

24-2026-cv

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

VT. FED. OF SPORTSMEN'S CLUBS, INC., ET AL.,

Plaintiffs-Appellants,

v.

MATTHEW BIRMINGHAM, ET AL.

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT (BURLINGTON) IN NO. 2:23-CV-710,
HONORABLE WILLIAM K. SESSIONS, III, JUDGE

**BRIEF OF AMICI CURIAE SECOND AMENDMENT FOUNDATION,
CALIFORNIA RIFLE & PISTOL ASSOCIATION, INCORPORATED,
SECOND AMENDMENT LAW CENTER, INC., MINNESOTA GUN
OWNERS CAUCUS, AND NATIONAL RIFLE ASSOCIATION OF
AMERICA IN SUPPORT OF PLAINTIFFS-APPELLANTS**

C.D. Michel
MICHEL & ASSOCIATES, P.C.
180 E. Ocean Blvd., Ste. 200
Long Beach, CA 90802
cmichel@michellawyers.com

Konstadinos T. Moros
SECOND AMENDMENT FOUNDATION
12500 NE 10th Pl.
Bellevue, WA 98005
kmoros@saf.org

Counsel for Amici Curiae

November 13, 2025

CORPORATE DISCLOSURE STATEMENT

Under Rule 26.1(a) of the Federal Rules of Appellate Procedure, counsel for amici curiae certify that Second Amendment Foundation, California Rifle & Pistol Association, Incorporated, Second Amendment Law Center, Inc., Minnesota Gun Owners Caucus, and National Rifle Association of America are nonprofit organizations and thus have no parent corporations and no stock.

Date: November 13, 2025

SECOND AMENDMENT FOUNDATION

/s/ Konstadinos T. Moros

Konstadinos T. Moros

Counsel for Amici Curiae

TABLE OF CONTENTS

	Page
Corporate Disclosure Statement.....	II
Table of Contents.....	III
Table of Authorities	IV
Interest of Amici Curiae	1
Introduction	2
Argument.....	4
I. <i>Bruen</i> ’s Framework Begins and Ends with Historical Analysis Once the Second Amendment Is Implicated	4
II. Because an Obvious Analogue Exists, The District Court Should Not Have Engaged in the “More Nuanced Approach”.....	10
III. Primary Sources Prove That Firearms Could Commonly be Purchased Without any Waiting in the Founding Era and in the 19th Century.	15
Conclusion.....	23

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Antonyuk v. Hochul</i> , 635 F. Supp. 3d 111 (N.D.N.Y. 2022).....	15
<i>Be&L Prods., Inc. v. Newsom</i> , 104 F.4th 108 (9th Cir. 2024)	6, 9
<i>Boland v. Bonta</i> , 662 F. Supp. 3d 1077 (C.D. Cal. 2023).....	7
<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008).....	9, 12
<i>Ezell v. City of Chicago</i> , 651 F.3d 684 (7th Cir. 2011).....	7
<i>Gazzola v. Hochul</i> , 88 F.4th 186 (2d Cir. 2023).....	6
<i>Jackson v. City & Cnty. of San Francisco</i> , 746 F.3d 953 (9th Cir. 2014).....	7
<i>John Doe No. 1 v. Reed</i> , 561 U.S. 186 (2010).....	14
<i>Luis v. United States</i> , 578 U.S. 5 (2016).....	7
<i>N.Y. State Rifle & Pistol Ass'n v. Beach</i> , 818 F. App'x 99 (2d Cir. 2020).....	4
<i>N.Y. State Rifle & Pistol Ass'n v. Bruen</i> , 597 U.S. 1 (2022).....	passim
<i>N.Y. State Rifle & Pistol Ass'n v. City of N.Y.</i> , 590 U.S. 336 (2020).....	8
<i>Nat'l Ass'n for Gun Rights v. Lamont</i> , 153 F.4th 213 (2d Cir. 2025).....	3
<i>Nguyen v. Bonta</i> , 140 F.4th 1237 (9th Cir. 2025)	11, 22

<i>Oakland Tactical Supply, LLC v. Howell Twp., Michigan</i> , 103 F.4th 1186 (6th Cir. 2024)	7
<i>Ortega v. Grisham</i> , 148 F.4th 1134 (10th Cir. 2025)	5, 8, 10, 13
<i>Pena v. Lindley</i> , 898 F.3d 969 (9th Cir. 2018).....	9
<i>Rigby v. Jennings</i> , 630 F. Supp. 3d 602 (D. Del. Sept. 23, 2022).....	7
<i>Snope v. Brown</i> , 145 S. Ct. 1534 (2025)	4, 6
<i>Teixeira v. Cnty. of Alameda</i> , 873 F.3d 670 (9th Cir. 2017).....	9
<i>United States v. Rahimi</i> , 602 U.S. 680 (2024).....	passim
<i>United States v. Toner</i> , 728 F.2d 115 (2d Cir. 1984)	4
<i>Vt. Fed’n of Sportsmen’s Clubs v. Birmingham</i> , 741 F. Supp. 3d 172 (D. Vt. 2024).....	passim
<i>Wolford v. Lopez</i> , 116 F.4th 959 (9th Cir. 2024)	15
<i>Yukutake v. Lopez</i> , 130 F.4th 1077 (9th Cir. 2025)	7

Statutes

18 U.S.C. § 922.....	5
U.S. Const., amend. I	6
U.S. Const., amend. II.....	passim

Other Authorities

Alberts, Kristin, <i>A Primer on the Gun that Won the West: Winchester 1873</i> , Guns.com (July 8, 2020), https://www.guns.com/news/2020/07/08/a-primer-on-the-gun-that-won-the-west-winchester-1873 (last visited Nov. 6, 2025)	20
--	----

- Aurora General Advertiser (Philadelphia), Oct. 24, 1812,
<https://www.newspapers.com/image/586580249/> (last visited Nov. 6, 2025) 18
- E. Remington & Sons Advertisement*, The Flushing Daily Times, Nov. 12, 1866, *available at* <https://books.google.com/books?id=XvRZAAAIBAJ&pg=PA4&dq=revolvers&a#v=onepage&q=revolvers&f=false> (last visited Nov. 6, 2025) 21
- Elliot's Pocket Revolver Advertisement*, Harper's Wkly., Dec. 14, 1861, *available at* <https://archive.org/details/harpersweeklyv5bonn/page/798/mode/2up> (last visited Nov. 6, 2025) 20
- Everytown Research & Policy, *Waiting Periods*,
<https://everytownresearch.org/rankings/law/waiting-periods/> (last visited Nov. 4, 2025) 11
- G.W. Simmons & Co. Revolver Advertisement*, Boston Evening Tr., Dec. 12, 1887, *available at* https://books.google.com/books?id=6Zc-AAAAIBAJ&pg=PA8&dq=revolvers&article_id=4796,5116559&hl=en&sa=X&ved#v=onepage&q=revolvers&f=false (last visited Nov. 6, 21
- Hartford Courant, Mar. 6, 1797, <https://www.newspapers.com/image-view/233556024/> (last visited Nov. 9, 2025) 17
- History.com Editors, 1847: *Samuel Colt Sells His First Revolvers to the U.S. Government*, History.com (Nov. 16, 2009), <https://www.history.com/this-day-in-history/january-4/colt-sells-his-first-revolvers-to-the-u-s-government> (last visited Nov. 6, 2025) 19
- New-York Evening Post, Dec. 1, 1806,
<https://www.newspapers.com/image/33514851/> (last visited Nov. 6, 2025) 17
- Revolver Advertisements*, Sears, Roebuck, and Co. Catalogue, Issue No. 112, Fall 1902, *available at* <https://archive.org/details/catalogueno11200sear/page/306/mode/2up> (last visited Nov. 6, 2025) 21
- Shufro, Cathy, *A Brief History of Guns in the U.S.*, Hopkins Bloomberg Pub. Health Mag. (Oct. 13, 2021), <https://magazine.publichealth.jhu.edu/2021/brief-history-guns-us> 21
- Sunstein, C., *On Analogical Reasoning*,
106 Harv. L. Rev. (1993) 13
- The Pittsfield Sun (Pittsfield), Sep. 27, 1806,
<https://www.newspapers.com/image/531981202/> (last visited Nov. 6, 2025) 18

The South-Carolina Gazette, Jun. 1, 1745,
<https://www.newspapers.com/image/605132111/> (last visited Nov. 9, 2025) 16

INTEREST OF AMICI CURIAE¹

Second Amendment Foundation (“SAF”) is a non-profit membership organization founded in 1974 with over 720,000 members and supporters in every state of the union. Its purposes include education, research, publishing, and legal action focusing on the constitutional right to keep and bear arms. Currently, SAF is involved in several Second Amendment-related lawsuits and thus has great interest in the outcome of this case.

Founded in 1875, California Rifle & Pistol Association, Incorporated, is a nonprofit organization that seeks to defend the Second Amendment and advance laws that protect the rights of individual citizens. In service of its mission to preserve the constitutional and statutory rights of gun ownership, California Rifle & Pistol Association regularly participates as a party or amicus in Second Amendment litigation.

Second Amendment Law Center, Inc. is a nonprofit corporation headquartered in Henderson, Nevada. Second Amendment Law Center is dedicated to promoting and defending the individual rights to keep and bear arms as envisioned by the Founding Fathers. Its purpose is to defend these rights in state and federal courts across the United States. It also seeks to educate the public about the social utility of firearm ownership and to provide accurate historical, criminological, and technical information about firearms to policymakers, judges, and the public.

¹ The parties have given their consent to the filing of this brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Minnesota Gun Owners Caucus (“MGOC”) is a 501(c)(4) non-profit organization incorporated under the laws of Minnesota with its principal place of business in Shoreview, Minnesota. MGOC seeks to protect and promote the right of citizens to keep and bear arms for all lawful purposes. MGOC serves its members and the public through advocacy, education, elections, legislation, and legal action. MGOC’s members reside both within and outside Minnesota.

The National Rifle Association of America (NRA) is America’s oldest civil rights organization and foremost defender of Second Amendment rights. It was founded in 1871 by Union veterans—a general and a colonel—who, based on their Civil War experiences, sought to promote firearms marksmanship and expertise amongst the citizenry. Today, the NRA is America’s leading provider of firearms marksmanship and safety training for both civilians and law enforcement. The NRA has approximately four million members, and its programs reach millions more.

INTRODUCTION

Amici submit this brief to assist this Court in correcting several analytical and historical errors made by the district court below.

The first error is a misconception about the Second Amendment analysis that has been spreading in a number of courts, not just the court below: the idea that there are now *two* Second Amendment tests, one for laws that directly affect the plain text of the Second Amendment, and another for implied or “ancillary” aspects of the right to keep and bear arms. Nothing in any Supreme Court ruling, nor in the opinions of any concurring justice of that Court, supports any such “fork” in the historical test of *Heller* and *Bruen*. When an arms regulation is challenged, it must be consistent with

historical tradition; if it is not, it cannot stand. The Supreme Court has been unequivocal on this point. Any tortured “plain text analysis” is a fabrication meant to relieve the government of the burden it is supposed to carry.

Next, the district court defied *Bruen* by making comparisons to historical laws that were so expansive as to be comical. For all of American history before the twentieth century, people could purchase firearms without any waiting period. That should have ended the historical analysis. The district court had no justification to point to dissimilar laws applying to drunkards in a transparent effort to bail out the government’s modern law.

Finally, the district court limited its own historical examination in inappropriate ways. When it came to citing historical laws, it was happy to use laws ranging from “the 1600s through the early 1900s.” *Vt. Fed’n of Sportsmen’s Clubs v. Birmingham*, 741 F. Supp. 3d 172, 211 (D. Vt. 2024). But when it came to the history of arms manufacture, it stuck strictly to the Founding Era, noting that “instant availability of a wide variety of guns would not have been anticipated at the founding.” *Vt. Fed’n of Sportsmen’s Clubs*, 741 F. Supp. 3d at 213. Even if that were true, as this brief will establish, a wide variety of instantly available guns was the reality by the mid-Nineteenth Century, and yet no waiting period laws existed until the following century.² Moreover, even as to the Founding Era, firearms were more available than

² Amici fully support Appellants’ challenge to Vermont’s unconstitutional magazine ban as well. But like Appellants, Amici acknowledge that any three-judge panel of this court is bound, for now, by *National Association for Gun Rights v. Lamont*, 153 F.4th 213 (2d Cir. 2025). To be sure, that case was wrongly decided, and it may soon be overturned by the Supreme Court either directly or indirectly. Several justices of the Supreme Court have acknowledged bans on common rifles and magazines are unconstitutional, and Justice Kavanaugh has noted that in his view, the Supreme

the State and its experts claim.

ARGUMENT

I. *BRUEN*’S FRAMEWORK BEGINS AND ENDS WITH HISTORICAL ANALYSIS ONCE THE SECOND AMENDMENT IS IMPLICATED

The district court reasoned that because Appellants “may keep and bear arms without immediately acquiring them,” Vermont’s waiting period law does not even implicate the plain text of the Second Amendment. *Vt. Fed’n of Sportsmen’s Clubs*, 741 F. Supp. 3d at 209.

Its first mistake was defining the proposed course of conduct far too narrowly, construing what the Appellants sought to do as “acquiring a firearm through a commercial transaction on-demand.” *Id.* The conduct at issue is simply “acquiring a firearm.” The other parts—the regulated commercial transaction and limits on buying “on-demand”—are the regulatory *burden* the government has placed on the proposed course of conduct. The burden is not part of the proposed course of conduct; in fact, it is exactly what is being challenged as unconstitutional. *See United States v. Martinez*, No. 23-cr-114, slip op. at 3 (E.D. Tex. Apr. 14, 2025) (“The Government next suggests that the ‘conduct’ covered by the text of the Second Amendment should be

Court “should and presumably will address the AR-15 issue soon, in the next Term or two.” *Snope v. Brown*, 145 S. Ct. 1534, 1535 (2025) (Kavanaugh, J., statement respecting the denial of certiorari).

This Court should revisit the issue with an en banc hearing as Appellants move it to do. App. Br. 11 n. 4. Otherwise, it will likely find itself on the wrong side of a Second Amendment question yet again. *See, e.g. United States v. Toner*, 728 F.2d 115, 128 (2d Cir. 1984) (incorrectly ruling that “the right to possess a gun is clearly not a fundamental right”); *N.Y. State Rifle & Pistol Ass’n v. Beach*, 818 F. App’x 99, 100 (2d Cir. 2020) (incorrectly asserting that “New York’s proper cause requirement does not violate the Second Amendment”).

defined narrowly to fit the precise conduct regulated by § 922(d)(10)—something like ‘selling a firearm to a drug trafficker.’ . . . But this impermissibly conflates the two steps of *Bruen*.’). The Tenth Circuit agreed in a similar case, defining the conduct at issue as simply acquiring arms, and dismissing New Mexico’s argument that a waiting period did not implicate the text because its burden was minimal since it had “no limiting principle.” *Ortega v. Grisham*, 148 F.4th 1134, 1144 (10th Cir. 2025).

This was clear in *Bruen* itself as well. There, New York argued that the Second Amendment “permits a State to condition handgun carrying in areas ‘frequented by the general public’ on a showing of a nonspeculative need for armed self-defense in those areas.” *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 33 (2022). The Supreme Court did not say that “carrying handguns publicly for self-defense without a showing of nonspeculative need” was the proposed course of conduct because that “showing of nonspeculative need” was the *burden* on the Second Amendment right. Instead, the conduct at issue was defined by the Supreme Court as “carrying handguns publicly for self-defense.” *Id.* at 32.

But more importantly, nothing in the Supreme Court’s Second Amendment jurisprudence—either the majority opinions or concurrences—supports the existence of a substantive “threshold question” or “plain text inquiry” that goes beyond the simple qualifier that arms-bearing conduct must be implicated. *See United States v. Rahimi*, 602 U.S. 680, 691 (2024) (the government must justify any regulation on arms-bearing conduct with historical tradition). This Court nevertheless described such a threshold when it ruled that the right to keep and bear arms can sometimes implicate an “ancillary” right to purchase, but limited protection arises only when the

challenged restrictions on purchasing arms “meaningfully constrain” their right to purchase arms. *Gazzola v. Hochul*, 88 F.4th 186, 197 (2d Cir. 2023). The Ninth Circuit has ruled similarly. *See Be&L Prods., Inc. v. Newsom*, 104 F.4th 108, 117 (9th Cir. 2024).

Those analyses misread *Bruen*. And they unjustifiably make what the Second Amendment protects much too narrow. By its plain language, *Bruen* eschews a two-step analytical test for deciding Second Amendment challenges: “Despite the popularity of th[e] two-step approach, it is one step too many.” 597 U.S. at 19. It makes little sense to strike down the old two-step test only to replace it with a new one, let alone a new two-step test plus a separate test for “ancillary” rights.

If there were any doubt, the Supreme Court dispelled it in *Rahimi*. “In *Bruen*, we explained that when a firearm regulation is challenged under the Second Amendment, the United States must show that the restriction ‘is consistent with the Nation’s historical tradition of firearm regulation.’” *Rahimi*, 602 U.S. at 689 (citing *Bruen*, 597 U.S. at 24); *see also id.* at 692 (“[T]he appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition.”). The analysis is one step: history and tradition.

To be sure, a challenger must show that the Second Amendment right to keep and bear arms is at least *implicated*. *Bruen*, 597 U.S. at 17. As Justice Thomas recently explained, “[a] challenger need only show that ‘the plain text’ of the Second Amendment covers his conduct. (citation omitted) This burden is met if the law at issue ‘regulates’ Americans’ ‘arms-bearing conduct.’” *Snope*, 145 S. Ct. at 1536 (Thomas, J., dissenting from denial of certiorari). But that initial showing is not an intensive analytical step. Like the First Amendment, which applies whenever speech is

regulated, the Second Amendment applies whenever the law regulates acquisition, ownership, possession, carrying, use, or commerce in arms.

Put more simply, “implicating” the right to keep and bear arms is far more expansive than covering only laws that directly restrict the literal “keeping” and “bearing” of arms. This discussion is critical here because, ever since *Bruen* was decided, some courts have exaggerated this “first step” into a gatekeeping device that avoids the historical inquiry altogether, shifting the burden away from the government. Under these “extremely narrow reading[s],” the Second Amendment is “wrongly. . .reduced to ‘a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.’” *Yukutake v. Lopez*, 130 F.4th 1077, 1092 (9th Cir. 2025) (citing *Bruen*, 597 U.S. at 70).³

A law may “implicate” the Second Amendment either directly or indirectly because constitutional rights protect not only core conduct but they also “implicitly protect those closely related acts necessary to their exercise.” *Luis v. United States*, 578 U.S. 5, 26 (2016) (Thomas, J., concurring). Indeed, courts have long recognized the Second Amendment protects such “attendant rights.” *See, e.g., Boland v. Bonta*, 662 F. Supp. 3d 1077, 1085 (C.D. Cal. 2023) (citing *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014)); *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011); *Rigby v. Jennings*, 630 F. Supp. 3d 602, 615 (D. Del. Sept. 23, 2022)); *Oakland*

³ *Yukutake* was vacated and will be reheard en banc, as is almost always the case for any Second Amendment victory in the Ninth Circuit. Amici recently discussed this unfortunate practice at length in their amicus brief for that case. *See* Brief of Amici Curiae Second Amendment Foundation, et al. at 3-12, *Yukutake v. Lopez*, No. 21-16756 (9th Cir. Aug. 25, 2025). Still, the three-judge panel’s point quoted above is persuasive.

Tactical Supply, LLC v. Howell Twp., Michigan, 103 F.4th 1186, 1189 (6th Cir. 2024) (“We agree . . . that at least some training is protected, not as a matter of plain text, but because it is a necessary corollary to the right defined in *Heller*.”).

As the Tenth Circuit recently put it, “[t]he Second Amendment’s text is not limited to direct prohibitions on possessing or using firearms. It states that the ‘right of the people to keep and bear Arms, shall not be infringed.’” *Ortega*, 148 F.4th at 1143 n.3. Once the concession is made that at least some protection attaches to those attendant or ancillary rights that make the Second Amendment meaningful, this Court has no authority to do anything but a *Bruen* analysis. *See N.Y. State Rifle & Pistol Ass’n v. City of N.Y.*, 590 U.S. 336, 365 (2020) (Alito, J., Gorsuch, J., and Thomas, J. dissenting) (“Once it is recognized that the right at issue is a concomitant of the same right recognized in *Heller*, it became incumbent on the City to justify the restrictions its rule imposes . . .”). The Supreme Court has not endorsed any separate interest-balancing Second Amendment test for “lesser” implied rights but has stated clearly that “when a firearm regulation is challenged under the Second Amendment, the [government] must show that the restriction ‘is consistent with the Nation’s historical tradition of firearm regulation.’” *Rahimi*, 602 U.S. at 689 (citing *Bruen*, 597 U.S. at 24); *see also Bruen*, 597 U.S. at 17, 24, 34 (emphasizing that the “only” way the government can justify an arms-bearing regulation is with historical tradition).

And that makes sense, because if judges got to decide whether an “ancillary right” is important enough to warrant protection, that heralds the reimposition of interest balancing in disguise. For example, before *Bruen*, the Ninth Circuit would look to the “severity of the burden” before deciding which level of scrutiny to apply. *See*,

e.g., *Pena v. Lindley*, 898 F.3d 969, 977 (9th Cir. 2018). Post-*Bruen*, that court simply slapped a fake moustache on that inquiry in *B&L Productions v. Newsom*, asking whether a law “meaningfully constrains” the right before turning to history. 104 F.4th at 118.⁴ But “meaningfully constrains” is indistinguishable from “severity of the burden.” Both invite courts to decide whether the Second Amendment is “really worth insisting upon.” *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008).

This Court made the same mistake in *Gazzola*, and that precedent should be narrowed because its reasoning is precisely what *Heller* and *Bruen* forbid. Indeed, the Supreme Court has “expressly rejected the application of any ‘judge-empowering ‘interest-balancing inquiry’ that ‘asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute’s salutary effects upon other important governmental interests.’” *Bruen*, 597 U.S. at 22. Yet by reviving “burden severity” under another name, this Court has reintroduced the very interest balancing the Supreme Court has twice rejected. The district court below was a prime example of this, as it approvingly cited amici who essentially argued that a waiting period is good *policy* to prevent suicide, even while acknowledging suicide is an “age-old problem.” *Vt. Fed’n of Sportsmen’s Clubs*, 741 F. Supp. 3d at 214. This made a mockery of the Supreme Court’s admonition that “the enshrinement of constitutional rights necessarily takes certain policy choices off the table.” *Heller*, 554 U.S. at 636.

In short, when a law regulates arms-bearing conduct, the Second Amendment is implicated, and the government must justify the law by reference to historical

⁴ The *B&L Productions* panel lifts its “meaningfully constrains” language directly from pre-*Bruen* precedent that is, at best, on life support in the wake of *Bruen*. 104 F.4th at 118 (citing *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 680 (9th Cir. 2017)).

tradition. It does not matter if a court thinks the burden imposed by the challenged law is minimal, or that it only implicates an “ancillary right,” or that it may be good policy. All of that would be a renewed form of the very interest-balancing test that the Supreme Court has explicitly forbidden. The district court erred in holding otherwise and should be reversed. Waiting periods have been held unconstitutional for a series of other rights, and “[t]he Second Amendment is no different.” *Ortega*, 148 F.4th at 1145. The government “cannot delay the exercise of a right because it believes that citizens might misuse it without sufficient time to reflect beforehand . . . regardless of paternalistic intent, waiting periods burden the right to keep and bear arms.” *Id.*

II. BECAUSE AN OBVIOUS ANALOGUE EXISTS, THE DISTRICT COURT SHOULD NOT HAVE ENGAGED IN THE “MORE NUANCED APPROACH”

Acknowledging that “unprecedented societal concerns or dramatic technological changes may require a more nuanced approach,” *Bruen*, 597 U.S. at 27, the Supreme Court authorized inferior courts to engage in reasoning by analogy in such circumstances, looking to whether a modern law is “relevantly similar” to proposed historical analogues. *Id.* at 28-29. But when there is no unprecedented concern or technological change, courts must instead look for “distinctly similar” historical laws rather than looser-fitting analogues. As the Ninth Circuit recently explained in a case about a one-gun-per-month purchasing limit, which California argued was meant to protect against gun trafficking, the State could not engage in a “more nuanced approach” of loose-fitting analogues because “the modern problems that California identifies as justification for its one-gun-a-month law are perhaps different in degree from past problems, but they are not different in kind. Therefore, a

nuanced approach is not warranted.” *Nguyen v. Bonta*, 140 F.4th 1237, 1245 (9th Cir. 2025); *see also id.* (“Because the industrialized production of guns can be traced back to the mid-nineteenth century, it is not a “dramatic technological change[]” requiring a nuanced approach.”).

The same is true here. However much the State may try and twist history, if a law-abiding citizen wanted to purchase a weapon in 1791, 1865, or any other time before the late Twentieth Century, they could do so without any waiting period. For that matter, even today only 13 states have implemented waiting periods, while the other 37 have not. *See* Everytown Research & Policy, *Waiting Periods*, <https://everytownresearch.org/rankings/law/waiting-periods/> (last visited Nov. 4, 2025). There isn’t even a *modern* tradition of waiting periods, let alone a historical tradition of them. They did not exist in the past and remain an outlier practice today.

Impulsive violence was a problem throughout our history just as it is now, yet the founding generation as well as those that followed it never sought to delay those seeking to purchase firearms. To be sure, the State claims that there were *effectively* waiting periods due to technological and transport limitations of the time—a point Amici rebut in more detail below—but it remains true that if someone in 1791 walked into a local gunsmith’s shop and firearms or other weapons were available for sale, they could buy them immediately, without any wait.

This absence of a similar law is important because “when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second

Amendment.” *Bruen*, 597 U.S. at 26. The district court correctly identified a societal problem that has clearly existed throughout our history that the modern law claims to address, but found no distinctly similar (or even vaguely similar) historical law that justified Vermont’s law. At that point, it should have simply concluded that Vermont’s law was inconsistent with our history and therefore unconstitutional.⁵

Instead, it took it upon itself to rely on unserious historical comparisons to uphold the law by any means necessary. Primarily, it looked to laws barring intoxicated people from possessing arms until they sobered up, ruling that they were similar to Vermont’s waiting period because “[i]n both cases, the relevant legislature identifies a period during which it believes that firearms pose an extreme risk to public safety. It then mandates that individuals refrain from carrying or using firearms until those people can exercise their Second Amendment rights safely and effectively.” *Vt. Fed’n of Sportsmen’s Clubs*, 741 F. Supp. 3d at 212.

This comparison falls apart under even surface-level scrutiny. For one, the laws drastically differ in “why” they were enacted. Barring people from possessing arms while they are intoxicated was not about preventing impulsive violence committed in a (sober) fit of rage; it was to prevent drunken violence. Of course, someone having a gun while he is drunk is dangerous, as is someone having a gun while they are enraged. But at that point, the comparison is so general that every challenged gun law may as well be upheld, because on some level all gun laws aim to mitigate danger. The

⁵ “Why do we require those showings? Through them, we seek to honor the fact that the Second Amendment ‘codified a *pre-existing* right’ belonging to the American people, one that carries the same ‘scope’ today that it was ‘understood to have when the people adopted’ it.” *Rahimi*, 602 U.S. 709 (Gorsuch, J., concurring) (quoting *Heller*, 554 U.S., at 592, 634-35)).

historical analysis of *Bruen* would become meaningless at that level of generality, because “[e]verything is similar in infinite ways to everything else.” *Bruen*, 597 U.S. at 29 (quoting C. Sunstein, *On Analogical Reasoning*, 106 Harv. L. Rev. 741, 773 (1993)). That’s why courts must not “read a principle at such a high level of generality that it waters down the right.” *Rahimi*, 602 U.S. at 740. (Barrett, J., concurring). Here, “[w]hile the justification for both laws at the highest level of generality is the same—preventing gun crime by dangerous or unstable people—one need look only one level deeper to see that who [the government] treats as dangerous (everyone) is not comparable to who historic intoxication laws treated as dangerous (intoxicated individuals).” *Ortega*, 148 F.4th at 1152.

The “how” of the law also differs tremendously. For the laws related to alcohol to temporarily disarm someone, that individual needed to make the choice to get drunk first. And it was only to that narrow subset of individuals that those laws applied. “Once the drunk sobered up, he could carry or use a gun once again.” *Id.* at 1151. No historical law imposed any wait time on every gun buyer because some of them *might* be drunk. But that is exactly what Vermont’s law does when it comes to combating impulsive violence. “The Waiting Period Act . . . applies a blanket burden across all of society, assuming that everyone is dangerous or unstable before they can exercise their Second Amendment right.” *Id.* at 1152.

Bruen does not only ask for “how” and “why,” but also the degree of burden imposed by the modern law compared to its proposed historical analogues. The “comparable burden on the right of armed self-defense,” *Bruen*, 597 U.S. at 29, is

simply much greater with a law that applies to everyone, as opposed to laws that apply only to those who choose to become inebriated.

The “how” comparison collapses even further when it comes to the particular facts of the Appellants. For example, as the district court itself acknowledged, Appellant Thompson “already owns several firearms.” *Vt. Fed’n of Sportsmen’s Clubs*, 741 F. Supp. 3d at 215. In that circumstance, the justification for Vermont’s law, “to prevent impulsive violence to the self and to the community,” *id.* at 214, has no application because the gun buyer could commit impulsive violence with a firearm they already own. Even if the law were constitutional as it pertains to first-time gun buyers, the district court did not even try to explain how the 72-hour waiting period could be constitutional as applied to challengers who already own firearms. Instead, it asserted that Appellants had not raised an as-applied challenge. *Id.* at 187. But as the Appellants point out, that is not correct. App. Br. 2 n. 2.⁶

Ultimately, the district court erred because rather than hold the government to some reasonable limits on generality between the modern law and proposed historical analogues, it squinted as hard as it could to see any vague similarity, and rubberstamped Vermont’s law on those grounds. A blanket waiting period is not at all

⁶ Moreover, the difference between facial and as-applied challenges is not some binary choice anyway. “The label is not what matters. The important point is that plaintiffs’ claim and the relief that would follow . . . reach beyond the particular circumstances of these plaintiffs. They must therefore satisfy our standards for a facial challenge to the extent of that reach.” *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010). Here, even assuming *arguendo* this Court believed Vermont’s law was constitutional as applied to first-time gun buyers, it would still be unconstitutional as to anyone who already owned at least one firearm and sought to buy another without any pointless wait time. That would be the extent of the reach in that scenario. This court could call that reach a partial facial challenge, or an as-applied challenge as to everyone in that circumstance, but again, the label is not what matters.

comparable to laws disarming drunkards, and “generally, a historical statute cannot earn the title ‘analogue’ if it is clearly more distinguishable than it is similar to the thing to which it is compared.” *Antonyuk v. Hochul*, 635 F. Supp. 3d 111, 131 (N.D.N.Y. 2022) (citing *Bruen*, 597 U.S. at 30).

III. PRIMARY SOURCES PROVE THAT FIREARMS COULD COMMONLY BE PURCHASED WITHOUT ANY WAITING IN THE FOUNDING ERA AND IN THE 19TH CENTURY.

The district court, relying on the State’s proffered experts, found that “the specific problem addressed by Vermont’s law—immediate acquisition of highly lethal firearms—was not present at the founding.” *Vt. Fed’n of Sportsmen’s Clubs*, 741 F. Supp. 3d at 213. The founders could not have expected the widespread availability of a “large menu of firearms,” and the “instant availability of a wide variety of guns would not have been anticipated at the founding.” *Id.* After all, as the State’s experts argue, there were no “Guns-R-Us” stores around in 1791. *Id.* And waiting for delivery of goods was an “accepted part of American life in the 18th and 19th century.” *Id.* Therefore, “the rapid availability of guns presents an ‘unprecedented social concern’ that requires a ‘more nuanced approach’ to historical analogy.” *Id.*

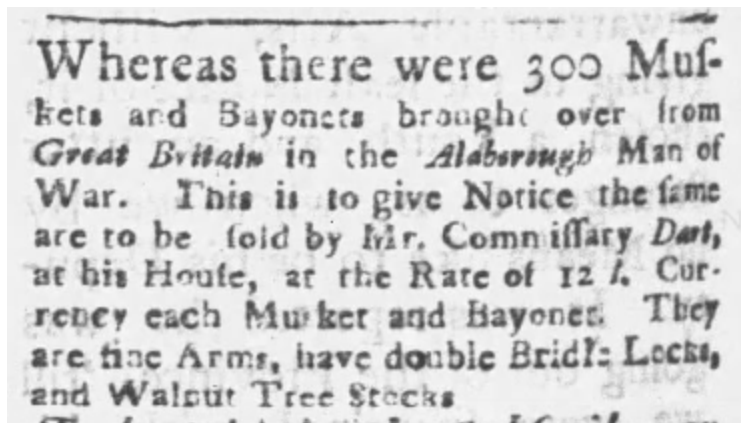
The State’s experts certainly have impressive academic credentials, and the historical narrative they weave sounds very compelling. If only it were true.

Obviously, there was no Bass Pro Shop in 1791.⁷ But there were analogous places: blacksmiths and other shops that sold firearms, swords, knives, and other

⁷ Nor should Appellants be held to that standard anyway. Every type of modern place has changed from its historical predecessors, but we can still draw close analogies. *See, e.g., Wolford v. Lopez*, 116 F.4th 959, 999 (9th Cir. 2024) (“Defendant likely is correct that, as his expert states, modern hospitals and medical facilities do not resemble the hospitals at the Founding. But medical facilities of some sort have

weapons, armor, and accoutrements. For some individuals living in remote areas, perhaps there would be a wait involved to either travel to a place that sold firearms, or a wait to have them shipped to them. But once an individual arrived somewhere that had firearms available for sale, no wait was involved, certainly none mandated by the government. And for those who lived in towns or cities, there would be no wait at all to purchase available arms.

Newspaper advertising of the time period demonstrates this reality. For example, the South Carolina Gazette advertised in 1745 that “300 Muskets and Bayonets” were to be “sold by Mr. Commissary Dart, at his House.” *See* The South Carolina Gazette, Jun. 1, 1745, at 2, <https://www.newspapers.com/image/605132111/> (last visited Nov. 9, 2025).



In 1797, Isaac Bull of Hartford, Connecticut advertised a great variety of goods “Just received, and for Sale,” including “Twenty-Six pair Horsemen’s Pistols.” *See*

existed since colonial times . . . Defendant has not introduced any evidence of a historical ban on firearms in medical facilities of any type.”).

Hartford Courant, Mar. 6, 1797, at 3, <https://www.newspapers.com/image-view/233556024/> (last visited Nov. 9, 2025).

P I S T O L S.

Just received, and for Sale
By **I S A A C D. B U L L,**

TWENTY-Six pair Horsemen's Pistols; a handsome variety of gold and gilt Ear-rings; gold, gilt, pearl and glass Pendants; elegant Miniature settings; Locketts with devices and plain; Necklaces, Watch Crystals, Chains, Seals, Keys and Hooks; elegant Ladies Pocket Books, Thread Cases and Purfes; Gentlemen's Pocket and Memorandum Books; great variety agate, gilt and other Snuff and Tobacco boxes; silver and other Segar Tubes and Boxes; Box Paints, Mathematical Instruments; plated, ivory, ebony and buck, carving, table and desert Knives and Forks; Razors, Scissors and Penknives in abundance; Braces and Bitts; Spectacles and Cases assorted; 50 M. Needles, &c. &c. Also, for sale as above among very many other articles, German and other Steel per faggot; Nails assorted per cask; 10 by 8, 9 by 7 and 8 by 6 Glass per quantity; best Virginia Tobacco in kegs; Philadelphia Gunpowder in quarter casks, Shot per cwt. clean Junk Bottles in hampers, Rock Salt, &c. &c. Hartford, March 4.

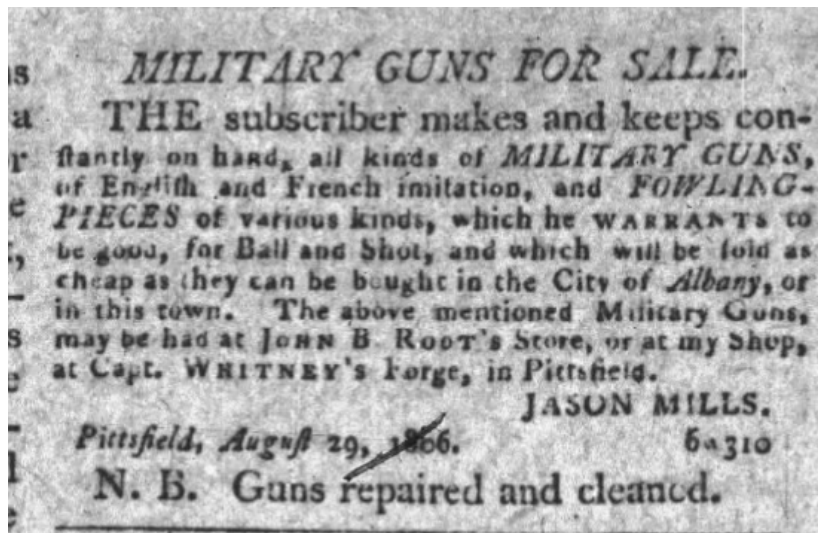
This of course continued after the turn of the century. An advertisement that ran in the New-York Evening Post on December 1, 1806, read: “NEW MUSKETS FOR SALE—2600 Muskets with Bayonets, by JOHN MURRAY & SONS, 269 Pearl-street.” See New-York Evening Post, Dec. 1, 1806, at 1, <https://www.newspapers.com/image/33514851/> (last visited Nov. 6, 2025).

Gold and Silver Watches, Oct. 22

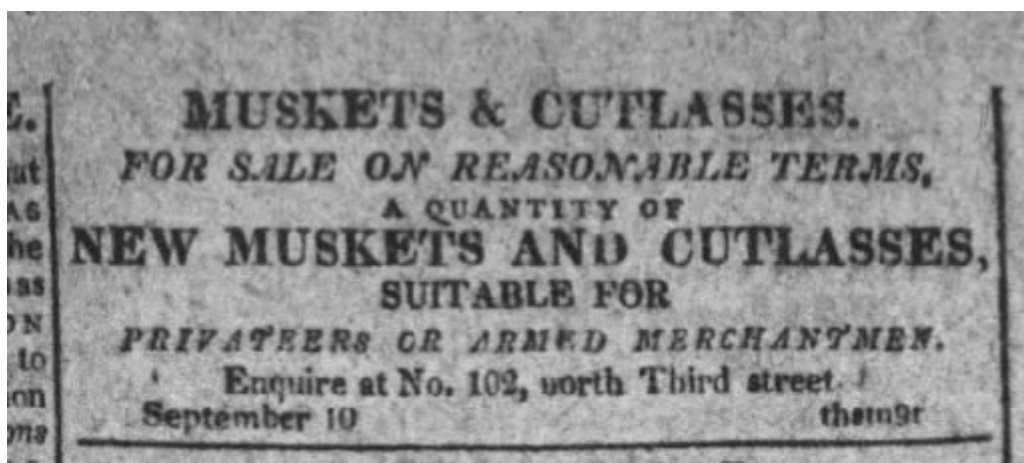
NEW MUSKETS FOR SALE.—2600
Muskets with Bayonets, by
JOHN MURRAY & SONS,
Oct. 22 269 Pearl-street.

FOR SALE—87 boxes Paccarelli Wire.

Also in 1806, an advertisement in a Pittsfield, Massachusetts newspaper announced, “MILITARY GUNS FOR SALE.” It continued that the seller “makes and keeps **constantly on hand**, all kinds of MILITARY GUNS . . . and FOWLING PIECES.” The Pittsfield Sun (Pittsfield), Sep. 27, 1806, at 4, <https://www.newspapers.com/image/531981202/> (last visited Nov. 6, 2025) (bold added).



An 1812 advertisement in the Aurora General Advertiser, a Philadelphia publication, offered “MUSKETS & CUTLASSES FOR SALE ON REASONABLE TERMS” that were “suitable for Privateers or Armed Merchantmen.” Those interested could inquire at No. 102 North Third Street. *See* Aurora General Advertiser (Philadelphia), Oct. 24, 1812, at 4, <https://www.newspapers.com/image/586580249/> (last visited Nov. 6, 2025).

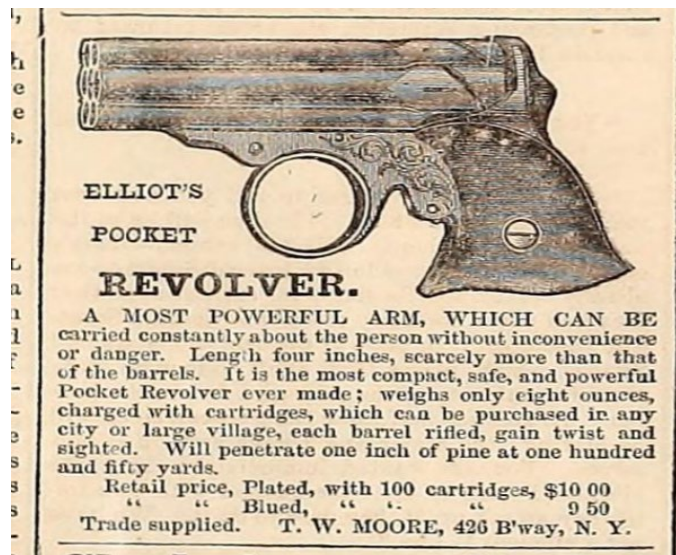


Amici could rattle off further examples, but those five advertisements make the point: while guns are undoubtedly more readily available in our modern era, people could often purchase firearms on demand two centuries ago, particularly if they lived in cities and towns. Some sellers even had firearms “constantly on hand,” as one of the advertisements above put it. It is safe to assume those sellers did not make their customers wait three days if they had money on hand and were ready to buy.

And whatever limitations on gun sales the founding era may have had due to the manufacturing and logistical challenges of the time, those dissipated by the mid-19th century. Mass production of firearms became the norm, and firearms availability greatly expanded. For example, between 1850 and 1860, separate from its government contracts, Samuel Colt’s young company sold about 170,000 pocket revolvers and another 98,000 full-size revolvers to civilians. History.com Editors, 1847: *Samuel Colt Sells His First Revolvers to the U.S. Government*, History.com (Nov.16, 2009), <https://www.history.com/this-day-in-history/january-4/colt-sells-his-first-revolvers-to-the-u-s-government> (last visited Nov. 6, 2025). As another example, between its introduction in 1873 and its discontinuation in 1919, Winchester sold 720,000 units of

its Model 1873, the lever-action rifle known as the “gun that won the west.” Kristin Alberts, *A Primer on the Gun that Won the West: Winchester 1873*, Guns.com (July 8, 2020), <https://www.guns.com/news/2020/07/08/a-primer-on-the-gun-that-won-the-west-winchester-1873> (last visited Nov. 6, 2025).

Firearms had become easy enough to produce that many more advertisements appeared in mainstream publications to drum up sales. For instance, a December 1861 issue of Harper’s Weekly advertised “Elliot’s Pocket Revolver,” a small pistol that “could be carried constantly about the person” and came with 100 cartridges for a total of \$10 (about \$368 today⁸).⁹ The advertisement noted that the gun could be purchased “in any city or large village.”



During the Reconstruction Era and after, newspapers ran similar ads. For instance, Remington advertised its wide array of “revolvers, rifles, muskets, pocket

⁸ All conversions were made using the CPI Inflation Calculator available here: <https://www.in2013dollars.com/>.

⁹ *Elliot’s Pocket Revolver Advertisement*, Harper’s Wkly., Dec. 14, 1861, at 799, available at <https://archive.org/details/harpersweeklyv5bonn/page/798/mode/2up> (last visited Nov. 6, 2025).

and belt revolvers, repeating pistols, rifle canes, [and] revolving rifles” in the Flushing Daily Times on November 12, 1866.¹⁰ And the Boston Evening Transcript published an advertisement for revolvers in its December 12, 1887, issue, with the vendor stating it expected to sell 200 per day at a price of \$3.50 (\$119 today).¹¹ Mass production had arrived, and no sales restrictions or wait times were implemented in response.

To be sure, by that time, buyers could also very easily mail-order guns, which would, of course, require waiting for their purchase to arrive. Americans could browse a large selection of firearms in the Sears Catalog, purchase as many as they wanted at affordable prices, and have them shipped to their homes with no background check or any other government intrusion. For example, the 1902 catalog prominently advertised an automatic revolver for \$2.75 (\$104 today) and also listed other revolvers for as low as \$1.60 (\$60 today).¹² The “wait time” to receive these guns was for an actual purpose—shipping the order—and not some government-imposed mandate. But if someone *did* need a gun immediately, they could buy one from local general stores without having to wait. See Cathy Shufro, *A Brief History of Guns in the U.S.*, Hopkins Bloomberg Pub. Health Mag. (Oct. 13, 2021), <https://magazine.publichealth>

¹⁰ *E. Remington & Sons Advertisement*, The Flushing Daily Times, Nov. 12, 1866, available at <https://books.google.com/books?id=XvRZAAAAIIBAJ&pg=PA4&dq=revolvers&a#v=onepage&q=revolvers&f=false> (last visited Nov. 6, 2025).

¹¹ *G.W. Simmons & Co. Revolver Advertisement*, Boston Evening Tr., Dec. 12, 1887, at 8, available at https://books.google.com/books?id=6Zc-AAAAIIBAJ&pg=PA8&dq=revolvers&article_id=4796,5116559&hl=en&sa=X&ved#v=onepage&q=revolvers&f=false (last visited Nov. 6, 2025).

¹² *Revolver Advertisements*, Sears, Roebuck, and Co. Catalogue, Issue No. 112, Fall 1902, at 306-07, available at <https://archive.org/details/catalogueno11200sear/page/306/mode/2up> (last visited Nov. 6, 2025).

[.jhu.edu/2021/brief-history-guns-us](https://www.jhu.edu/2021/brief-history-guns-us) (“Soon after the end of the Civil War, gunmakers with surpluses sought peacetime customers. They convinced dry goods stores to sell handguns alongside flour and sugar.”).

To be clear, Amici firmly believe the proper time period for historical analogues is the founding era, not the later 19th century. That is why advertisements from that earlier time period were also included above. But the State, its experts, and the district court all saw it fit to rely on historical laws from later in the 19th century. “The appropriate question is whether the analogous historical restrictions reveal useful constitutional principles, not necessarily *when* they are from.” *Vt. Fed’n of Sportsmen’s Clubs*, 741 F. Supp. 3d at 197 n.16 (emphasis added).

Given that, it is only fair that they also must contend with the retail realities of the era as well, specifically, the increasing availability of firearms. Whatever the limits of the founding era, by the 1850s and thereafter, there essentially *were* the equivalent of “Guns-R-Us” stores around. Other courts have concluded the same. “[W]e are unpersuaded by California’s argument that the mass availability of firearms is a new development. In another case, California argued that ‘[t]he market revolution of the Jacksonian period (1828-1854) led to radical advancements in firearms technology and [the] wide availability of cheaper, deadlier, concealable firearms.’” *Nguyen*, 140 F.4th at 1245 (citing Defendants’ Memorandum of Points and Authorities in Support of Motion for Summary Judgment at 15, *Chavez v. Bonta*, No. 3:19-cv-01226 (S.D. Cal. Mar. 15, 2024), ECF No. 132-1.).

To conclude, contrary to what the State and its experts claim, individuals could purchase firearms quickly in the founding era. There were certainly some logistical

limits for those who did not live in population centers, but even those began to dissipate as mass production of firearms became the norm in the decades after the founding. And it bears repeating that no state passed any waiting period law when faced with this reality of immediately available firearms.

CONCLUSION

Waiting periods implicate the plain text of the Second Amendment, and they have no basis in our historical tradition. Thus, they are plainly unconstitutional. The district court should be reversed.

Dated: November 13, 2025

Respectfully submitted,

SECOND AMENDMENT FOUNDATION

/s/ Konstadinos T. Moros

Konstadinos T. Moros

SECOND AMENDMENT FOUNDATION

12500 NE 10TH PL.

Bellevue, WA 98005

kmoros@saf.org

C.D. Michel

MICHEL & ASSOCIATES, P.C.

180 E. Ocean Blvd., Ste. 200

Long Beach, CA 90802

cmichel@michellawyers.com

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B)(i) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and the Rules of this Court, it contains 5,974 words. This brief also complies with the typeface and typestyle requirements of Federal Rules of Appellate Procedure 29(a)(4), 32(a)(5), and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Garamond.

Date: November 13, 2025

SECOND AMENDMENT FOUNDATION

/s/ Konstadinos T. Moros

Konstadinos T. Moros

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing BRIEF OF AMICI CURIAE SECOND AMENDMENT FOUNDATION, CALIFORNIA RIFLE & PISTOL ASSOCIATION, INCORPORATED, SECOND AMENDMENT LAW CENTER, INC., MINNESOTA GUN OWNERS CAUCUS, AND NATIONAL RIFLE ASSOCIATION OF AMERICA IN SUPPORT OF PLAINTIFFS- APPELLANTS with the Clerk of the Court for the United States Court of Appeals for the Second Circuit on November 13, 2025, using the Appellate Electronic Filing system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Date: November 13, 2025

SECOND AMENDMENT FOUNDATION

/s/ Konstadinos T. Moros

Konstadinos T. Moros

Counsel for Amici Curiae