subsequent decision in New York State Rifle & Pistol Ass'n v. Bruen rendered their prosecutions unconstitutional. Central to their theory was that Bruen had rendered one of the underlying criteria for obtaining a permit—that the applicant had a "justifiable need" to carry—invalid under the Second Amendment. But

this Court explained that their challenge could not proceed: the defendants had never requested carry permits but instead took the law into their own hands and carried anyway. As a result, those defendants could not excuse their unlawful conduct on the grounds that Bruen had invalidated one of the underlying permit criteria, especially as the permitting criteria were severable. As Wade held, an individual who wishes to challenge parts of a permitting system may not simply ignore that system, wait until he has been arrested, and then seek to raise a collateral attack on the licensing criteria in order to avoid the consequences of his actions. That is dispositive in this identical case. This Court can and should stop there.

In any event, if this Court does consider the collateral attack on the permit criteria, defendants run into a second problem: the age requirement survives Second Amendment scrutiny because it comports with our Nation's historical tradition. As the United States Supreme Court explained most recently in United States v. Rahimi, States have considerable flexibility to address the problem of gun violence, so long as the measures the States adopt stay within the broad principles underlying the Nation's historical tradition. As relevant to this case, extraordinary historical evidence confirms that States can place limits on access to firearms by those under 21—evidence present at every period of this country's history. And that overwhelming evidence is consistent with the broad principles

allowing restrictions on firearms by those who present a public safety risk—a population that, modern evidence confirms, includes those under 21. Under any of these principles, the age requirement passes muster.

The motion court wrongly entertained defendants' collateral attacks and invalidated the longstanding age requirement. This Court should reverse.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

Amicus Attorney General relies on the Statement of Procedural History and Facts in the State's brief and highlights the following.

A. New Jersey's Public Carry Permitting Law.

1. Public carry of handguns has long been "the most closely-regulated aspect of [the State's] gun-control laws." In re Preis, 118 N.J. 564, 568 (1990). Since 1905, New Jersey has restricted the concealed carrying of firearms to individuals who had permits to do so. See 1905 N.J. Laws, ch. 172 at 324. That remains true today: any individual who wishes to carry a handgun in public must first obtain a permit. N.J.S.A. 2C:39-5 (b)(1). Knowingly possessing a handgun in public without such a permit is a second-degree crime. Ibid.

To obtain a permit, an applicant must follow a two-step process. First, the applicant must apply to the relevant law enforcement official—the chief police officer in the municipality, or the superintendent of the State Police. N.J.S.A. 2C:58-4(c). At the time of defendants' arrests (August 2021 and January 2022), the application required certain biographical information and the endorsement of "three reputable persons who have known the applicant for at least three years

[1] As they are closely related, the Attorney General has combined these sections for the Court's convenience.

preceding the date of application, and who shall certify ... that the applicant is a person of good moral character and behavior." N.J.S.A. 2C:58-4(b).

An applicant must also satisfy several substantive criteria, including the age requirement at issue here. Among other things, the applicant must "not [be] subject to any of the disabilities set forth in [2C:58-3(c)]." N.J.S.A. 2C:58-4(c). Those disqualifications turn on factors like the applicant's mental and physical health, criminal history, potential danger to public safety, and—relevant here—age. N.J.S.A. 2C:58-3(c). "Any person under the age of 21 years" must be denied a permit. N.J.S.A. 2C:58-3(c)(4).[2] The applicant must also show "that he is thoroughly familiar with the safe handling and use of handguns," N.J.S.A. 2C:58-4(c), which he can show by completing a training course, submitting qualification scores, or passing a use-of-force test, N.J.A.C. 13:54-2.4(b), (c).

[2] New Jersey law separately prohibits those under 21 from "purchas[ing] … or otherwise acquir[ing] a handgun, unless the person is authorized to possess the handgun in connection with the performance of official duties." N.J.S.A. 2C:58-6.1(a). And such persons cannot "possess, carry, fire or use a handgun except under" enumerated circumstances, including under a parent's supervision or for military training. N.J.S.A. 2C:58-6.1 (b). But as the motion court recognized, "[n]one of the defendants [were] charged with the fourth-degree crime under N.J.S.A. 2C:58-6.1," (Pa3), so those prohibitions should not be at issue here, as defendants Phillips and Pinkett concede (Db7 n.3).

Further, until Bruen, he had to establish "a justifiable need to carry a handgun" based on an "urgent necessity for self-protection." N.J.S.A. 2C:58-4(c).[3]

Second, after the application is submitted, the chief or the superintendent conducts the necessary background checks. Ibid. At the time of defendants' offenses, if the chief or superintendent approved the application, the applicant had to present it to the Superior Court for review. N.J.S.A. 2C:58-4(d). (Today, there is no such requirement—approval by the chief or superintendent is final.) If the Superior Court was likewise satisfied that all permit requirements were met, it issued an order granting the applicant a public carry permit. Ibid. If the court instead considered denying the permit, state law required it to first hold a hearing to allow the applicant "to proffer reasons why he satisfies the standard and respond to any questions from the judge." In re Carlstrom, 240 N.J. 563, 572 (2020). At the hearing, the court could take evidence and hear testimony to assess whether the applicant qualifies for a permit. Id. at 572-73.

If the chief police officer or superintendent instead denies the application, then the applicant may request a hearing in the Superior Court within 30 days of the denial. N.J.S.A. 2C:58-4(e). In any case, a permit applicant dissatisfied

[3] As noted below, N.J.S.A. 2C:58-3 and 58-4 were amended effective December 22, 2022. L. 2022, c. 131, §§ 2-3. These citations are to the statutes as they existed at the time of defendants' offenses.

with the decision of the Superior Court may appeal the decision "in accordance with law and the rules governing the courts of this State." Ibid.

2. New Jersey partially amended these laws after defendants' arrests, but the State retained the requirements that individuals must obtain a permit before carrying a gun in public and that those under 21 cannot acquire such permits. In June 2022, the United States Supreme Court issued Bruen, holding that New York's "proper cause" requirement to obtain a license to carry in public—which required individuals to establish a special self-defense need before they could publicly carry—violated the right of "ordinary, law-abiding citizens" to "carry handguns publicly for self-defense." 597 U.S. 1, 9-11 (2022). The Court noted that other States' analogous requirements to show "special need for self-protection" to get public-carry permits were also invalid. Id. at 12-15 & n.2.

But Bruen did not disturb other parts of the permitting laws. The majority in Bruen explicitly acknowledged that a wide range of States had "well-defined restrictions governing the intent for which one could carry arms, the manner of carry, or the exceptional circumstances under which one could not carry arms." Id. at 38. Beyond recognizing their existence, the Court made clear it had no doubt as to the validity of those "licensing regimes"—that is, while it found that States could not condition the grant of a carry license on a showing of a special self-defense need, it confirmed that States could require an individual to obtain

a permit to carry more generally. Id. at 38 n.9; see also id. at 80 (Kavanaugh, J., concurring) (confirming that "the 6 States . . . potentially affected by today's decision," including New Jersey, "may continue to require licenses for carrying handguns for self-defense" without the heightened self-defense requirement). That is, "Bruen['s] … holding did not effectuate a wholesale invalidation of the various states' gun licensing and permit systems." In re M.U.'s Application for a Handgun Purchase Permit, 475 N.J. Super. 148, 192 n.11 (App. Div. 2023).

The day after the Court issued Bruen, the New Jersey Attorney General issued a Law Enforcement Directive to implement the decision. See N.J. Att'y Gen. L. Enf't Dir. 2022-07 (June 24, 2022) (Aa1-3). The Directive underscored that "[w]hile Bruen impacts our justifiable need requirement, the ruling does not change any other aspect of New Jersey's public carry laws." (Aa1). The Directive further reminded residents that "carrying a handgun without a permit is still illegal in this state, and law enforcement agencies must consider all other [] mandatory requirements for obtaining a carry permit before granting an application." (Aa1-2). And it instructed that "the applicable law enforcement agency shall continue to ensure that the applicant satisfies all of the criteria of N.J.S.A. 2C:58-4d and N.J.A.C. 13:54-2.4, except that the applicant need not submit a written certification of justifiable need to carry a handgun." (Aa2).

In December 2022, the Legislature likewise amended the permitting laws in light of Bruen. Consistent with the Supreme Court's decision and Directive 2022-07, the statute formally eliminated the "justifiable need" requirement and revised a series of other requirements. See L. 2022, c. 131. But the amended statute did not change the basic requirement that a person in New Jersey obtain a permit before lawfully carrying a handgun in public, or that the person would need to satisfy a number of longstanding requirements before obtaining such a permit—including reaching the age of 21. See id.; N.J.S.A 2C:39-5(b). Chapter 131 retained the various disqualifications under N.J.S.A. 2C:58-3(c), and added that an applicant cannot receive a permit if he is subject to an outstanding arrest warrant or is a fugitive fleeing from another state. L. 2022, c.131, § 2. Further, the applicant must be endorsed by four reputable persons who certify that he "has not engaged in any acts or made any statements that suggest the applicant is likely to engage in conduct, other than lawful self-defense, that would pose a danger to the applicant or others." Id. § 3. The new statute also enumerated conditions for online instruction, in-person instruction, and target training. See id. § 3(d), (g). And it added requirements for how an individual who has obtained a permit may lawfully carry, such as requiring that the person carry the handgun in a holster. See id. §§ 2(d), 3, 4, 5.

B. Factual Background.

Defendants were all under the age of 21 when they were found in public with handguns equipped with large-capacity magazines (LCMs). None had ever applied for a permit.

In August 2021, Phillips—then 18—was arrested and found with a fully loaded handgun equipped with an LCM. (Pa58-59).[4] He was indicted in March 2022 for second-degree unlawful possession of a handgun, violating N.J.S.A. 2C:39-5(b); fourth-degree possession of hollow-point bullets, violating N.J.S.A. 2C:39-3(f); and fourth-degree possession of an LCM, violating N.J.S.A. 2C:39-3(j). (Pa2-3, 60-63).

In January 2022, Preston and Pinkett—then 19 and 20, respectively—were arrested and found with two handguns, both affixed with LCMs. (Pa40-43). They were indicted in October 2022 for second-degree unlawful possession of a handgun, fourth-degree possession of an LCM, and second-degree possession of a weapon for an unlawful purpose, violating N.J.S.A. 2C:39-4(a). (Pa44-50).

All three defendants separately moved to dismiss the unlawful handgun possession counts against them. Their cases were consolidated by the motion court, who heard oral argument. (Pa2-3).

[4] The Attorney General adopts the State's citations to the record: Pa refers to the State's Appendix, and Db refers to defendants' (Phillips and Pinkett) brief. Aa refers to the Attorney General's appendix.

The court granted defendants' motions. Although it acknowledged this Court's holding in State v. Wade, 476 N.J. Super. 490 (App. Div. 2023), leave to appeal denied, 255 N.J. 492 (2023), that defendants could not challenge their indictments for permitless carry when they had never previously applied for a permit, it determined that Wade was "not dispositive" in this case because it "implicates an entirely different section of the permitting statutes." (Pa11). The motion court thus concluded that "a criminal court is a proper venue to challenge the constitutionality of New Jersey gun permitting statutes" even if a defendant has failed to apply for a permit entirely. (Pa12).

Turning to the merits, the motion court examined the constitutionality of not just the permitting laws' age requirement, see N.J.S.A. 2C:58-4(c); 2C:58-3(c)(4), but also the separate statute generally prohibiting those under 21 from purchasing and possessing handguns, N.J.S.A. 2C:58-6.1—even though, as the court acknowledged, "[n]one of the defendants [we]re charged with the fourth-degree crime under N.J.S.A. 2C:58-6.1." (Pa3). Citing Bruen, the motion court asked whether the State had shown "that N.J.S.A. 2C:58-6.1 is consistent with the Nation's history and tradition of firearms regulation." (Pa14). Finding that the State had not done so, the Court facially invalidated N.J.S.A. 2C:58-6.1 and then declared that "N.J.S.A. 2C:39-5(b), operating through N.J.S.A. 2C:58-4, [is] unconstitutional as applied to these defendants." (Pa33-34).

On May 10, 2024, the motion court stayed its decision pending resolution of the State's motion for leave to appeal. (Pa39; Pa57). On June 11, 2024, this Court granted the State's motions for leave to appeal and to continue the stay. (Pa69-72). This Court also granted the State's motion to consolidate the three appeals. (Pa73). The Attorney General moved to appear as amicus curiae and to file this brief on October 3, 2024.

LEGAL ARGUMENT

POINT I

DEFENDANTS' COLLATERAL CHALLENGES ARE FORECLOSED BY WADE.

1. This appeal should begin and end with Wade—and the myriad decisions and principles on which that precedent relies. In Wade, defendants were arrested before Bruen for carrying without a permit, 476 N.J. Super. at 495, and it was undisputed that "neither defendant had applied for a permit" before, id. at 498. While defendants chose to challenge the constitutionality of the underlying permitting requirements only after they had been arrested for carrying in public without a permit, this Court explained that such challenges could not proceed.

As Wade explained, the challengers' failure to first seek a permit violated the longstanding concept that "to establish standing to challenge an allegedly unconstitutional permit statute, the challenger must have applied for a permit or license under the statute." Id. at 505-06 (collecting cases). That requirement is based on the bedrock principle that "law-abiding citizens are not free to ignore a statute and presume that they would have been granted a permit but for one potentially invalid provision of a permit statute." Id. at 507 (discussing Borough of Collingswood v. Ringgold, 66 N.J. 350 (1975)). Importantly, "even if [the challengers] had standing to make a constitutional challenge," the concededly unconstitutional justifiable-need provision was severable from the rest of the

permitting law. Id . at 508-10. So the "remaining provisions" of the permitting laws were "constitutional and enforceable at the time of [challengers'] arrest." Id. at 511. Said another way, even though one of the permitting criteria in effect at the time—justifiable need—was unconstitutional, multiple other criteria were still valid, and thus defendants still could not have carried a firearm in public without satisfying them first. There was, in short, no way for the defendants to get around their failure to seek a permit and to instead just carry unlawfully.

Wade also discussed in detail the precedents and principles that compelled this conclusion. As Wade explained, our Supreme Court confronted a similar situation in Collingswood v. Ringgold, involving a constitutional challenge to an ordinance requiring permits for door-to-door solicitations. See Wade, 476 N.J. Super. at 507-08 (citing 66 N.J. at 354, 364). There, the ordinance gave the local police chief discretion to reject door-to-door solicitation permits based on a criminal conviction or unethical business practices without "furnish[ing] any clue as to what standards the [c]hief may bring to bear on the issue of when to deny or when to grant a permit in the face of a conviction or reported unethical business practices." 66 N.J. at 366-67. Our Supreme Court agreed that such unfettered discretion was unconstitutional, but also held that the remainder of the scheme—including the requirement to obtain a permit in the first place—was valid. 66 N.J. at 366-67, 369. Because the defendants in Ringgold violated

that permit requirement altogether and never "attempted to register as required," the Court held their "conduct clearly f[ell] within the proscription of this ordinance" and "could not properly be ignored with impunity." Id. at 364. So even though part of the underlying permitting scheme was unlawful, the Court thus "affirmed defendant[s'] convictions." Wade, 476 N.J. Super. at 507.

There are good reasons for the rule adopted in Ringgold and Wade. For one, it is a matter of public safety: the very reason that States maintain licensing requirements is to ensure, in advance, that an individual is properly qualified to carry a firearm in public. See Poulos v. New Hampshire, 345 U.S. 395, 409 & n.13 (1953) (noting that the "valid requirements of license are for the good of the applicants and the public"); see also Bruen, 597 U.S. at 38 n.9 (discussing carry license regimes). But if the law "allow[s] applicants to proceed without the required permits to run businesses, erect structures, [or] purchase firearms," and then challenge the permitting requirements only once they have been caught, that "is apt to cause breaches of the peace or create public dangers." Poulos, 345 U.S. at 409 & n.13 (emphasis added). Nor is this unfair; individuals have "the choice of complying with the regulation, or not engaging in the regulated activity, or before they act, petitioning the appropriate civil tribunals for a modification of or exception from the regulation." Ibid. All they cannot choose is to go without a permit and then challenge part of the permitting process only

if caught. Ibid. After all, allowing persons to "ignore[]" a permitting process "with impunity," Ringgold, 66 N.J. at 364, based on their personal opinion that they would later win a challenge to some of its terms, would offend the principle that "no man can be judge in his own case," Walker v. City of Birmingham, 388 U.S. 307, 320-21 (1967), and undermine the incentive for anyone to comply.

For another, a contrary rule would be all but impossible to administer. In a case in which there are multiple valid permitting criteria, and only one criterion has been held unconstitutional, there would be a question whether the defendant would have sought a permit but for the unconstitutional criterion and would have been able to obtain one. See Wade, 476 N.J. Super. at 506 (emphasizing those defendants had not "established" that they "would have qualified for a gun-carry permit excluding the justifiable need requirement"). But "a motion to dismiss criminal charges is not the proper venue" to make permit-related challenges. Id. at 507. It would require the court overseeing a criminal prosecution to evaluate, among other things, whether (1) defendant would have applied for a permit had there been no justifiable-need provision or 21-year-old requirement; (2) could have shown he was thoroughly familiar with safe handling of handguns; (3) could have found individuals to endorse his application; and (4) could have satisfied the disqualification requirement, including showing that his application to carry in public was not contrary to public safety. See supra at 4-7, 9 (citing

other undisputed requirements). When an individual does not follow the law and first seek a permit, but instead raises a collateral challenge after an arrest, the Court is "left to speculate" whether he would have been "denied the permits" based on any of these separate requirements. Wade, 476 N.J. Super. at 507. A criminal prosecution is no place for such a permitting mini-trial.

Wade also explained why this approach applies to permitting laws that are only challenged or invalidated in part, rather than in their entirety. The Attorney General has consistently acknowledged that a challenger may collaterally attack a permitting law that is "completely invalid"—i.e., if all its criteria are unlawful. City of Chicago v. Atchison, T. & S. F. Ry. Co., 357 U.S. 77, 89 (1958) (citing Smith v. Cahoon, 283 U.S. 553, 562 (1931); Staub v. City of Baxley, 355 U.S. 313, 319 (1958)). That makes sense; if the entire permitting process is invalid, it is "as though the[law] did not exist." Poulos, 345 U.S. at 410-14 (discussing cases). There is no basis to require someone to seek a permit that is completely unlawful in all its criteria, as there is no part of the process to which they could still be subject. Indeed, that was the case in Plummer v. United States, 983 A.2d 323 (D.C. 2009), on which defendants rely. (Db37-39). In Plummer, the D.C. Court of Appeals allowed a defendant to invoke the unconstitutionality of D.C.'s "total ban on handgun possession" as a defense to his prosecution despite never

applying for a license, because that restriction was "completely invalid," not just invalid in part. 983 A.2d at 340-42 (quoting Chicago, 357 U.S. at 89).

But as Wade explains, that specific exception has no bearing here. Where only discrete portions of an overall permitting scheme are unconstitutional, then individuals are still required to seek a permit to show they satisfy the rest of the permitting criteria, and a decision to carry without any permit whatsoever may still be punished because it "clearly falls within the [scheme's] proscription"—the provisions still in effect. Ringgold, 66 N.J. at 364, 366-67; accord Wade, 476 N.J. Super. at 508-11. As Wade explained, that describes the State's public-carry law: even if the permit criteria included an "invalid provision," each of the permitting criteria was severable, leaving the ultimate requirement to obtain a permit before carrying a firearm "constitutional and enforceable at the time of defendants' arrest." 476 N.J. Super. at 507, 511. In other words, "carrying guns in public can still be regulated and subject to a permit requirement," and that permitting mandate can still be enforced against challengers who choose not to follow it. Id. at 508, 510; id. at 496 ("[E]ach defendant needed a permit to carry handguns outside their homes and if the State proves that they did not have permits, they will be guilty of a crime under N.J.S.A. 2C:39-5(b)(1).").

Given the wealth of precedents and principles on which Wade relied, it is no surprise that this Court has repeatedly foreclosed collateral challenges to the

State's public-carry permitting law before and after Wade, and that both the U.S. Supreme Court and our Supreme Court have rejected petitions to review these decisions. See Wade, 255 N.J. 492 (denying leave to appeal); State v. Reeves, No. A-0921-20, 2023 WL 2358676, at *3 (App. Div. Mar. 6, 2023) (Aa6)[5] ("agree[ing] with the Attorney General that a criminal prosecution is not the proper venue for demonstrating that defendant would have been granted an unrestricted permit if the justifiable-need requirement did not exist"), certif. denied, 254 N.J. 176 (2023), and cert. denied, No. 23-6521, 144 S. Ct. 2633 (Mem) (2024); State v. Hiraldo, No. A-2599-21, 2023 WL 7545161, at *6 (App. Div. Nov. 14, 2023) (Aa16-17) (following Wade). When an individual is arrested for carrying a firearm in public without a permit, he cannot collaterally challenge one of the underlying criteria in this severable permitting scheme.

2. Wade compels the outcome here. As in Wade, these defendants were arrested for possessing a handgun without a permit in contravention of N.J.S.A. 2C:39-5 (b)(1). (Pa2-3). As in Wade, defendants concededly never applied for a permit, yet carried firearms in public anyway. And as in Wade, defendants sought to leverage subsequent Supreme Court Second Amendment precedent to

[5] While unpublished opinions do not constitute precedent and are not binding on any court, they can serve as secondary authority. R. 1:36-3; Pressler & Verniero, Current N.J. Court Rules, comment 2 on R. 1:36-3, p. 337 (2023). The Attorney General is not aware of any contrary unpublished opinions. R. 1:36-3.

collaterally attack their charges. But as Wade held, such collateral challenges to this permitting law cannot proceed. See 476 N.J. Super. at 507 (emphasizing no one can "ignore" a permitting scheme on the assumption that he "would have been granted a permit but for one potentially invalid provision").

That should have been the end of this collateral attack. Given "the same or indistinguishable fact pattern" here, the motion court had an "obligation to follow" that decision and reject defendants' collateral attack. State v. Farmer, 48 N.J. 145, 183 (1966); see also Macchi v. Conn. Gen. Ins. Co., 354 N.J. Super. 64, 71-72 (App. Div. 2002) (holding "the motion judge erred" by deviating from appellate precedent as facts were "indistinguishable"); State v. Reece, 222 N.J. 154, 166, 171 (2015) (reaching same conclusion as prior decision when "[t]he facts presented here are strikingly similar to those present in [precedent]"). That is why, although the decision is unpublished, this Court already applied Wade to reject another defendant's collateral challenge to the permitting age criterion without having to reach the merits. See State v. Gilliard, No. A-1513-21, 2024 WL 502337, at *8 (App. Div. Feb. 9, 2024) (Aa26) (relying on Wade to conclude that "Gilliard does not have standing" and thus "reject[ing] Gilliard's argument that New Jersey's gun permit scheme was unconstitutional").

The motion court's effort to distinguish Wade was unavailing. The court acknowledged that the two cases were "similar in procedural presentation—via

a motion to dismiss counts of an indictment" by defendants who were charged with carrying firearms without a permit and who had never in fact sought a permit. (Pa11). The motion court, however, saw Wade as inapplicable just because the "challenge here implicates an entirely different section of the permitting statutes that the Wade panel had no occasion to address"—that is, this case involves the permitting law's age restriction rather than its justifiable need criterion. (Pa11). But that is a distinction without a difference. The point of Wade is that even if one portion of a permitting law is invalid, a citizen cannot "ignore" the rest of the permitting scheme on a mere assumption that he "would have been granted a permit but for [the] one potentially invalid provision." 476 N.J. Super. at 507. That is equally true of this case as that one: just as "carrying guns in public can still be regulated and subject to a permit requirement" without a justifiable need, id. at 510, so too can New Jersey enforce the remainder of its permitting criteria, regardless of the constitutionality of the age criterion. See (Pa34-35 (motion court admitting that, absent the age restriction, "nothing … prevents New Jersey from mandating that eighteen-to-twenty-year-olds apply for and obtain permits, just as older New Jerseyans must")). That the specific permit criterion being challenged has changed thus in no way impacts Wade's fundamental analysis.

Indeed, the reasoning that animates Wade and Ringgold applies neatly to this identical case. Although defendants repeatedly argue that they can mount their claims collaterally because the age requirement is unconstitutional "on its face," (Db35-39), they misunderstand the line Wade and Ringgold drew. As explained above, the question is whether a law is completely facially invalid (so applying for a permit is unnecessary because no criterion can be in effect) from those that are only partially invalid (where seeking a permit to comply with the rest of the valid criteria is still required). See supra at 17-18. As in Wade, there is no dispute that even if the age restriction is unconstitutional, but see Point II, infra, it remains "severable from the remainder of the [permitting] statute," and "eighteen-to-twenty-year-olds [must still] apply for and obtain permits" to fulfill the rest of the criteria—such as establishing an ability to safely handle firearms or showing that the applicant will not threaten public safety. (Pa34-35 (quoting Wade, 476 N.J. Super. at 509)); see also (Pa35-36 (admitting "the requirements as upheld in Wade … must be met for a permit to issue.")). In the language of Wade, "the remaining provisions" of the permitting scheme are "constitutional and enforceable." 476 N.J. Super. at 496, 511. That is likewise fatal here.

Moreover, as in Wade, a criminal prosecution is no place for a permitting mini-trial to determine whether defendants would have sought a permit to carry and would have obtained one but for the age requirement. There are compelling

reasons to believe they would not have obeyed the law and applied for a permit to carry, regardless of the age criterion: Pinkett and Preston were arrested for possessing guns "with a purpose to use [them] unlawfully against the person or property of another," N.J.S.A. 2C:39-4(a); Phillips was arrested for possessing prohibited hollow-nose bullets, N.J.S.A. 2C:39-3(f); and all three were arrested for possessing prohibited LCMs, N.J.S.A. 2C:39-3(j). (Pa44-50; Pa60-63). That is all evidence of their disinterest in following established state law, which only confirms that this criminal prosecution would be an inappropriate forum in which to test those counterfactual questions.

And even if they had sought a permit, there is no evidence that they would have received one but for the age criterion. Defendants offer no record evidence to support that they would have passed a background check, demonstrated that their application was inconsistent with public safety, and/or satisfied the safe-handling requirements. Compare Wade, 476 N.J. Super. at 506 (noting counsel had offered a "certification representing that Wade had no other disqualifying factors and that he would have qualified to receive a permit but for the justifiable need" criterion but still finding that "insufficient to establish facts in dispute"), with (Pa67-68 (certification of Phillips's lawyer not even trying to make such an effort to discuss Phillips's other qualifications)). Instead, defendants demand another bite at the apple via a "further evidentiary hearing" to demonstrate for

the first time "that they were otherwise eligible to obtain a permit." (Db41-42). But as explained above, the point of a permitting process is to make individuals establish all of this before they carry weapons, to best protect public safety. See supra at 15-17. That is why courts regularly refuse to test such counterfactuals belatedly and outside the context of an actual permitting proceeding. See Wade, 476 N.J. Super. at 507 (law does not leave individuals "free to ignore" permitting scheme, and then challenge part of that scheme in this forum only once they are caught carrying without a permit). This Court should do the same.

Although defendants complain that they could not have gotten a permit in light of the age restriction, that argument both fails and is indistinguishable from Wade. Defendants argue that there would have been no point to seeking a permit if "a person could know with 100 percent certainty that he was ineligible for a permit because he was under twenty-one years of age." (Db33 (arguing that, in Wade, it was "not immediately ascertainable" whether someone had a justifiable need to carry unless they first sought a permit)); see also (Pa13 (motion court speculating that "there is no way to know if an application would even have been accepted for consideration because of their ages")). But defendants and the court alike overlook another avenue that would have addressed this concern: they could have filed a civil suit challenging the age criterion, before choosing to disregard the entire permitting requirement outright. See Poulos, 345 U.S. at

409 n.13 (explaining that challengers, "before they act," can "petition[] the appropriate civil tribunals for a modification of or exception from the regulation"). Indeed, that is how Bruen and Heller themselves arose: through civil suits by individuals who complied with the law until they won their court judgments. And multiple pending challenges to other age restrictions arose in the same manner. See Point II, infra (citing various pre-enforcement challenges). If defendants viewed the age criterion as unlawful, they could have challenged it in civil proceedings in either state or federal court, and then applied for a permit to satisfy the remaining criteria if they prevailed. All they could not do is "ignore a statute and presume that they would have been granted a permit but for one potentially invalid provision of a permit statute," Wade, 476 N.J. Super. at 507 (emphasis added), regardless of either the clarity or invalidity of the one permitting criterion they challenge.[6]

* * *

Wade makes clear that "carrying guns in public can still be regulated and subject to a permit requirement." Wade, 476 N.J. Super. at 509-11 (citing Bruen,

[6] If anything, defendants' argument is weaker than the argument in Wade. Wade involved a situation in which one of the permitting criterion was unquestionably unconstitutional—Bruen itself had invalidated the justifiable-need restriction. Here, by contrast, defendants were presuming not only that they would satisfy the remaining permitting criteria, but also that their view of the age restriction's unconstitutionality was correct, despite no New Jersey or U.S. Supreme Court precedent endorsing their claim.

597 U.S. at 38 n.9). By refusing to seek permits, defendants refused to comply not just with the age criterion, but also the indisputably lawful aspects of New Jersey's law, taking the law into their own hands. Just as in Wade, they cannot now challenge one discrete aspect of the State's permitting scheme after their apprehension and arrest. See id. at 505-08. Said another way, regardless of the age restriction's constitutionality, "if the State proves that [defendants] did not have permits, they will be guilty of a crime under N.J.S.A. 2C:39-5 (b)(1)." Id. at 496. The motion court should have followed Wade and denied defendants' motions without reaching the merits of the collateral Second Amendment attacks on the age requirement. See Gilliard, 2024 WL 502337, at *8 (Aa26).

POINT II

THE PERMITTING STATUTES' 21-YEAR-OLD AGE MINIMUM IS CONSTITUTIONAL.

If this Court reaches the merits, but see supra Point I, it should uphold the age criterion. Although the Second Amendment protects the right to keep and bear arms, it is "not unlimited." District of Columbia v. Heller, 554 U.S. 570, 626 (2008). Instead, governments may still adopt firearms-related measures that are consistent with the Second Amendment's "text, as informed by history," or with "the Nation's historical tradition of firearm regulation." Bruen, 597 U.S. at 19, 24. In canvassing the historical tradition, the United States Supreme Court

recently emphasized that courts need not ask whether a modern firearms law is a "historical twin" or a "dead ringer" to prior firearms restrictions. United States v. Rahimi, 144 S. Ct. 1889, 1898 (2024). Instead, the question that courts must ask is "whether the challenged regulation is consistent with the principles that underpin our regulatory tradition." Ibid. (emphasis added); see also id. at 1904 (Sotomayor, J., concurring) (noting a "regulation 'must comport with the principles underlying the Second Amendment,' but need not have a precise historical match"); id. at 1925 (Barrett, J., concurring) ("Historical regulations reveal a principle, not a mold."). New Jersey law, which restricts "any person under the age of 21 years" from receiving a permit to purchase or publicly carry handguns, N.J.S.A. 2C:58-3(c); 2C:58-4(c), is consistent with that historical tradition. The trial court and defendants' contrary conclusions misunderstand the law and the history.

1. There is a longstanding historical tradition of restricting the access of firearms for those younger than 21.

At the Founding, "[t]he age of majority at common law was 21." Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185, 201 (5th Cir. 2012) ("NRA"), abrogated on other grounds by Bruen, 597 U.S. 1; see also 1 William Blackstone, Commentaries on the Laws of England 451 (1765) ("[F]ull age in male or female, is twenty one years, …

who till that time is an infant, and so styled in law."). This meant those under 21—"minors," or "infants"—were unable to exercise "the right of petition," vote, or serve on juries. Megan Walsh & Saul Cornell, Age Restrictions and the Right to Keep and Bear Arms, 1791-1868, 108 Minn. L. Rev. 3049, 3063-65 (2024). Similarly, "[t]heir ability to enter contracts was severely restricted," such that they could usually not enter into binding contracts. Id. at 3057, 3065; accord 1 Blackstone, Commentaries, at 453. And they were often grouped with "madmen," including in being deemed ineligible to serve as peace officers. See Walsh & Cornell, supra, at 3086.

To the Founders, minors suffered from an "inability … to take care of themselves; and this inability continue[d], in contemplation of law, until the infant ha[d] attained the age of twenty-one years." 2 James Kent, Commentaries on American Law 233 (2d ed. 1832). For instance, John Adams explained that those under 21 could not vote because they lack "[j]udgment and "[w]ill" and were not "fit to be trusted by the "[p]ublic." Letter from John Adams to James Sullivan, 26 May 1776, available at https://perma.cc/CE79-RA8K. Gouverneur Morris, a signer of the Constitution and drafter of its Preamble, similarly warned that minors "want[ed] prudence" and "ha[d] no will of their own." James Madison's Notes of the Constitutional Convention, August 7, 1787, Yale L. Sch. Avalon Project, available at https://perma.cc/QJ7B-D4J4. Given that

widespread social understanding, until minors reached 21 (the age of majority), "authority over their lives rested with other decision-makers," including parents, educators, and militia superiors. Walsh & Cornell, supra, at 3068.

That impacted the circumstances under which those under 21 could access firearms. The "total parental control over children's lives extended into the schools," Brown v. Entertainment Merchants Ass'n, 564 U.S. 786, 830 (2011) (Thomas, J., dissenting), included exercising power to forbid minors from possessing guns and other weapons on university campuses, see Walsh & Cornell, supra, at 3069-72. For instance, the University of Georgia (founded in 1785) decreed that "no student shall be allowed to keep any gun, pistol, Dagger, Dirk[,] sword cane[,] or any other offensive weapon in College or elsewhere, neither shall they or either of them be allowed to be possessed of the same out of the college in any case whatsoever." The Minutes of the Senate Academicus of the State of Georgia, 1799-1842, available at https://perma.cc/7RJR-9JYR; see also Acts of the General Assembly and Ordinances of the Trustees, for the Organization and Government of the University of North Carolina 15 (Raleigh, Off. of the Raleigh Reg. 1838) ("No Student shall keep … firearms, or gunpowder."), available at https://tinyurl.com/2p8mx5zr. Thomas Jefferson, an "ardent defen[der] of an expansive vision of the right to keep and bear arms," and James Madison, "the drafter of the Second Amendment," Walsh & Cornell,

supra at 3072, likewise forbade students at the University of Virginia from "keep[ing] or us[ing] weapons or arms of any kind," University of Virginia Board of Visitors Minutes (October 4-5, 1824), Encyclopedia Va. (Dec. 7, 2020), available at https://tinyurl.com/58kmj2tj. These "regulations of student gun ownership and possession during and after the Founding era confirm that the public understanding of the Second Amendment accepted age limitations." Jones v. Bonta, 705 F. Supp. 3d 1121, 1137 (S.D. Cal. 2023) (collecting other examples).

Founding Era militia laws similarly "underscore[d] minors' inability to act independently outside of the context of adult supervision." Walsh & Cornell, supra, at 3076. Several States excluded 18-to-20-year-olds from militia service entirely—including New Jersey. See id. at 3084 (citing Act of Nov. 6, 1829, § 1, 1829 N.J. Laws 3, 3; 1843 Ohio Acts 53, § 2); see also Opinion of the Justices, 39 Mass. (22 Pick.) 571, 576 (1838) ("[I]t is competent for the State legislature by law to exempt from enrolment in the militia, all persons under twenty-one."). Indeed, even when minors were allowed or required to enroll in State militias, they were often exempted from having to furnish their own arms. See Walsh & Cornell, supra, at 3080-84 (citing, e.g., 1792 N.H. Laws 436, 447; Act of Mar. 6, 1810, ch. CVII, § 28, 1810 Mass. Acts 151, 176; Act of Jun. 18, 1793, ch. XXXVI, § 2, II Del. Laws 1134, 1135 (1793)). Rather, "[p]arents, guardians,

or, at times, the local government were responsible in the event a minor appeared without sufficient weaponry." Ibid. If minors had an established right to keep and bear arms on the same terms as adults, it would be odd for these militia laws to require parents or guardians to instead obtain arms for them. In short, "the founding generation would have shared the view that public-safety-based limitations of juvenile possession of firearms were consistent with the right to keep and bear arms." United States v. Rene E., 583 F.3d 8, 15 (1st Cir. 2009).

Restrictions on firearms possession by persons under 21 continued—and expanded—in the nineteenth century. See Heller, 554 U.S. at 605 (describing sources in this period as "a critical tool of constitutional interpretation"). The increase in regulations on firearms possession were brought about by "dramatic technological changes," Bruen, 597 U.S. at 27, as by "the mid-19th century," "[i]mprovements in weapons technology contributed to [a] rise in interpersonal violence," Bianchi v. Brown, 111 F.4th 438, 464-65 (4th Cir. 2024) (en banc) (explaining that during the Founding era, "there was little regulation of firearms in America, as they were seldom used in homicides that grew out of the tensions of daily life"). Thus, "civilians"—including minors—"had easy access to more portable and precise firearms than ever before." Id. at 465. This "easier access and potential abuse of firearms by minors" led governments to respond, including restricting minors' access. Walsh & Cornell, supra, at 3088-89.

Even before the Civil War, Alabama, Tennessee, and Kentucky limited minors' access to firearms. See Act of Feb. 2, 1856, no. 26, § 1, 1856 Ala. Acts 17, 17 (prohibiting selling, giving, or lending "to any male minor, a bowie knife, … or air gun or pistol"), available at https://tinyurl.com/mr3kvnan; 1856 Tenn. Acts 92, 92 (similarly prohibiting selling, giving, or lending "to any minor a pistol, bowie-knife, dirk or Arkansas tooth-pick"), available at https://tinyurl.com/3e4nfn6n; Act of Jan. 12, § 23, 1860 Ky. Acts 241, 245 (prohibiting "any person, other than the parent or guardian" from selling, giving, or lending "any pistol, dirk, bowie-knife, … or other deadly weapon"), available at https://tinyurl.com/4awczbr6. Importantly, those three States understood "minors" to cover those under 21 at that time. See, e.g., Saltonstall v. Riley, 28 Ala. 164, 172 (1856) (describing "a minor under the age of twenty-one years"); Seay v. Bacon, 36 Tenn. 99, 102 (1856) (distinguishing "minors" from those that "had attained the age of twenty-one years"); Newland v. Gentry, 57 Ky. 666, 671 (1857) (explaining that an infant's "minority" lasted until "he attains the age of twenty-one"); see also NRA, 700 F.3d at 201 (explaining that "it was not until the 1970s that States enacted legislation to lower the age of majority to 18"). That is, were defendants correct, New Jersey could not restrict firearms in 2024 in the very manner multiple states restricted before the Civil War, precisely the opposite of what Bruen and Rahimi's methodology suggests.

The trend only intensified during Reconstruction—the period in which the States adopted the Fourteenth Amendment, which made the Second Amendment applicable to them for the first time. See McDonald v. City of Chicago, 561 U.S. 742, 758, 764-65 (2010) (plurality op.). During that period, "[t]he number of restrictions on minors' access to firearms increased dramatically." Walsh & Cornell, supra, at 3090-93 (collecting 14 such statutes enacted between 1875 and 1885). By "the end of the 19th century, nineteen States and the District of Columbia had enacted laws expressly restricting the ability of persons under 21 to purchase or use particular firearms, or restricting the ability of 'minors' to purchase or use particular firearms while the state age of majority was set at age 21." NRA, 700 F.3d at 202 & n.14 (citing 1856 Ala. Acts 17; 16 Del. Laws 716 (1881); 27 Stat. 116-17 (1892) (District of Columbia); 1876 Ga. Laws 112; 1881 Ill. Laws 73; 1875 Ind. Acts 86; 1884 Iowa Acts 86; 1883 Kan. Sess. Laws 159; 1873 Ky. Acts 359; 1890 La. Acts 39; 1882 Md. Laws 656; 1878 Miss. Laws 175–76; Mo.Rev.Stat. § 1274 (1879); 1885 Nev. Stat. 51; 1893 N.C. Sess. Laws 468–69; 1856 Tenn. Pub. Acts 92; 1897 Tex. Gen. Laws 221–22; 1882 W. Va. Acts 421–22; 1883 Wis. Sess. Laws 290; 1890 Wyo. Sess. Laws 1253).

Tellingly, these restrictions were seen as comfortably constitutional by those to consider the issue. Thomas Cooley, the author of a "massively popular" treatise, Heller, 554 U.S. at 616, concluded that "the State may prohibit the sale

of arms to minors." Thomas M. Cooley, Treatise on Constitutional Limitations 740 n.4 (5th ed. 1883). To support that view, Cooley cited the one constitutional challenge to such restrictions during that era: State v. Callicutt, 69 Tenn. 714 (1878). Callicutt resoundingly approved of a statute making it a crime "to sell, give, or loan a minor a pistol, or other dangerous weapon," noting such a law was "not only constitutional as tending to prevent crime but wise and salutary in all its provisions." Id. at 716-17. The State is unaware of any other constitutional challenge to these 19th-century restrictions; that the only such challenge was soundly rejected "settle[s]" that minors' access to firearms "could be prohibited consistent with the Second Amendment." Bruen, 597 U.S. at 30 (that there were "no disputes regarding the lawfulness of such prohibitions" counts strongly in favor of a modern analogue's constitutionality); cf. id. at 27 ("[I]f some jurisdictions actually attempted to enact analogous regulations during this timeframe, but those proposals were rejected on constitutional grounds, that rejection surely would provide some probative evidence of unconstitutionality." (emphasis added)).

The Nation's tradition continues to the present. Consider federal law. In the 1960s, Congress found minors' access to handguns was "a significant factor in the prevalence of lawlessness and violent crime." Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, tit. IV, § 901(a), 82 Stat. 197,

225-26 (finding "causal relationship between the easy availability of firearms other than a rifle or shotgun and juvenile and youthful criminal behavior"); see also 114 Cong. Rec. 12,309 (1968) (statement of Sen. Dodd) (noting "minors under the age of 21 years accounted for 35 percent of the arrests for the serious crimes of violence, including murder, rape, robbery, and aggravated assault," and 21 percent of the arrests for murder); Federal Firearms Act: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the S. Comm. On the Judiciary, 90th Cong. 57 (1967) (statement of Sheldon S. Cohen) (adding "[t]he easy availability of weapons make [minors'] tendency toward wild, and sometimes irrational behavior that much more violent, that much more deadly"). Congress sought to limit that availability by prohibiting commercial sale of handguns to 18-to-20-year olds across the country—a law still in effect. See 18 U.S.C. § 922(b)(1), (c)(1). And in 2022, concerned "the profile of the modern mass shooter is often in the 18-to-21-year-old range," 168 Cong. Rec. S3024 (statement of Sen. Murphy), Congress also required enhanced background checks for all persons under 21. See Bipartisan Safer Communities Act, Pub. L. No. 117-159, div. A, tit. II, § 12001(a)(1)(B)(i)(III), 136 Stat. 1313, 1323 (2022) (codified as amended at 18 U.S.C. § 922(t)(1)(C)).

That tradition is particularly pronounced among the States. A substantial majority of States and the District of Columbia today restrict access to firearms

by those under 21, just as States have done for centuries: at least 37 jurisdictions impose restrictions on the purchase, possession, or use of firearms by persons under 21. See, e.g., Alaska Stat. §§ 11.61.220(a)(6), 18.65.705; Ariz. Rev. Stat. §§ 13-3102(A)(2), 13-3112(E); Ark. Code § 5-73-309; Cal. Penal Code §§ 26150, 26155, 26170; Colo. Rev. Stat. § 18-12-203(1)(b); Conn. Gen. Stat. §§ 29-28(b), 29-35(a), 29-36f; D.C. Code §§ 7-2502.03(a)(1), 7-2509.02(a)(1); Del. Code Ann. tit. 11, § 1448(a)(5); Fla. Stat. §§ 790.06(1), (2)(b), 790.053(1); Ga. Code §§ 16-11-125.1(2.1), 16-11-126(g)(1), 16-11-129(b)(2)(A); Haw. Rev. Stat. §§ 134-2(a), 134-9(a); 430 Ill. Comp. Stat. 65/2(a)(1), 65/4(a)(2), 66/25(1); 720 Ill. Comp. Stat. 5/24-1(a)(10); Iowa Code § 724.22; Ky. Rev. Stat. § 237.110(4)(c); La. Rev. Stat. § 40:1379.3(C)(4); Mass. Gen. Laws ch. 140, § 131(d)(iv); Md. Code Ann., Pub. Safety §§ 5-101(r), 5-133(d); Mich. Comp. Laws § 28.425b(7)(a); Minn. Stat. § 624.714; Neb. Rev. Stat. § 69-2433; Nev. Rev. Stat. § 202.3657(3)(a)(1); N.J. Stat. §§ 2C:58-3(c)(4), 2C:58-4(c), 2C:58-6.1(b); N.M. Stat. § 29-19-4(A)(3); N.Y. Penal Law § 400.00(1); N.C. Gen. Stat. § 14-415.12(a)(2); Ohio Rev. Code § 2923.125(D)(1)(b); Okla. Stat. tit. 21 § 1272(A); Or. Rev. Stat. § 166.291(1)(b); 18 Pa. Cons. Stat. § 6109(b); R.I. Gen. Laws §§ 11-47-11, 11-47-18; S.C. Code § 23-31-215(A); Utah Code §§ 76-10-505, 76-10-523(5); Va. Code § 18.2-308.02(A); Wash. Rev. Code §§ 9.41.240(2),(3), 9.41.070; Wis. Stat. § 175.60(3)(a); Wyo. Stat. § 6-8-104(a)(iv), (b)(ii).

It is not difficult to see why so many States and the Federal Government have believed that imposing firearms restrictions on individuals under 21 is well within our Nation's tradition. See Rahimi, 144 S. Ct. at 1901 (asking whether a modern law is "relevantly similar" to historical laws "in both why and how it burdens the Second Amendment right"). Indeed, courts consistently hold that the Second Amendment, at a minimum, permits restrictions that "address a risk of dangerousness," because "[l]egislatures historically prohibited possession by categories of persons based on a conclusion that the category as a whole presented an unacceptable risk of danger if armed." United States v. Jackson, 110 F.4th 1120, 1127-28 (8th Cir. 2024); accord United States v. Perez-Garcia, 96 F.4th 1166, 1186 (9th Cir. 2024); United States v. Williams, 113 F.4th 637, 650, 657 (6th Cir. 2024); Kanter v. Barr, 919 F.3d 437, 464-65 (7th Cir. 2019) (Barrett, J., dissenting). This Court likewise has recognized the state Legislature's "broad discretion to determine when people's status or conduct indicate[s] a sufficient threat to warrant disarmament." M.U., 475 N.J. Super. at 189. Said another way, States remain free to make "present-day judgments about categories of people whose possession of guns would endanger the public safety," Kanter, 919 F.3d at 464-65 (Barrett, J., dissenting), consistent with that long and unbroken historical tradition.

The Legislature was free to determine that allowing persons under 21 to access firearms would present an unacceptable risk of danger—and thus regulate them. See, e.g., NRA, 700 F.3d at 203 (finding federal restrictions on "ability of 18-to-20-year-olds to purchase handguns" from retailers to be "consistent with a longstanding tradition of targeting select groups' ability to access and to use arms for the sake of public safety," including "a longstanding tradition of age- and safety-based restrictions on the ability to access arms"). As explained above, legislative findings across decades confirm that access to firearms by individuals under 21 is both "a significant factor in the prevalence of lawlessness and violent crime" and a driver of mass shootings. See supra at 34-35 (findings in 1968 and 2022 laws). The evidence bears those findings out: "The 18-to-20-year age group … has been identified as disproportionately prone to violence, including gun violence, compared to older age groups." Jones, 705 F.Supp.3d at 1134.

A range of statistics unfortunately substantiates the dangerousness of this age group. The group currently commits crimes at a disproportionate rate: 18-to-20-year-olds made up 15% of homicide and manslaughter arrests in 2019, despite constituting less than 4% of the U.S. population. Compare U.S. Dep't of Justice, Crime in the U.S., Arrests, by Age, 2019, Tbl. 38, available at https://tinyurl.com/a36b236v, with U.S. Census Bureau, Age and Sex

Composition in the U.S.: 2019, Tbl. 1, available at https://tinyurl.com/nhcyk3ap. Furthermore, FBI data "confirms that homicide rates peak between the ages of 18 and 20"; research shows this "age group commits gun homicides at a rate three times higher than adults aged 21 or older"; and "studies show that at least one in eight victims of mass shootings from 1992 to 2018 were killed by an 18 to 20-year-old." Lara v. Comm'r Pa. State Police, 97 F.4th 156, 164-65 & nn. 26-28 (Mem) (3d Cir. 2024) (Krause, J., dissenting from denial of rehearing en banc) (collecting sources).

Modern evidence helps explain the threat. As one federal court discussed, "studies have concluded individuals between the ages of 18 and 20 'are more impulsive, more likely to engage in risky and reckless behavior, unduly influenced by peer pressure, motivated more by rewards than costs or negative consequences, less likely to consider the future consequences of their actions and decisions, and less able to control themselves in emotionally arousing situations.'" Jones, 705 F.Supp.3d at 1134 (quoting report by developmental psychologist). This is at least in part due to "still-developing cognitive systems of 18-20-year-olds" leading to "increas[ed] risk of impulsive behavior." Ibid. Modern biology teaches that "[o]ne of the last parts of the brain to mature—and which continues to develop into the mid-twenties—is the prefrontal cortex, which supports self-control, including judgment, impulse control and inhibition,

and long-range planning." Ibid.; see also NRA, 700 F.3d at 210 & n.21 (noting "modern scientific research supports the commonsense notion that 18-to-20-year-olds tend to be more impulsive than young adults aged 21 and over"); Lara, 97 F.4th at 164 & nn. 30-31 (Krause, J., dissenting) (discussing, e.g., Mariam Arain et al., Maturation of the Adolescent Brain, 9 Neuropsychiatric Disease & Treatment 449, 453, 456 (2013), on adolescent development).[7]

This is all why several courts, before and after Bruen, detailed this clear historical tradition in upholding other restrictions on minors' access to firearms. See, e.g., NRA, 700 F.3d at 200-04 (discussing "considerable historical evidence of age- and safety-based restrictions on the ability to access arms" in upholding a federal statute restricting sale of handguns to individuals under 21); Rene E., 584 F.3d at 12 (relying on "existence of a longstanding tradition of prohibiting juveniles from both receiving and possessing handguns" to uphold a juvenile ban); Jones, 705 F. Supp. 3d at 1136 (in analogous lawsuit, relying on "historical

[7] At the Founding such persons were seen not only as dangerous, but as incapable of civic virtue. Beyond restricting firearms from categories considered dangerous, governments have limited the right to keep and bear arms to the "virtuous citizenry." M.U., 475 N.J. Super. at 184 & n.9 (collecting cases and sources). The Founders were "animated by a classical republican notion that only those with adequate civic 'virtue' could claim the right to arms," and believed individuals under 21 lacked civic virtue. NRA, 700 F.3d at 201-02 (acknowledging the Second Amendment allows for restrictions on "those who, like children or the mentally imbalanced, are deemed incapable of virtue"); Rene E., 583 F.3d at 15-16 (same).

regulations which limited the ability of 18-to-20-year-olds to purchase, acquire, and possess certain weapons" to uphold California law generally prohibiting the sale of long guns to individuals under 21). This Court should join them.

2. Defendants and the motion court's contrary positions fall short. Their central premise is that, to justify the permitting scheme's age criterion, the State must produce "founding era regulations" that "categorically disarm[ed] people under twenty-one." (Db4-5, 20); accord (Pa32 (recognizing the approach "relies only on prior laws on the books" during the Founding Era)). That view "misunderst[ands] the methodology" the Second Amendment analysis requires in multiple respects. Rahimi, 144 S. Ct. at 1897.

As an initial matter, defendants and the motion court err in demanding the modern law be a perfect match to its historical predecessors. The United States Supreme Court's decision in Rahimi is crystal clear that while a modern firearms "law must comport with the principles underlying the Second Amendment, … it need not be a dead ringer or a historical twin." Id. at 1898 (cleaned up). Said another way, the Second Amendment is "not meant to suggest a law trapped in amber": the Constitution "permits more than just those regulations identical to ones that could be found in 1791." Id. at 1897-98; see also id. at 1925 (Barrett, J., concurring) (agreeing that Second Amendment reasoning is not "a regulatory straightjacket"; that the "challenged regulation need not be an updated model of

a historical counterpart"; and that "imposing a test that demands overly specific analogues has serious problems"). The State has provided significant evidence from the Founding that individuals under 21 did not have the same unrestricted access to firearms as other adults, and illustrates the governing principles—including a risk of danger, and their status as infants—that explain why. See supra at 27-31, 37-40. In light of Rahimi, that is amply sufficient to uphold the restrictions.

Moreover, defendants' and the motion court's approach suffers a deeper error: our Nation's history is replete with identical age-based restrictions, and such history from the nineteenth century cannot be discounted. As noted above, from before the Civil War and continuing unbroken through the present, a wide range of States have restricted access to firearms by those under 21. See supra at 32-36 (cataloguing laws). Defendants and the motion court believed that New Jersey could not rely on such evidence because the State was limited to evidence from the Founding alone, but Rahimi is again to the contrary. As the lopsided majority explained, if there is a consistent tradition across time periods—even if the precise evidence available at the Founding or at Reconstruction differs—it is "unnecessary to decide" which takes precedence, and courts may consider sources from both eras. 144 S. Ct. at 1898 n.1; see id. at 1897-98 ("[T]he Second Amendment permits more than just those regulations identical to ones that could

be found in 1791."); id. at 1916 (Kavanaugh, J., concurring) (emphasizing need for judges to consider the broader tradition, "at least when reasonably consistent and longstanding," to interpret "vague constitutional text"). Indeed, in this case, the principle that States could restrict access to firearms by those under 21 was strikingly consistent across the Founding and Reconstruction, even if the precise approach to those restrictions developed across the 19th Century. Defendants and the motion court thus err in foreclosing this important source of history.

Indeed, discounting such voluminous evidence from the Reconstruction era is particularly untenable. Because the Fourteenth Amendment incorporated the Second Amendment against the States, Reconstruction-Era sources—which reflect how the ratifying States understood that Amendment—are "a critical tool of constitutional interpretation." Heller, 554 U.S. at 605-19 (evaluating "how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century"); McDonald, 561 U.S. at 770-78 (plurality) (citing sources showing the "ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty"); see also Rahimi, 144 S. Ct. at 1913 (Kavanaugh, J., concurring) ("The Court also looks to the understandings of the American people from the pertinent ratification era."); cf. Tyler v. Hennepin County, 598 U.S. 631, 641-42 (2023) (same approach for Takings Clause). This Court thus

has a responsibility to assess "the understanding of the right to bear arms both at the time of the ratification of the Second Amendment in 1791 and at the time of the ratification of the Fourteenth Amendment in 1868." Wolford v. Lopez, No. 23-16164, __ F.4th ___, 2024 WL 4097462, at *12 (9th Cir. Sept. 6, 2024); see also, e.g., Antonyuk v. Chiumento, 89 F.4th 271, 304-05 (2d Cir. 2023) ("[T]he prevailing understanding of the right to bear arms in 1868 and 1791 are both focal points of our analysis."), vacated in light of Rahimi, 144 S. Ct. 2709 (Mem) (2024). Given the originalist methodology governing this challenge, it would be a puzzling result indeed for the Fourteenth Amendment to foreclose state laws that the States had specifically maintained when ratifying it—as the decision below does.

Defendants and the motion court's reliance on two federal decisions—the Third Circuit's ruling in Lara, 91 F.4th 122 (2024), reh'g en banc denied, 97 F.4th 156 (2024), cert. pet'n pending, No. 24-93 (U.S.), and the Eighth Circuit's opinion in Worth v. Jacobson, 108 F.4th 677 (2024)—is unavailing. Those cases, to be sure, invalidated firearms restrictions on individuals under 21. But as an initial matter, those courts do not bind this one, see Ryan v. Am. Honda Motor Co., 186 N.J. 431, 436 (2006), and other cases and jurists have found to the contrary. See, e.g., Jones v. Bonta, 705 F. Supp. 3d 1121; NRA, 700 F.3d 185; Lara, 91 F.4th at 140-48 (Restrepo, J., dissenting); Lara, 97 F.4th at 156-

66 (Krause, J., dissenting from denial of rehearing en banc); Nat'l Rifle Ass'n v. Bondi, 61 F.4th 1317 (11th Cir. 2023), opinion vacated upon granting of re'hg en banc, 72 F.4th 1346 (11th Cir. 2023). This Court should instead adhere to Rahimi and the robust historical record—and principles the record illuminates—in this case.

Nor are they persuasive. Most crucially, Lara predates Rahimi, and may be vacated pursuant to a pending certiorari petition in light of that intervening decision. Lara, after all, demanded that the State be able to provide a precise "founding-era statute imposing restrictions on the freedom of 18-to-20-year-olds to carry guns." 91 F.4th at 137; see also id. at 134 ("set[ting] aside the … catalogue of statutes from the mid-to-late nineteenth century" entirely). But Rahimi since emphasized the importance of considering the "principles" behind our tradition rather than demanding precise fits between historical and modern laws, and noted that judges should not rule out evidence from Reconstruction if those principles are consistent. See 144 S. Ct. at 1897-98 & n.1; see also id. at 1925 (Barrett, J., concurring) (rejecting view that the "founding-era legislatures maximally exercised their power to regulate, thereby adopting a 'use it or lose it' view of legislative authority"). By correctly assessing the relevant historical

principles in light of Rahimi, rather than looking for a Founding Era twin, this Court does not have to disregard such a significant body of evidence.[8]

In addition to this central methodological error, defendants also challenge specific portions of the State's historical evidence, (see Db19-25), but none of their responses hold water. First, they rely on Worth to dismiss Founding-Era college restrictions as "much different in scope" than an age minimum to obtain a public-carry permit. (Db21-22 (quoting 108 F.4th at 695-96)). But such restrictions "illuminate broadly shared cultur[al] and legal values"—also known as the underlying historical principle—that support the understanding "that for individuals below the age of majority, there was no unfettered right to purchase, keep, or bear arms." Walsh & Cornell, supra, at 3073-75; accord Jones, 705 F. Supp. 3d at 1137 ("[U]niversity rules … demonstrate the general understanding during the historically relevant era that firearm regulation of 18-20-year-olds was well-established on numerous fronts and consistent with … state regulation in the first half of the nineteenth century"). Rahimi could hardly have been more

[8] And although Worth was decided after Rahimi, it gave the Supreme Court's instructions short shrift. The Eighth Circuit there "analyze[d] the government's identified historical analogues" without once asking what historical principle those analogues produced. 108 F.4th at 688 (emphasis added). In doing so, it applied a "divide-and-conquer approach to the historical evidence" that Rahimi and other circuits have repeatedly and squarely rejected. Perez-Garcia, 96 F.4th at 1191.

explicit that an analysis based on historical principles, rather than a demand for a historical dead ringer, properly reflects the Second Amendment's scope.

Second, defendants misunderstand the Founding era militia evidence on which they rely. Defendants claim that the Militia Act of 1792 supports their view because it "required all able-bodied men to enroll in the militia and to arm themselves upon turning 18." (Db23 (citing 1 Stat. 271)). But that claim runs into multiple independent problems. For one, "the 1792 Militia Act gave States discretion to impose age qualifications on service, and several States chose to enroll only persons age 21 or over, or required parental consent for persons under 21." NRA, 700 F.3d at 204 n.17 (debunking defendants' reliance on the Militia Act). Indeed, as recounted above, some States—including New Jersey—beginning eligibility at 21 (vitiating defendants' argument) and others allowing participating in a militia as young as 15 (even though no one would suggest 15-year-olds have a Second Amendment right to possess firearms). See ibid. ("Such fluctuation undermines [defendants'] militia-based claim that the right to purchase arms must fully vest precisely at age 18."). And other laws exempted those under 21 from having to furnish arms—and placed that responsibility with parents or guardians, given the Founding-era view that individuals remained infants. See supra at 27-31. The better reading of Founding-era militia laws is that they reinforced the historical understanding that minors lacked "an

independent, constitutional right to keep and bear arms outside of the militia context." Walsh & Cornell, supra, at 3086.

Moreover, the reliance on the Militia Act of 1792 suffers from a second problem: it wrongly conflates mandatory "militia service for individuals under the age of 21" with a "general right to independently commercially acquire [or publicly carry] firearms for individual use for any purpose." Jones v. Bonta, 705 F. Supp. 3d at 1138; accord Bondi, 61 F.4th at 1331; Walsh & Cornell, supra, at 3075-76. Indeed, the argument "that every citizen who is subject to military duty has the right to keep and bear arms, and that this right necessarily implies the right to buy or otherwise acquire, and the right in others to give, sell, or loan to him" was expressly rejected by a Reconstruction-era state high court in Callicutt, 69 Tenn. at 716-17, the case easily disposing of the sole Founding- or Reconstruction-era constitutional challenge to an age restriction. Citing the Militia Act of 1792 is hardly enough to undermine age-based firearms restrictions that have been widespread across the Nation for centuries.

Finally, defendants argue that even if this Court were to consider various 19th-century age restrictions, several restrictions are too different because they "regulated only the furnishing of firearms to persons under twenty-one" instead of regulating those persons' ability to carry arms in public. (Db23-24). But that response runs into three independent problems. For one, it overlooks that many

of the Reconstruction era sources are highly similar or even more capacious than the modern restriction they challenge. See, e.g., 1883 Wis. Sess. Laws 290 ("It shall be unlawful for any minor, within this state, to go armed with any pistol or revolver, and it shall be the duty of all sheriff's, constables, or other public police officers, to take from any minor, any pistol or revolver, found in his possession."), available at https://tinyurl.com/234xhbpr; 1883 Kan. Sess. Laws 159 ("Any minor who shall have in his possession any pistol, revolver … or other dangerous weapon, shall be deemed guilty of a misdemeanor."), available at https://tinyurl.com/mv2cdzn4. For another, defendants yet again demand the State produce a "dead ringer" or a "historical twin," contrary to the clear teachings of Rahimi, 144 S. Ct. at 1898. See also id. at 1901 (emphasizing that even if a State's law is "by no means identical" to these Reconstruction-era laws, "it does not need to be"). And finally, there has always been variation among States on the best way to protect individuals from firearms violence, including firearms violence by those under 21. See Bianchi, 111 F.4th at 447 (emphasizing that "States may take a variety of approaches to address" firearms violence, and that the Second Amendment has always coexisted with "the worthy virtues of federalism and democracy"); McDonald, 561 U.S. at 785 (plurality op.) (explaining that the Second Amendment "by no means eliminates" States' "ability to devise solutions to social problems that suit local

needs and values" such that "state and local experimentation with reasonable firearms regulations will [lawfully] continue"). By restricting minors' ability to carry firearms, New Jersey law clearly "comport[s] with the principles underlying the Second Amendment." Rahimi, 144 S. Ct. at 1898.

CONCLUSION

This Court should reverse and vacate the order dismissing the counts of the indictments charging defendants with unlawful possession of a handgun without a permit.

Respectfully submitted,

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