BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 23-CF-344

EMANUEL LEYTON PICON, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

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Cr. No. 2021-CF3-4336

TABLE OF CONTENTS

TABLE OF AUTHORITIES*

Cases

* Authorities upon which we chiefly rely are marked with asterisks.

Other Authorities

ISSUES PRESENTED

I. Whether the trial court erred in permitting the prosecutor to argue that Leyton's testimony should be disbelieved because he offered a third-party-perpetrator defense to police but claimed self-defense at trial, where the prosecutor was not arguing that Leyton inappropriately tailored his testimony to the trial evidence, and in any event this Court's precedent would permit such a "tailoring" argument.

II. Whether the District's age-based firearm registration and licensing limitations violate the Second Amendment, where there is a historical tradition of age-based restrictions that stretches from the founding to the present.

INTRODUCTION

In the early morning hours of July 30, 2021, Edwin Hernandez and Selvin Amaya were walking along 14th Street, NW, heading home. Without warning, the man walking ahead of them—appellant Emanuel Leyton Picon ("Leyton")—turned around, pulled out a gun, and shot Hernandez at close range. Initially, Leyton claimed that the shot had come from a passing car. But when police found Leyton's DNA on the gun used in the shooting, Leyton changed stories, admitting at trial that he had been the shooter while claiming that he had shot in self-defense.

Leyton's substantive challenges to his convictions fail. During closing argument, the prosecutor permissibly urged the jury to discredit Leyton's trial testimony because it differed from his initial account to police. And the District's restrictions on firearm licensing and registration for those under 21 years old (like Leyton) do not violate the Second Amendment under *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022). Aside from a limited remand for merger, Leyton's convictions should be affirmed.

COUNTERSTATEMENT OF THE CASE

On February 18, 2022, Leyton was indicted for assault with intent to kill while armed (AWIKWA) (D.C. Code §§ 22-401, 22-4502), aggravated assault while armed (AAWA) (D.C. Code §§ 22-404.01, 22-4502), assault with a dangerous

weapon (ADW) (D.C. Code § 22-402), assault with significant bodily injury while armed (ASBIWA) (D.C. Code §§ 22-404(a)(2), 22-4502), four associated counts of possession of a firearm during a crime of violence (PFCV) (D.C. Code § 22-4504(b)), carrying a pistol without a license (CPWL) (D.C. Code § 22-4504(a)(1)), possession of an unregistered firearm (UF) (D.C. Code § 7-2502.01(a)), and unlawful possession of ammunition (UA) (D.C. Code § 7-2506.01(a)(3)) (Record (R.) 15). After a trial from January 4-18, 2023, before the Honorable Robert D. Okun, a jury convicted Leyton of 9 counts, acquitting him only of AWIKWA and the related PFCV (R. A at 31-39, 66; 1/18 Transcript (Tr.) 7-9). (All transcripts are from 2023.) On April 7, 2023, the court sentenced Leyton to a total of 120 months of incarceration, suspended as to all but 72 months, five suspended years of supervised release, and three years of probation (4/7 Tr. 19-21; R. 72-73). Leyton noted an appeal on April 22, 2023 (R. 74).

The Trial

The Government's Evidence

On the night of July 29-30, 2021, cousins Edwin Hernandez and Selvin Amaya went to a club called Johana's on 14th Street, NW (1/5 Tr. 19-20, 52, 64-65, 74-76, 114). They drove to Johana's together, arriving at around 9:30 or 10:00 (1/5 Tr. 76, 84). After some time at the club, two women started fighting in front of Hernandez and Amaya (1/5 Tr. 53-54, 77-80, 82-83, 114-15; 1/9 Tr. 52-53).

Hernandez and Amaya were not involved in the resulting skirmish, but Johana's security kicked everyone out of the club (1/5 Tr. 54, 82-84; 1/9 Tr. 53).

Hernandez's next memory was waking up on the floor of Johana's after being shot (1/5 Tr. 56-57). But Amaya and surveillance video filled in the details. After leaving, Hernandez and Amaya began walking back to their car (1/5 Tr. 84). Johana's was on 14th Street near the intersection with Decatur Street, and their car was parked along Decatur Street (1/5 Tr. 34, 86-87; 1/9 Tr. 74). They were walking behind a man (later identified as Leyton) who had also been kicked out of Johana's (1/5 Tr. 87-88, 107). "[O]ut of nowhere," when they got to Decatur Street, Leyton "turned around quickly," lifted up his shirt, pulled a black handgun from his waist, and shot Hernandez in the chest from six-to-eight feet away (1/5 Tr. 87-93, 117). It all happened "too fast" for Amaya to "say anything" (1/5 Tr. 89). Nor did Leyton say anything to them (1/5 Tr. 90). Neither Hernandez nor Amaya were armed, and they had no conflict with Leyton (1/5 Tr. 61-62, 90-91). After shooting, Leyton "just stood there" (1/5 Tr. 117). Hernandez and Amaya ran back inside of Johana's, where Amaya realized that Hernandez had been shot (1/5 Tr. 93-95).

Surveillance video captured Hernandez and Amaya calmly leaving the club and slowly walking out of the camera's view toward Decatur (Gov. Ex. 8 at 3:35:44-3:36:13; 1/5 Tr. 97-99). One second later, the crowd looks back in their direction, and Hernandez and Amaya run back to Johana's (Gov. Ex. 8 at

3:36:14-3:36:24; 1/5 Tr. 99; 1/12 Tr. 91). Moments later, Leyton "sauntered behind them in the same direction," pointing and seeming animated (Gov. Ex. 8 at 3:36:21-3:36:49; Gov. Ex. 9 at 3:36:21-3:36:49; 1/12 Tr. 63-64). Emergency personnel took Hernandez to the hospital, where he was treated for a life-threatening gunshot wound to his chest (1/5 Tr. 5-16, 23-30, 105). The bullet had traveled "only a few inches" away from his heart, coming "very close" to major arteries (*id.* at 23-24).

Meanwhile, officers on scene stopped Leyton, who matched the description given by Amaya (1/9 Tr. 56-65, 81-85, 94-97). Amaya positively identified Leyton as the shooter (1/5 Tr. 107-09; 1/9 Tr. 29, 35-39). Investigating officers also discovered a shell casing near the corner of 14th and Decatur (1/9 Tr. 75-78, 131-40).

The next day, police recovered a black handgun hidden in a flowerpot a few doors down from Johana's (1/9 Tr. 149-64; 1/10 Tr. 49-51; see Gov. Ex. 3, 26-28). A firearm examiner concluded that the cartridge casing found at the scene of the shooting was consistent with having come from the gun (1/10 Tr. 79-81, 95). DNA recovered from the gun matched Leyton's (1/10 Tr. 125-30). Leyton did not have a license to carry a firearm or a registration (1/11 Tr. 15-18).

The Defense Evidence

Leyton testified that he shot Hernandez, but claimed he acted to protect himself. According to Leyton, he had driven to Johana's to meet a group that

included his ex-girlfriend, Gixele (1/11 Tr. 89). After some time at the club, he went back to his car to get a bottle of water, then returned (*id.* at 89-90, 92-93). Both times Leyton entered Johana's, he was patted down by security, who failed to detect the gun that Leyton was concealing near his genitals (*id.* at 90, 104-05).

Leyton reported "tension" between a drunk Gixele and another group (1/11 Tr. 92-93). Then, as Leyton was walking Gixele to the bathroom, a man from the other group (seemingly Amaya) tried to trip her (*id.* at 93-95, 113-14, 153-55). Leyton "got in the guy's face" and told him "that was a bitch-ass move" (*id.* at 94-95). Hernandez and his friends started arguing with Leyton, calling names back and forth, but Leyton saw it as "nothing serious"; when one said he wanted to fight, Leyton responded, "you can see me outside" (*id.* at 94-95, 112-13). By that point, Gixele had started fighting another woman, and when others joined in against Gixele, Leyton "rushed up there and start[ed] pushing, shoving people, punching," including punching a woman in her face (*id.* at 95-97, 115-17). Security guards intervened kicked out Gixele and Leyton (*id.* at 97).[1]

[1] In closing argument, the prosecutor noted the improbability of this timeline: Surveillance video showed that less than 100 seconds elapsed between when Leyton reentered the club and when commotion from the fight drew a security guard inside (see Gov. Ex. at 3:33:00-3:34:40). That was not enough time for Leyton to "come back in, dance with his girlfriend, tensions rise, . . . she gets tripped, he . . . gets into some [argument] with the guys[,] [t]hen there's the fight with the girls and then they [all] get kicked out" (1/12 Tr. 93).

As Leyton walked to his car, he heard "threats" being yelled from behind (1/11 Tr. 97-100). When he turned around, he saw the two men he had argued with (apparently, Hernandez and Amaya) "walking up to me, kind of rushing" (*id.* at 98-99, 124-25). (Later, Leyton said there were actually three people (*id.* at 100, 152).) They were "reaching to their pants," "like, putting their pants up, fixing their pants" or "going to reach down for something" (*id.* at 102). Leyton thought "that they were reaching for a knife or a weapon," but admitted that he never saw a weapon, and he "d[id]n't know if they have weapons" (*id.* at 102, 104, 121-22). Nor did he see any of them "take anything out of their waistband" (*id.* at 122).

After the men "surrounded" him (and maybe one "reach[ed] out to [him]"), Leyton pulled out his gun and shot (*id.* at 104-06, 111, 148). He did not aim for anyone in particular (*id.* at 106). After shooting, he stayed around to see "what happened" (*id.* at 106). Leyton got "rid of the gun," though he "zoomed out" and "d[id]n't remember what [he] did with it" (*id.* at 107).

Leyton admitted that when he spoke to law enforcement after his arrest, he had "lied," offering a very different account of the shooting (1/11 Tr. 87, 108-09). Leyton told police that after seeing the men behind him, he turned around and walked backwards towards Decatur (*id.* at 130). Once he reached the corner, Leyton told police, he had "heard a shot" "from really close" by (*id.* at 130-31). After extensive cross-examination, Leyton reluctantly admitted that he had also told police that night

that he "thought the gunshot came from two cars that were parked on Decatur street" (*id.* at 131-40). When Leyton "lied to the police and said [he] didn't shoot [Hernandez], [he] thought the gun was stashed away and hidden" in the flowerpot (*id.* at 142).

SUMMARY OF ARGUMENT

Leyton's challenge to the prosecutor's closing argument fails. Legally, this Court has already held that a prosecutor may point out that a defendant's presence during trial gave him an opportunity to tailor his testimony to the trial evidence. This division has no authority to overrule that prior holding. Factually, the government was not making that sort of "tailoring" argument anyway. The prosecutor's point was that Leyton changed his account based on the DNA and ballistics evidence developed before trial—not that Leyton was hearing that evidence for the first time in open court and adjusting his trial testimony accordingly. In any event, there was no "substantial prejudice."

Nor do the District's age-based firearm registration and licensing limitations violate the Second Amendment. Unlike the exceptional laws the Supreme Court invalidated in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), the age-based restrictions here reflect a historical tradition that stretches from the founding to the present. At the founding, legislatures established an age qualification of 21 for a variety of

important rights, and there is no evidence that the Second Amendment's ratifiers believed that the Amendment would preclude adoption of the same age qualification for keeping and bearing of arms. During the nineteenth century, when handguns became more lethal and more widespread, many jurisdictions placed special restrictions or bars on handguns for 18-to-20-year-olds. And in modern times, "all fifty States (and the District of Columbia)" have "imposed minimum-age qualifications on the use or purchase of particular firearms." *National Rifle Ass'n of Am., Inc. v. ATF*, 700 F.3d 185, 190 n.4 (5th Cir. 2012).[2]

ARGUMENT

I. The Prosecutor's Argument Was Permissible.

A. Standard of Review and Legal Principles

"When evaluating claims of prosecutorial error, [this Court] must first determine whether the challenged statements from the prosecutor, viewed in context, were, in fact, improper." *Bost v. United States*, 178 A.3d 1156, 1190 (D.C. 2018). "The regulation of closing argument [is] left to the discretion of the trial judge," so

[2] We agree that Leyton's ADW and ASBIWA convictions merge with his AAWA conviction. *Medley v. United States*, 104 A.3d 115, 132 (D.C. 2014). Also merging are his three related PFCV convictions (one for each assault-based conviction). *Matthews v. United States*, 892 A.2d 1100, 1106 (D.C. 2006). Because Leyton's "sentences for these counts are concurrent and congruent," "[n]o resentencing is required." *Medley*, 104 A.3d at 133.

when counsel makes an improper statement during closing argument, "the question of what, if any, remedial action is appropriate is committed to the trial judge's discretion." *Id.* (cleaned up). "A criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements must be viewed in context." *Jones v. United States*, 739 A.2d 348, 353 (D.C. 1999) (quotation marks omitted).

"If the statements were improper and the claim was properly preserved at trial, a reversal is only warranted if the statements caused 'substantial prejudice,'" hinging on whether the Court "can say, with fair assurance that the judgment was not substantially swayed by the error." *Bost*, 178 A.3d at 1190 (cleaned up) (citing *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)). "The four factors to be considered when determining prejudice are 1) the gravity of the impropriety, 2) its relationship to the issue of guilt, 3) the effect of any corrective action by the trial judge, and 4) the strength of the government's case." *Id.* (quotation marks omitted).

B. Additional Background

Before closing argument, based on the prosecutor's cross-examination of Leyton (see 1/11 Tr. 140-45), the defense preemptively objected to an argument that "the defendant" had switched his defense based on the evidence: "he's not switching because he's not in charge of the case; me and Mr. Healy are" (1/12 Tr. 37-38). The government explained that it would be "comparing" Leyton's accounts at "two time

periods": "One, speaking to police; two, speaking in his defense at trial" (*id.*). The trial court overruled the objection, explaining that such an argument was "fair": "[I]t's not about the defense. It's about what he said to the police and what he said when he testified on the stand after hearing the evidence in the case. I think the government's argument is fair if it's focused on the differences in what he said and the reasons for why there might be that difference." (*Id.* at 39.)

During the initial closing argument, the prosecutor accordingly argued that Leyton's changing account made his claims of self-defense less credible:

> [T]here are special reasons here to not believe what this defendant is telling you. Because he took the stand and told you—told you in his own words that the night this happened he lied and lied and lied repeatedly to the police. And why did he lie repeatedly to the police? To get out of trouble.
>
> He knew he had shot this guy. He stashes the gun. And once the gun is hidden, he repeatedly tells police, I was there, but it wasn't me; the shots came from some cars parked on the street. Told that to police three times that night. He lied to get out of trouble. He admits that to you. He used the word "lie" himself.
>
> Why would you think that here, at trial, he wouldn't again lie to get himself out of trouble? It's—I urge you not to believe his words. And think about the timing of his change in his story.
>
> On the scene, when he stashed the gun, when he thinks he's gotten away with it and he fooled police, he says, yeah, I was there, but I just wasn't the shooter.
>
> Once the gun is found, once you hear the DNA evidence linking the defendant to the gun, once you hear the ballistics evidence linking the gun to the shooting, now it seems that—he can't really say he's not the shooter anymore, so how else is he going to get out of trouble? His only

choice left is self-defense, and so that's what he says.

> Ladies and gentlemen, that is—that is too convenient. That is not credible. (1/12 Tr. 72-73.)

C. *Teoume-Lessane*, Not *Jenkins*, Governs This Claim.

In *Jenkins v. United States*, 374 A.2d 581 (D.C. 1977), this Court condemned an argument suggesting that a defendant's "presence during the trial facilitated his ability to fabricate," offering a two-sentence explanation of why this was improper:

> In effect, the prosecutor sought to have the jury draw adverse inferences from appellant's exercise of his right to confront the witnesses against him. *Cf. Griffin v. California*, 380 U.S. 609 (1965). This, we think, was improper, and in the future, such comments on a defendant's presence in the courtroom should not be countenanced by the trial court.

Jenkins, 374 A.2d at 584; *see also Coreas v. United States*, 565 A.2d 594, 604 (D.C. 1989) (under *Jenkins*, "[d]rawing an adverse inference from the defendant's exercise of his constitutional right to confront witnesses is impermissible").

Two decades later, the Second Circuit cited *Jenkins* in holding that "it is constitutional error for a prosecutor to insinuate to the jury for the first time during summation that the defendant's presence in the courtroom at trial provided him with a unique opportunity to tailor his testimony to match the evidence." *Agard v. Portuondo*, 117 F.3d 696, 707-09 (2d Cir. 1997). But the Supreme Court reversed. In *Portuondo v. Agard*, 529 U.S. 61 (2000), the Court held that "it was constitutional for a prosecutor, in her summation, to call the jury's attention to the fact that the defendant had the opportunity to hear all other witnesses testify and to tailor his

testimony accordingly." *Id.* at 63. Like the Second Circuit, the Supreme Court cited *Jenkins* among the contrary decisions. *See id.* at 67. The Court declined to "extend . . . *Griffin v. California*, which involved comments upon a defendant's *refusal* to testify," to a "tailoring" argument. *Id.* at 65 (citation omitted). The Court explained that while *Griffin* prohibited a legally impermisible inference, "it is natural and irresistible for a jury, in evaluating the relative credibility of a defendant who testifies last, to have in mind and weigh in the balance the fact that he heard the testimony of all those who preceded him." *Id.* at 65, 67-68 & n.1 (emphasis omitted). "Allowing comment upon the fact that a defendant's presence in the courtroom provides him a unique opportunity to tailor his testimony is appropriate—and indeed, given the inability to sequester the defendant, sometimes essential—to the central function of the trial, which is to discover the truth." *Id.* at 73.

Teoume-Lessane v. United States, 931 A.2d 478 (D.C. 2007), presented "the first occasion on which this court has been required to address the *Portuondo* decision, and therefore presents the question of whether this aspect of *Jenkins* remains good law in the District." *Id.* at 492. Over seven carefully reasoned paragraphs, *Teoume-Lessane* concluded that "*Jenkins*, in its reliance on *Griffin*, was a constitutional decision that has now been overruled by the United States Supreme Court in *Portuondo* and therefore is no longer binding on this court." *Id.* at 494-95. This Court rejected suggestions that *Jenkins* was a non-constitutional ruling under

this Court's "supervisory authority to maintain more stringent local standards to deter prosecutorial misconduct." *Id.* at 494. "To the contrary, *Jenkins* relied specifically on *Griffin*, a constitutional decision of the Supreme Court." *Id. Jenkins* and its progeny "assumed" "that a defendant's Sixth Amendment confrontation rights included the right to listen to the testimony of all other witnesses before testifying *and* the right to testify without the prosecutor commenting on the effect these circumstances have on the defendant's credibility as a witness. The Supreme Court, however, has determined that no such constitutional right exists." *Id. Teoume-Lessane* also "decline[d] . . . to exercise [this Court's] supervisory authority to prohibit the government from commenting on a defendant's ability to tailor his own testimony to the evidence," while noting that a defendant could seek an instruction that he had a constitutional right to be present. *Id.* at 495 & n.14.

Since *Teoume-Lessane*, this Court has repeatedly upheld similar closing arguments. In *Smith v. United States*, 175 A.3d 623 (D.C. 2017), this Court rejected challenges to "closing argument to the effect that appellant's presence during the testimony of the government's witnesses gave him an opportunity to tailor his testimony, even though the prosecutor 'could point to nothing specific that Mr. Smith did to tailor his testimony,'" explaining that *Teoume-Lessane* recognized that *Portuondo* had overruled *Jenkins* and declined to prohibit such argument on non-constitutional grounds. *Id.* at 633 n.10. More recently, in *Young v. United States*, 305

A.3d 402 (D.C. 2023), this Court saw nothing improper in a prosecutor's argument urging the jury to discredit a defendant who "'gets on the stand and makes these self-serving statements about how it was self-defense and tries to match it up with all the evidence that's been introduced, all the evidence that he's heard.'" *Id.* at 424.

Leyton maintains (Br. 8-13) that *Teoume-Lessane* should be overruled because it misinterpreted *Jenkins*, which was really a non-constitutional decision that survived *Portuondo*. But *Teoume-Lessane* has it right. *Jenkins* suggested the argument was improper because "the prosecutor sought to have the jury draw adverse inferences *from appellant's exercise of his right to confront the witnesses against him*." 374 A.2d at 584 (emphasis added). This "right" of course comes from the Confrontation Clause. And the sole case *Jenkins* cited on this point was *Griffin*, which found a constitutional violation in using a defendant's invocation of his Fifth Amendment right against self-incrimination as evidence of guilt. *See* 380 U.S. at 615; *see also United States v. Goodwin*, 457 U.S. 368, 372 (1982) (punishing someone "for exercising a protected statutory or constitutional right" violates due process). *Jenkins*'s "cf." cite for *Griffin* that so puzzles Leyton (Br. 10-11 & n.3) thus has a clear meaning: just as it is unconstitutional to use a defendant's invocation of his Fifth Amendment right against self-incrimination as evidence of guilt, so too it is unconstitutional (*Jenkins* reasoned) to use a defendant's exercise of his Sixth Amendment right to confront witnesses as evidence of guilt. *Jenkins* was a

constitutional ruling. The Supreme Court in *Portuondo* likewise read *Jenkins* as a constitutional ruling, not as an exercise of non-constitutional supervisory authority.

Even if reasonable minds could differ on this score, a division of this Court lacks authority to overrule *Teoume-Lessane*, which held that *Jenkins* was a constitutional decision that was abrogated by *Portuondo*. Even if a different division could have reached another decision, *Teoume-Lessane*'s interpretation is binding, because "no division of this court will overrule a prior decision of this court." *M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971).

Leyton suggests that *Teoume-Lessane* may be overruled because "[w]here a division of this court fails to adhere to earlier controlling authority, we are required to follow the earlier decision rather than the later one." *Thomas v. United States*, 731 A.2d 415, 421 n.6 (D.C. 1999). But *Thomas* kicks in when there is a clear contradiction between two opinions—usually because the later decision did not realize that the earlier one existed. *See, e.g.*, *id.* ("there is no indication in *Townsend* that *Proctor* and *Brewster* were brought to the attention of the court."). It is not to be deployed whenever a litigant disagrees with how a division interprets precedent. After all, divisions are continually interpreting precedential decisions, and those interpretations are binding. Leyton cites no authority suggesting that a disgruntled litigant can keep seeking the same rejected interpretation from subsequent divisions, on the theory that the "true" meaning of the precedent should govern. Leyton's

proposal that this division should overrule *Teoume-Lessane* and reinstate *Jenkins* would destabilize the entire precedent-based system, inviting the constant relitigation of old issues that *M.A.P. v. Ryan* seeks to prevent. Indeed, if this division were now to overrule *Teoume-Lessane* and hold that *Jenkins* governs, nothing would prevent a later division from reversing course again, holding that this division was wrong and *Teoume-Lessane* governs. There is no basis for the legal chaos that Leyton invites. *Teoume-Lessane* remains binding, foreclosing Leyton's challenge.

D. Even Under *Jenkins*, Leyton Shows No Error.

Even if *Jenkins* were still good law, it would not help Leyton, because the prosecutor's argument here was not that Leyton's "*presence during the trial* facilitated his ability to fabricate" in the way that *Jenkins* condemns. 374 A.2d at 584 (emphasis added).[3] Instead, the prosecutor contended that evidence emerged *between the crime and the trial* that made Leyton's original account to police unsustainable: On the scene, when Leyton "thinks he's gotten away with it and he fooled police," he told the police, "yeah, I was there, but I just wasn't the shooter" (1/12 Tr. 73). "Once the gun is found" and linked to Leyton, though, "he can't really

[3] *See, e.g.*, *Teoume-Lessane*, 931 A.2d at 495 ("aspects of appellant's testimony . . . seemed unusually coincidental to the government's presentation"); *Portuondo*, 529 U.S. at 64 (prosecutor argued defendant's presence allowed him to "sit there and think" "[h]ow am I going to fit [what I say] into the evidence?"); *Jenkins*, 374 A.2d at 584 (prosecutor argued defendant's presence meant he "knew what the evidence was, and he knew exactly what he had to explain away").

say he's not the shooter anymore, so how else is he going to get out of trouble? His only choice left is self-defense, and so that's what he says." (*Id.*)

True, the prosecutor referred to evidence linking the gun to Leyton in terms of *the jury* ("you") "hear[ing] the DNA evidence" and "hear[ing] the ballistics evidence" (1/12 Tr. 70, 73). But no reasonable juror would have interpreted the argument to mean that *Leyton* was hearing about the DNA and ballistics for the first time at trial. Indeed, the government's opening statement previewed that such evidence already existed and would be presented at trial (see 1/5 a.m. Tr. 40).

Nor was the prosecutor "impugning" Leyton for "remaining silent during trial until it was the turn of the defense to present its case" (cf. Br. 12). Leyton seems to imagine that the jury blamed him for not taking the stand at the start of the case and claiming self-defense. But the trial court had already instructed the jury that first "the government will try to prove the charges that it has brought by presenting evidence," and only "[a]fter the government presents its evidence, the defendant may present evidence, but he is not required to do so, because the law does not require a defendant to prove his innocence or to produce any evidence at all" (1/5 a.m. Tr. 29).

Similarly, the government did not suggest that Leyton had maintained his claims of a third-party shooter until the eve of trial, or that he had some pretrial obligation to disclose his self-defense claims (cf. Br. 13-14). The government's argument focused on "two time periods": the initial police interview and the trial

testimony (1/12 Tr. 37-38; 1/13 Tr. 5-6). And anyway, the trial court specifically told the jury (in response to a jury note) that they could not consider the defendant's original plea, because they had no evidence about it.[4]

E. Leyton Shows No "Substantial Prejudice."

Finally, even if the prosecutor's comments were somehow erroneous, they caused no "substantial prejudice." Leyton does not (and could not) dispute that the prosecutor could permissibly argue that the jury should discredit Leyton's testimony because he was changing his story based on the discovery of new evidence: at first he told the police there was another shooter, but when his DNA was found on the gun, he switched to self-defense. That unchallenged reasoning was the focus of the prosecutor's argument (1/12 Tr. 72-73). In addition, the "gravity of [any] impropriety" was slight. *Bost*, 178 A.3d at 1190. Moreover, the trial court here (see 1/12 Tr. 41-42, 45, 47-48) "gave the jury instructions on its obligation to judge credibility and on the status of statements by counsel," which even *Jenkins* holds "mitigates" the error that the case recognizes. 374 A.2d at 585.

In addition, the evidence against Leyton was strong. Leyton admitted to being the shooter (as Amaya testified), but his self-defense claims were doubly weak. First,

[4] While Leyton mentions (Br. 13) the jury's note asking about "the defendant's original response/answer/plea to the government's charges" (1/13 Tr. 3), he does not claim that the trial court erred in its response. Instead, he had "no objection" to the response that the court ultimately gave (1/13 Tr. 12).

his account of the shooting was not credible: The video surveillance had Hernandez and Amaya meandering slowly off-screen just a second before the shooting, at odds with the "rushing" up and "surrounding" of Leyton that he had described (see Gov. Ex. Gov. Ex. 8 at 3:35:44-3:36:24). And his actions right after the shooting—following Hernandez and Amaya, seeming to continue his aggression toward them (see Gov. Ex. 8 at 3:36:21-3:36:49; Gov. Ex. 9 at 3:36:21-3:36:49)—similarly did not square with Leyton fearing for his safety. Leyton also admitted that he had "lied" to police originally, undercutting his credibility at trial (1/11 Tr. 87, 108-09). Second, as the prosecutor explained during closing argument (see 1/12 Tr. 77-78), even Leyton's own account did not justify a self-defense shooting. Leyton never claimed that Hernandez and Amaya actually had a weapon, or represented a weapon. He described them "putting their pants up, fixing their pants" (1/11 Tr. 102), which could be consistent with them being armed, but also has many obvious other explanations. And Leyton never claimed that they had *retrieved* an object from their waistband. At the very least, once Leyton had his gun in his hand, there was no theory for why Hernandez and Amaya (without any weapons in their hands) continued to pose a danger. As the prosecutor told the jury: "You can't pull a gun and shoot someone at point-blank range in the chest because they say mean things to you, they're threatening you, or they're grabbing their pants. You can't do it. It's not reasonable. It is excessive." (1/12 Tr. 77.) In short, the "gravity of the

impropriety," "its relationship to the issue of guilt," "the effect of any corrective action by the trial judge," and "the strength of the government's case" all point to no substantial prejudice. *Bost*, 178 A.3d at 1190.

II. The Second Amendment Permits the District's Age-Based Firearm Restrictions.[5]

A. Statutory and Regulatory Background

Age-based restrictions on firearms in the District of Columbia date back to 1892, when Congress barred any person in the District from (among other things) "giv[ing] to any minor under the age of twenty-one" any "deadly or dangerous weapon[]," including a "pistol[]." 27 Stat. 116-17 (1892).

Today, the District prohibits persons under 21 from obtaining a license to carry a pistol. *See* D.C. Code § 7-2509.02 (requiring that a license applicant certify and demonstrate that he is at least 21 years old); D.C. Mun. Reg. § 24-2332 (same). The District also requires firearm registration applicants between ages 18 and 21 to provide a notarized statement by a parent or guardian that (1) the registrant has that parent or guardian's permission to own and use the firearm, and (2) the parent or guardian assumes civil liability for damages resulting from the registrant's actions

[5] Substantial portions of Part II of the government's brief here are taken from a brief that the federal government recently filed in the Fourth Circuit addressing these federal restrictions. *See* Gov't Br., *Brown v. ATF*, No. 23-2275 (4th Cir. brief filed Jan. 22, 2024), 2024 WL 323114.

in using that firearm. D.C. Code § 7-2502.03(a)(1).[6]

[6] Federal law likewise imposes age-based limits on commercial sales of handguns. Following a multi-year inquiry into violent crime that included "field investigation and public hearings," S. Rep. No. 88-1340, at 1 (1964), Congress found "that the ease with which" handguns could be acquired by "juveniles without the knowledge or consent of their parents or guardians[] . . . and others whose possession of such weapons is similarly contrary to the public interest[] is a significant factor in the prevalence of lawlessness and violent crime in the United States," Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, tit. IV, § 901(a)(2), 82 Stat. 197, 225; *see also* 114 Cong. Rec. 12,309 (1968) (statement of Sen. Dodd). Based on its investigations, Congress identified "a causal relationship between the easy availability of firearms other than a rifle or shotgun and juvenile and youthful criminal behavior." Pub. L. No. 90-351, tit. IV, § 901(a)(6), 82 Stat. at 225-26; *see also 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); S. Rep. No. 89-1866, at 58-60 (1966). These legislative findings accord with more recent empirical evidence identifying a relationship between setting the minimum age to purchase handguns at 21 and a decrease in violent crime. *See, e.g.*, Kara E. Rudolph et al., *Association Between Connecticut's Permit-to-Purchase Handgun Law and Homicides*, 105 Am. J. of Pub. Health e49, e49-50 (2015), https://perma.cc/A5K8-ZZQT. To that end Congress included statutory provisions designed to address "[t]he clandestine acquisition of firearms by juveniles and minors," S. Rep. No. 90-1097, at 79 (1968), in both the Omnibus Crime Control and Safe Streets Act of 1968 and the Gun Control Act of 1968, Pub. L. No. 90-618, tit. I, § 101, 82 Stat. 1213, 1213-14.

Under the current versions of those restrictions, federally licensed sales of firearms to an individual between the ages of 18 and 20 are limited to "a shotgun or rifle." 18 U.S.C. § 922(b)(1); *see also id.* § 922(c)(1) (similar restrictions when purchaser "does not appear in person at the licensee's business premises"). Congress has also promulgated various other national age-based firearms regulations. For example, Congress has generally barred individuals under 18 years old from possessing handguns. *See* 18 U.S.C. § 922(x). And in 2022, Congress adopted provisions that require enhanced background checks for individuals under the age of 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)).

B. *Bruen* and the Relevant Legal Framework

In *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022) , the Supreme Court considered a challenge made by two "law-abiding, *adult* citizens" to New York's requirement that, to obtain a license to carry a concealed firearm outside the home or place of business for self-defense, one must prove that "proper cause exists" to issue it. 597 U.S. at 12-13, 15 (emphasis added). "Proper cause" was not defined by statute, but had been interpreted by New York courts to require proof of a "special need for self-protection distinguishable from that of the general community." *Id.* at 12 (cleaned up). This was a "demanding" standard. *Id.* Living or working in a high-crime area was not enough; instead, applicants typically needed "evidence of particular threats, attacks, or other extraordinary danger to personal safety." *Id.* at 13 (cleaned up).

The Supreme Court held that New York's "proper cause" requirement violated the Second Amendment. In doing so, *Bruen* disproved the then-prevailing two-step test fashioned by the lower courts after *District of Columbia v. Heller*, 554 U.S. 570 (2008), which required (1) determining whether the regulated conduct fell within "the original scope of the [Second Amendment] right based on its historical meaning," and if so, (2) engaging in a means-end balancing inquiry to decide whether the challenged regulation satisfied either strict or intermediate scrutiny (depending on whether the regulation burdened a "core" right). *Bruen* held that

> this two-step approach[] is one step too many. Step one of the predominant framework is broadly consistent with *Heller*, which demands a test rooted in the Second Amendment's text, as informed by history. But *Heller* and *McDonald* [*v. City of Chicago*, 561 U.S. 742 (2010),] do not support applying means-end scrutiny in the Second Amendment context.

597 U.S. at 19 (cleaned up). In adopting this approach, *Bruen* explained that it was applying—not altering—*Heller*'s test: "The test that we set forth in *Heller* and apply today requires courts to assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding." *Id.* at 26.

Applying the text-and-history test, *Bruen* first concluded that the Second Amendment's text—"the right of the people to keep and bear Arms shall not be infringed"—protected conduct governed by New York's "proper cause" requirement: the right of "ordinary, law-abiding, *adult* citizens" who wish to "carry[] handguns publicly for self-defense." *Id.* at 31-32 (emphasis added). "The Second Amendment's plain text thus presumptively guarantees petitioners . . . a right to 'bear' arms in public for self-defense." *Id.*

Next, the Court considered whether New York could show that its proper-cause requirement was "consistent with this Nation's historical tradition of firearm regulation," such that "the pre-existing right codified in the Second Amendment, and made applicable to the States through the Fourteenth, does not protect petitioners' proposed course of conduct." 597 U.S. at 34. *Bruen* agreed that, "[t]hroughout modern Anglo-American history, the right to keep and bear arms in public has

traditionally been subject to 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. Nonetheless, there was not "a tradition of broadly prohibiting the public carry of commonly used firearms for self-defense," or of "limiting public carry only to those law-abiding citizens who demonstrate a special need for self-defense." *Id.* Accordingly, "[u]nder *Heller*'s text-and-history standard, the proper-cause requirement is therefore unconstitutional." *Id.* at 39

Notably, *Bruen* did not hold—or even suggest—that merely requiring a license would itself infringe on the Second Amendment's text, so as to shift the burden to the government to justify a historical tradition of licensing. This Court has already recognized that "*Bruen* 'does not prohibit States from imposing licensing requirements' for concealed-carry of a handgun for self-defense." *Abed v. United States*, 278 A.3d 114, 129 n.27 (D.C. 2022) (quoting *Bruen*, 597 U.S. at 79 (Kavanaugh, J. concurring)). To the contrary, *Bruen* emphasized:

> To be clear, nothing in our analysis should be interpreted to suggest the unconstitutionality of the 43 States' "shall-issue" licensing regimes, under which a general desire for self-defense is sufficient to obtain a permit. Because these licensing regimes do not require applicants to show an atypical need for armed self-defense, *they do not necessarily prevent "law-abiding, responsible citizens" from exercising their Second Amendment right to public carry.* Rather, it appears that these shall-issue regimes, which often require applicants to undergo a background check or pass a firearms safety course, *are designed to ensure only that those bearing arms in the jurisdiction are, in fact, "law-abiding, responsible citizens."* And they likewise appear to contain only narrow, objective, and definite standards guiding licensing

> officials, rather than requiring the appraisal of facts, the exercise of judgment, and the formation of an opinion—features that typify proper-cause standards like New York's.

597 U.S. at 38 n.9 (emphasis added) (cleaned up).

In a separate concurrence, Justice Alito emphasized that *Bruen* "does not expand the categories of people who may lawfully possess a gun," and federal law thus continues to "bar[] the sale of a handgun to anyone under the age of 21." *Bruen*, 597 U.S. at 73 (Alito, J., concurring) (citing 18 U.S.C. §§ 922(b)(1), (c)(1)).

Bruen did not abrogate all post-*Heller* caselaw upholding the District of Columbia's gun laws. To the extent that prior decisions applied *Heller*'s "step one" text-and-history analysis, *Bruen* does not call these precedents into question at all. *See Bruen*, 597 U.S. at 19 ("Step one of the predominant framework is broadly consistent with *Heller*, which demands a test rooted in the Second Amendment's text, as informed by history."). *Bruen* calls into question only those decisions predicated upon the "second step" means-end balancing. Since *Heller*, both this Court and the D.C. Circuit have repeatedly upheld the District's gun registration and licensing regimes based on reasoning that survives *Bruen*.

As to registration, this Court held in *Lowery v. United States*, 3 A.3d 1169 (D.C. 2010), that the D.C. "restrictions" on gun registration—including the age-related restrictions found in D.C. Code § 7-2502.03(a)(1)—"are compatible with the core interest protected by the Second Amendment." *Id.* at 1175-76; *see also Heller*

v. District of Columbia (*Heller II*), 670 F.3d 1244, 1254-55 (D.C. Cir. 2011) ("basic registration requirements are self-evidently de minimis, for they are similar to other common registration or licensing schemes, such as those for voting or for driving a car, that cannot reasonably be considered onerous"). More recently, in *Dubose v. United States*, 213 A.3d 599 (D.C. 2019), the Court emphasized that "'[b]asic registration of handguns is deeply enough rooted in our history to support the presumption that a registration requirement is constitutional.'" *Id.* at 603 (quoting *Heller II*, 670 F.3d at 1253).

As to licensing, the D.C. Circuit in *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017), anticipated the *Bruen* decision and enjoined the District's "good reason" requirement for obtaining a license to carry a concealed handgun based on text and history, without any inquiry into means-ends scrutiny. *See Bruen*, 597 U.S. at 15 (citing *Wrenn* with approval). At the same time, though, *Wrenn* reasoned that "[a]t the Second Amendment's core lies the right of responsible citizens to carry firearms for personal self-defense beyond the home, subject to longstanding restrictions" that "reflect limits to the preexisting right protected by the Amendment." 864 F.3d at 659, 667; *see also id.* at 664 ("[T]he Second Amendment must enable armed self-defense by commonly situated citizens: those who possess common levels of need *and pose only common levels of risk*.") (emphasis added). And, *Wrenn* added, "[t]hese traditional limits" that the Second Amendment tolerates

"include, for instance, licensing requirements." *Id.* at 667; *see also Medina v. Whitaker*, 913 F.3d 152, 154 (D.C. Cir. 2019) (concluding based on history and tradition that "felons are not among the law-abiding, responsible citizens entitled to the protections of the Second Amendment"). This Court has thus explained that *Wrenn* "did not invalidate the statutory scheme which required a person to obtain a license to carry a pistol outside the home," instead "[s]evering the 'good reason' provision" while leaving the other licensing requirements "operative" and constitutional. *Dubose v. United States*, 213 A.3d at 604-05; *see also Abed*, 278 A.3d at 129 n.27 (*Bruen* does not prohibit handgun licensing); *Brown v. United States*, 979 A.2d 630, 638-42 (D.C. 2009).

C. Additional Background

Leyton was 20 years old at the time of the shooting. Before trial, he moved to dismiss the CPWL, UF, and UA counts, arguing that the age-based restrictions on D.C. handgun licensing and registration violate the Second Amendment (R. 27). The government opposed (R. 46).

Judge Okun denied the motion in a written order, explaining that "D.C.'s age-based restrictions on the right to keep and bear arms are consistent with the text and history of the Second Amendment" (R. 50 at 5). *Bruen*, the trial court emphasized, "involved two 'law-abiding, *adult* citizens,'" and the concurring opinions suggested that licensing requirements and age-related restrictions remain valid (*id.* at 3

(emphasis by Judge Okun)). Further, the Court explained, "courts that have addressed this issue have consistently rejected Second Amendment challenges to age-based licensing provisions" (*id.* at 4). While "these pre-*Bruen* cases" might have "applied 'one step too many' in their analyses," they "discuss the text and history of the Second Amendment in a way that remains persuasive post-*Bruen*" (*id.*). And they reveal "a 'longstanding tradition of age- and safety-based restrictions on the ability to access arms,'" consistent with the District's laws (*id.*).

D. The District's Age Requirements Are Constitutional Under *Bruen*.

1. Appellate Courts Disagree About the Constitutionality of Age-Based Restrictions.

This Court has not squarely ruled on the constitutionality of the District's age-based firearm restrictions. *Cf. Lowery*, 3 A.3d at 1175-76 (stating that firearm-registration requirements, including "§ 7-2502.03 (a)(1) (age)," are "compatible with the core interest protected by the Second Amendment); *Brown*, 979 A.2d at 642 ("leav[ing] for another day" "whether the Second Amendment generally affords a seventeen-year-old a right to bear arms"). Other courts disagree about the issue.

On one side, the First and Fifth Circuits have upheld age-based restrictions. *See, e.g.*, *Nat'l Rifle Ass'n of America v. McCraw*, 719 F.3d 338, 347 (5th Cir. 2013); *Nat'l Rifle Ass'n of America v. ATF*, 700 F.3d 185, 199-204 (5th Cir. 2012); *United States v. Rene E.*, 583 F.3d 8, 15-16 (1st Cir. 2009). While those decisions rested in

part on the now-rejected interest-balancing "second step," they also relied on text and history in a way that remains persuasive post-*Bruen*.[7] They explain that persons under 21 are outside the scope of the Second Amendment because they were considered "infants" in the founding era, and that regulating firearm possession by persons under 21 is consistent with the Nation's historical tradition. Post-*Bruen*, at least one district court has recognized that "the panel's discussion of the historical record in *NRA* [*v. ATF*] satisfies the *Bruen* test" and rejected a challenge to § 922(b)(1) on that ground. *Reese v. ATF*, 647 F. Supp. 3d 508, 524 (W.D. La. 2022), *pending appeal* No. 23-30033 (5th Cir. argued Nov. 6, 2023).

After *Bruen*, the Eleventh Circuit similarly concluded in a now-vacated

[7] In *NRA v. ATF*, the Fifth Circuit was "inclined to uphold the challenged federal laws at step one of our analytical framework, [but] in an abundance of caution, [the court] proceed[ed] to step two," and "conclude[d] that the challenged federal laws pass constitutional muster even if they implicate the Second Amendment guarantee." 700 F.3d at 204. *McCraw* treated *NRA v. ATF*'s first-step analysis as binding, explaining that "under circuit precedent, we conclude that the conduct burdened by [Texas statutes prohibiting 18-to-20-year-olds from carrying handguns in public] likely 'falls outside the Second Amendment's protection.'" 719 F.3d at 347 (quoting *NRA v. ATF*, 700 F.3d at 203). *Rene E.* upheld a law barring firearm possession for juveniles under age 18. But "because the line between childhood and adulthood was historically 21, not 18, the First Circuit's conclusion that there is a 'longstanding tradition' of preventing persons under 18 from 'receiving' handguns applies with just as much force to persons under 21." *NRA v. ATF*, 700 F.3d at 204; *see also In re Jordan G.*, 33 N.E.3d 162, 168 (Ill. 2015) (similarly reasoning that "our conclusion in [*People v. Aguilar*, 2 N.E.3d 321, 329 (Ill. 2013)], that age based restrictions on the right to keep and bear arms are historically rooted, applies equally to those persons under 21 years of age" as to persons under 18 in *Aguilar*).

opinion that such age-based restrictions were constitutional. *See Nat'l Rifle Ass'n v. Bondi*, 61 F.4th 1317 (11th Cir.), *opinion vacated upon granting of rehearing en banc*, 72 F.4th 1346 (11th Cir. 2023). While noting that "it's not clear whether 18-to-20-year-olds 'are part of "the people" whom the Second Amendment protects,'" the *Bondi* panel explained that even assuming 18-to-20-year-olds fell within the Second Amendment's text, regulating "the sale of firearms to 18-to-20-year-olds is consistent with this Nation's relevant historical tradition of firearm regulation." *Id.* at 1324-25. The panel explained that "many states, when the Fourteenth Amendment was ratified, banned 18-to-20-year-olds from buying and sometimes even possessing firearms," doing so "to address the public-safety problem some 18-to-20-year-olds with firearms have long represented." *Id.* at 1332.

On the other hand, a divided Third Circuit panel recently struck down a Pennsylvania law that "effectively bans 18-to-20-year-olds from carrying firearms outside their homes during a state of emergency," concluding that the Second Amendment "presumptively encompass all adult Americans, including 18-to-20-year-olds, and we are aware of no founding-era law that supports disarming people in that age group." *Lara v. Comm'r Pennsylvania State Police*, 91 F.4th 122 (3d Cir. 2024). Judge Restropo disagreed, explaining in a lengthy dissent that "the scope of the right, as understood during the Founding-era, excludes those under the age of 21." *Id.* Notably, the Pennsylvania law effectively banned carrying of *all* firearms,

not just handguns.[8]

2. The District's Age Requirements Are Consistent With the Second Amendment's Text and the Nation's Historical Tradition of Firearm Regulation.

Leyton's facial challenge to the age requirement doubly fails. He fails to show that the plain text of the Second Amendment applies to persons under 21. Moreover, even if age-based restrictions fell within the scope of the Second Amendment, they are "consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 17.

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[8] Appeals addressing the constitutionality of age-based firearm restrictions—including appeals from most of the district court cases Leyton cites (see Br. 20)—are now pending in circuits across the country. *See, e.g.*, *Brown v. ATF*, No. 23-2275 (4th Cir.) (in abeyance pending en banc decision in *Maryland Shall Issue, Inc. v. Moore*, No. 21-2017); *McCoy v. ATF*, No. 23-2085 (4th Cir.) (appeal of *Fraser*) (in abeyance pending *Maryland Shall Issue*); *Reese v. ATF*, No. 23-30033 (5th Cir. argued Nov. 6, 2023); *Worth v. Jacobson*, No. 23-2248 (8th Cir. argued Feb. 13, 2024); *Rocky Mt. Gun Owners v. Polis*, No. 23-1380 (10th Cir. appellee brief due Apr. 1, 2024); *NRA v. Bondi*, No. 21-12314 (11th Cir.) (en banc) (held pending Supreme Court decision in *United States v. Rahimi*, No. 22-915). Before *Bruen*, divided panels in the Fourth and Ninth Circuits found that specific firearm restrictions on 18-to-20-year-olds violated the Second Amendment, but their opinions were later vacated. *See Jones v. Bonta*, 34 F.4th 704, 720 (9th Cir. 2022), *vacated on reh'g*, 47 F.4th 1124 (9th Cir. 2022); *Hirschfeld v. ATF*, 5 F.4th 407, 418 (4th Cir. 2021), *vacated and appeal dismissed as moot*, 14 F.4th 322 (4th Cir. 2021). The Seventh Circuit found it unnecessary to decide whether 18-to-20-year-olds are within the Second Amendment's scope, upholding a parental-consent requirement under the now-invalid, interest-balancing step. *See Horsley v. Trame*, 808 F.3d 1126 (7th Cir. 2015).

Evidence from the founding confirms that the Second Amendment's text was not understood as preventing legislatures from implementing age qualifications on access to arms. At the founding, as today, legislatures established age qualifications for a range of activities, from getting married, *see, e.g.*, 4 *Statutes at Large of Pennsylvania* 153 (James T. Mitchell & Henry Flanders eds., 1897), to becoming a naturalized citizen, *see* Act of Mar. 26, 1790, ch. 3, 1 Stat. 103, 103-04; Act of Jan. 29, 1795, ch. 20, 1 Stat. 414, 414-15, to forming enforceable contracts, *see* 2 James Kent, *Commentaries on American Law* 101 (1827). *See also* Saul Cornell, *"Infants" and Arms Bearing in the Era of the Second Amendment: Making Sense of the Historical Record*, 40 Yale L. & Pol'y Rev. Inter Alia 1, 9-10 (2021) (collecting examples).

For the Second Amendment's ratifiers, a natural point at which to draw the line between underage individuals and responsible adults was age 21. "The age of majority at common law was 21" and at the founding, individuals under that age were classified as "minor[s]" or "infant[s]." *NRA v. ATF*, 700 F.3d at 201; *see* 1 William Blackstone, *Commentaries on the Laws of England* 451 (1765) ("So that full age in male or female, is twenty one years[] . . . who till that time is an infant, and so styled in law."). Consistent with the common law understanding, the "American colonies, then the United States, adopted age twenty-one as the near universal age of majority." Vivian E. Hamilton, *Adulthood in Law and Culture*, 91

Tul. L. Rev. 55, 64 (2016); *see* 2 Kent, *supra*, at 191 (confirming that "the inability of infants to take care of themselves[] . . . continues, in contemplation of law, until the infant has attained the age of twenty-one years").

Legislatures thus set 21 as the age qualification for many important activities. Among other examples, those under 21 generally could not "claim the right of petition," Cornell, *supra*, at 8-10; enter many kinds of contracts, *see* 1 Zephaniah Swift, *A System of the Laws of the State of Connecticut* 213-16 (Windham & John Byrne eds., 1795); serve on juries, *see* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 877 n.52 (1994) (finding no evidence that historical legislatures authorized individuals under the age of 21 to serve on juries); or vote, *see* Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. Cin. L. Rev. 1345, 1345, 1358-59 (2003) (explaining that state legislatures allowed individuals to vote only after they turned 21, a practice that persisted from the founding through the 26th Amendment's passage in 1971).

In explaining these age qualifications, the founders emphasized their view that reason and judgment are not fully developed before age 21. For example, John Adams observed that individuals under that age could not vote because they lack "[j]udgment" and "[w]ill" and are not "fit to be trusted by the [p]ublic." *Letter from John Adams to James Sullivan, 26 May 1776*, https://perma.cc/CE79-RA8K (on file

with the National Archives). Gouverneur Morris, a signer of the Constitution and drafter of its Preamble, likewise warned that under-21-year-olds "want prudence" and "have no will of their own." *James Madison's Notes of the Constitutional Convention, August 7, 1787*, Yale L. Sch. Avalon Project, https://perma.cc/QJ7B-D4J4. Similarly, although at the founding citizens generally had a duty to serve as peace officers, among those ineligible for such service were "infants"—that is, individuals under the age of 21. John Faucheraud Grimké, *The South-Carolina Justice of Peace* 117-18 (R. Aitken & Son eds., 1788). There is no basis for concluding that the founders nevertheless believed that 18-to-20-year-olds were constitutionally entitled to purchase lethal weapons without parental approval. *See NRA v. ATF*, 700 F.3d at 201-02.

That conclusion accords with historical norms concerning parental supervision of 18-to-20-year-olds. Founding-era parents generally retained substantial authority to supervise individuals under the age of 21. *See Brown v. Entertainment Merchs. Ass'n*, 564 U.S. 786, 834 (2011) (Thomas, J., dissenting). Nothing in the historical record suggests that when the founders codified the Second Amendment, they intended to alter that paradigm.

Nineteenth-century evidence supports the same conclusion. The Supreme Court has described evidence from that period as a "critical tool of constitutional interpretation." *Heller*, 554 U.S. at 605. The Court explained that "the public

understanding of a legal text in the period after its enactment" is probative as to its meaning. *Id*. Thus, the Court looks to nineteenth-century sources in discerning the historical scope of various constitutional provisions, including the Second Amendment, *see, e.g.*, *id.* at 605-19 (considering evidence "through the end of the 19th century"); *Bruen*, 597 U.S. at 35-36, 50-56 (same).

Within a lifetime of the founding, state legislatures enacted laws that parallel the restrictions challenged here. At the founding, handguns were rare, fired only one shot, often misfired, took a long time to load, and could not be kept loaded for extended periods. *See* Randolph Roth, *Why Guns Are and Are Not the Problem*, in Jennifer Tucker et al. eds., *A Right to Bear Arms?: The Contested Role of History in Contemporary Debates on the Second Amendment* 113, 117-18 (2019). By the mid-nineteenth century, "a burst of innovations in the arms industry" resulted in revolvers that could be loaded and fired quickly. *Id*. at 121-24. As handguns became more lethal and more widespread, legislatures moved to limit the sale of those weapons to underage individuals.

For as long as legislatures have codified age qualifications on handguns, they have drawn the line at age 21. As early as 1856, Alabama forbade providing "to any male minor" any "air gun or pistol," Act of Feb. 2, 1856, No. 26, § 1, 1856 Ala. Laws 17, 17, and "[a]t that time, the age of majority in Alabama was twenty-one years," *Bondi*, 61 F.4th at 1325. Two years later, Tennessee likewise barred

providing "to any minor a pistol[] . . . or like dangerous weapon, except a gun for hunting or weapon for defence in travelling." *The Code of Tennessee* pt. IV, tit. 1, ch. 9, art. II, § 4864, at 871 (Return J. Meigs & William F. Cooper eds., 1858). A year after that, Kentucky similarly prevented anyone other than parents or guardians from providing "any pistol[] . . . or other deadly weapon[] . . . to any minor." Act of Jan. 12, 1860, ch. 33, § 23, 1859 Ky. Acts 241, 245.

In the decades surrounding the passage of the Fourteenth Amendment, which established that the Second Amendment (like other provisions of the Bill of Rights) is applicable to the states, at least 20 jurisdictions restricted the purchase of firearms by 18-to-20-year-olds. The scope of these laws varied, but all of them prohibited 18-to-20-year-olds from purchasing handguns without the approval of their parents or guardians. An 1875 Indiana law, for example, made it a crime "for any person to sell, barter, or give to any other person, under the age of twenty-one years, any pistol" or similar deadly weapon. Act of Feb. 27, 1875, ch. 40, § 1, 1875 Ind. Acts 59, 59 § 1. And again, Congress in 1892 enacted a comparable ban in the District, prohibiting "giv[ing] to any minor under the age of twenty-one" any "deadly or dangerous weapon[]," including a "pistol[]." 27 Stat. 116-17 (1892). Beyond the five laws already discussed, similar prohibitions were also enacted in Delaware (1881), Georgia (1876), Illinois (1881), Iowa (1884), Kansas (1883), Louisiana (1890), Maryland (1882), Mississippi (1878), Missouri (1879), North Carolina (1893),

Oklahoma (1890), Texas (1897), West Virginia (1882), Wisconsin (1883), and Wyoming (1890).[9] The prohibitions thus spanned every region of the country and covered much of the population.

The restrictions were widely recognized and approved by courts, commentators, and the public. One review of newspaper editorials and other sources of the period noted consistent support for "laws restricting the sale of dangerous weapons to minors." Jacob Charles, *Armed in America: A History of Gun Rights from Colonial Militias to Concealed Carry* ch. 4 & n.211-12 (2019). Thomas Cooley, who wrote a "massively popular" treatise that *Heller* cited with approval, 554 U.S. at 616, likewise explained "[t]hat the State may prohibit the sale of arms to minors," Thomas M. Cooley, *Treatise on Constitutional Limitations* 740 n.4 (5th ed. 1883).

In what appears to be the sole nineteenth-century judicial decision addressing

[9] *See* 16 Del. Laws 716 (1881); 1876 Ga. Laws 112, No. CXXVIIII (O. No. 63), § 1; 1881 Ill. Laws 73, § 2; 1884 Iowa Acts and resolutions 86, ch. 78, § 1; 1883 Kan. Sess. Laws 159, ch. CV, 1-2; 1890 La. Acts 39, No. 46, § 1; 1882 Md. Laws 656, ch. 424, § 2; 1878 Miss. Laws 175, ch. 66, §§ 1-2; *Revised Statutes of the State of Missouri* 224, § 1274 (1879); 1885 Nev. Stat. 51, ch. 51, § 1; 1893 N.C. Pub. L. & Res. 468, ch. 514, § 1; 1890 Okla. Laws 495, ch. 25, art. 47, § 3; 1897 Tex. Gen. Laws 221-22, ch. 155, § 1; 1882 W. Va. Acts. 421-22, ch. 135, § 1; 1883 Wis. Sess. Laws 290, ch. 329, §§ 1-2; 1890 Wyo. Sess. Laws 140, § 97; *see also* Proceedings of the Common Council of the City of Chicago for the Municipal Year 1872-3, at 113-14 (1874) (Chicago); 1895 Neb. Laws 237-38, *Laws of Nebraska Relating to the City of Lincoln*, Art. XXVI, §§ 2, 5 (Lincoln, Nebraska)

age prohibitions similar to those at issue here, the Tennessee Supreme Court upheld a state law prohibiting the sale of pistols to under-21-year-olds. The court held that the law was "not only constitutional as tending to prevent crime but wise and salutary in all its provisions." *State v. Callicutt*, 69 Tenn. 714, 716-17 (1878). In contrast, in a decision issued a few years earlier, the same court concluded that "a statute that forbade openly carrying a pistol" contravened the state constitution's Second Amendment analogue. *Heller*, 554 U.S. at 629 (citing *Andrews v. State*, 50 Tenn. 165, 187 (1871)). "[T]he fact that there was apparently only a single challenge to these [prohibitions'] constitutionality until well into the twentieth century" further illustrates that the public "considered the statutory prohibitions constitutionally permissible." *Bondi*, 61 F.4th at 1330. Nineteenth-century evidence thus provides overwhelming support for the age-based restrictions on firearms.

It is a testament to the strength of this historical tradition that in modern times, "all fifty States (and the District of Columbia) have imposed minimum-age qualifications on the use or purchase of particular firearms." *NRA v. ATF*, 700 F.3d at 190 n.4. The restrictions challenged here thus stand in stark contrast to the "outlier[]" laws the Supreme Court invalidated in *Bruen* and *Heller*. *Bruen*, 597 U.S. at 70; *see id*. at 78-79 (Kavanaugh, J., joined by Roberts, C.J., concurring) (highlighting the "unusual" nature and "extreme outlier" status of the New York law in *Bruen*); *Heller*, 554 U.S. at 629 (noting that "[f]ew laws in the history of our

Nation have come close to the severe restriction of the District's handgun ban"). As Justice Alito emphasized in concurrence, *Bruen* therefore "does not expand the categories of people who may lawfully possess a gun" and federal law thus continues to "bar[] the sale of a handgun to anyone under the age of 21." *Bruen*, 597 U.S. at 73 (Alito, J., concurring) (citing 18 U.S.C. §§ 922(b)(1), (c)(1)).

Leyton criticizes reliance on nineteenth-century analogues (Br. 21). But the Supreme Court has explained that, while nineteenth-century materials may "not provide as much insight into [the Second Amendment's] original meaning" as founding-era sources, they nonetheless constitute a "critical tool of constitutional interpretation." *Bruen*, 597 U.S. at 20, 36 (quoting *Heller*, 554 U.S. at 605, 614). The Court's extensive review of nineteenth-century evidence in both *Heller* and *Bruen* confirms that such evidence plays an important part in Second Amendment analysis. *See Heller*, 554 U.S. at 605-19 (considering evidence "through the end of the 19th century"); *Bruen*, 597 U.S. at 35-36, 50-56 (same); *see id*. at 30 (looking to "18th- and 19th-century" evidence in discussing the scope of the sensitive places doctrine). That numerous nineteenth-century jurisdictions heavily restricted the usage or purchase of handguns by 18-to-20-year-olds—and that there is no evidence that those prohibitions were viewed as infringing the right to keep and bear arms—thus provides strong support for the challenged restrictions.

3. Counterarguments by Leyton and Others Do Not Withstand Scrutiny.

Leyton primarily counters by analogizing to other constitutional rights, arguing that the First or Fourth or Eighth Amendments could not be limited to people over 21 years old (Br. 17, 19-20). But permissible restrictions on the purchase of firearms are not determined by direct reference to the protections of other amendments. As *Bruen* makes clear, any interpretation of the Second Amendment must be "informed by history," 597 U.S. at 19, and history shows that the Second, First, and Fourth Amendments do not share the same scope. If the scope of the Second Amendment was coterminous with that of the First or Fourth Amendments, the Supreme Court's focus on "the Nation's historical tradition of firearm regulation" would appear to be misplaced. *Id*. at 24.

The error is illustrated by Leyton's analogy (Br. 19-20) to Eighth Amendment decisions like *Roper v. Simmons*, 543 U.S. 551 (2005), which hold that otherwise constitutionally permissible punishments are cruel and unusual punishment for persons under 18. Insofar as the analysis is relevant, it underscores the error in suggesting that the Second Amendment's drafters did not contemplate age restrictions. More generally, the constitutionality of a particular punishment for Eighth Amendment purposes does not determine the scope of the protections afforded by the Second Amendment. Indeed, the Eighth Amendment analysis is explicitly ahistorical. Punishments that were once commonly accepted no longer

survive constitutional scrutiny in light of an "evolving standards of decency" test that focuses on "contemporary" standards. *Id.* at 562-63. In looking to contemporary standards, the Supreme Court has concluded that capital punishment of persons over 18 is permissible because "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood." *Id*. at 574. But the inquiry into contemporary standards of decency says nothing about "this Nation's historical tradition," *Bruen*, 597 U.S. at 17, with regard to the right to bear arms.

Nor is Leyton correct that all rights must necessarily vest at age 18. For example, until the enactment of the 26th Amendment in 1971, the "constitutionally recognized" age for voting from the 14th Amendment was 21, which remained the "universal age for voting" across the States until World War II. Karlan, *supra*, 71 U. Cin. L. Rev. at 1358-59. More broadly, while "[a] child, merely on account of his minority, is not beyond the protection of the Constitution," "constitutional rights of children cannot be equated with those of adults" given (in part) "their inability to make critical decisions in an informed, mature manner[] and the importance of the parental role in child rearing." *Bellotti v. Baird*, 443 U.S. 622, 633-34 (1979) (plurality op.) (citing *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring); *Moore v. East Cleveland*, 431 U.S. 494, 503-04 (1977) (plurality op.)); *see also Miller v. Alabama*, 567 U.S. 460, 471 (2012) ("children have a 'lack of maturity and an underdeveloped sense of responsibility,' leading to recklessness,

impulsivity, and heedless risk-taking"); *J.D.B. v. North Carolina*, 564 U.S. 261, 271-73 (2011) (age is "a fact that generates commonsense conclusions about behavior and perception"). The Second Amendment provides for "'the right of law-abiding, *responsible* citizens to use arms' for self-defense." *Bruen*, 597 U.S. at 26 (quoting *Heller*, 554 U.S. at 635) (emphasis added). The Second Amendment's text and history permits a legislature to draw the line for "responsible citizens" at age 21.

On appeal, Leyton abandons his trial court argument (R. 27 at 4-8) that founding-era militia laws, and service by 18-20-year-olds in founding era militias, support his claim. This implicit concession is well taken. Some courts have rejected firearm restrictions placed on 18-to-20-year-olds, invoking founding-era militia laws, especially the National Militia Act of 1792. *See, e.g.*, *Lara*, 91 F.4th at 136-37. But founding-era legislatures retained discretion to exclude 18-to-20-year-olds from militias. The National Militia Act provided that "each and every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years (*except as is herein after excepted*) shall severally and respectively be enrolled in the militia." Militia Act § 1, 1 Stat. 271, 271 (1792) (emphasis added). The next section of the Act "gave States discretion to impose age qualifications on service." *NRA v. ATF*, 700 F.3d at 204 n.17; *see* Militia Act § 2, 1 Stat. at 272 (excluding from the militia "all persons who now are or may hereafter be exempted by the laws of the respective states"). When

the governor of Massachusetts requested legal advice on this issue, the Massachusetts Supreme Judicial Court concluded: "[I]t is competent for the State legislature by law to exempt from enrol[l]ment in the militia, all persons under twenty-one and over thirty years of age." *In re Opinion of the Justices*, 39 Mass. (22 Pick) 571, 576 (1838).

Thus, "in some colonies and States, the minimum age of militia service either dipped below age 18 or crept to age 21, depending on legislative need." *NRA v. ATF*, 700 F.3d at 204 n.17. Virginia set a minimum age of 21, which it lowered in times of exceptional need, such as in 1755 prior to the Seven Years War.[10] Other states—like Georgia, New Jersey, and North Carolina—enrolled only individuals over 21 in their militias at various points in the late eighteenth and mid-nineteenth centuries.[11] Moreover, because the "minimum age of militia service" during the founding era

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[10] *See* An Act for the settling and better Regulation of the Militia, ch. II, § II, *reprinted in* 4 *The Statutes at Large; Being a Collection of All the Laws of Virginia, from the First Session of the Legislature, in the Year 1619*, at 118, 118 (William Waller Hening ed., 1820) (originally promulgated in 1723); An Act for raising levies and recruits to serve in the present expedition against the French, on the Ohio, ch. II, §§ I-III, *reprinted in* 6 Hening, *supra*, at 438, 438-39 (1819) (originally promulgated in 1754); An Act for the better regulating and training the Militia, ch. II, §§ II- III, *reprinted in* 6 Hening, *supra*, at 530, 530-31 (1819) (originally promulgated in 1755).

[11] *See, e.g.*, *The Code of the State of Georgia*, pt. 1, tit. 11, chs. 1, 2, §§ 981, 1027, at 189, 189, 199 (Richard H. Clark et al. eds., 1861); An Act to exempt minors from Militia Duty in time of peace (1829), *reprinted in A Compilation of the Public Laws of the State of New-Jersey, Passed Since the Revision in the Year 1820*, at 266, 266 (Josiah Harrison ed., 1833); N.C. Const. of 1868, art. XII, § 1.

sometimes fell as low as 16, the militia-based rationale also "proves too much." *Id.*; *see Medina*, 913 F.3d at 159-60 ("We do not think the public, in ratifying the Second Amendment, would have understood the right to be so expansive and limitless" as to guarantee "the possession of weapons by . . . even children."). "Such fluctuation undermines [any] militia-based claim that the right to purchase arms must fully vest precisely at age 18." *NRA v. ATF*, 700 F.3d at 204 n.17.

Indeed, founding-era militia laws exemplify the tradition of adult supervision over 18-to-20-year-olds' access to arms. Pennsylvania's 1755 Militia Act, drafted by Benjamin Franklin, permitted individuals under 21 to enroll in the militia but provided "[t]hat no [y]outh, under the [a]ge of [t]wenty-one [y]ears, . . . shall be admitted to enroll himself[] . . . without the [c]onsent of his or their [p]arents or [g]uardians, [m]asters or [m]istresses, in Writing under their Hands." *Militia Act, [25 November 1755]*, Nat'l Archives, https://perma.cc/2DFN-Z2GN. In a similar vein, at least six states—including Massachusetts (1810), New Hampshire (1821), Vermont (1807), North Carolina (1806), Maine (1821), and Missouri (1826)—required parents to furnish the firearms for their children's militia duty, presumably on the assumption that minors could not obtain arms themselves. Permitting a 16-year-old to drill with a musket under the oversight of militia officers does not imply that the same individual would have a right to obtain handguns outside that context

and without parental approval.[12]

In any event, authorization to carry a firearm while serving in the militia, or in highly regulated entities such as the National Guard, does not determine the scope of the right to bear arms outside that context. *Heller* "decoupled" militia service from the scope of the Second Amendment. *NRA v. ATF*, 700 F.3d at 204 n.17. *Heller* explained that the founders understood the Second Amendment as codifying "an individual right unconnected with militia service." 554 U.S. at 582; *see also id.* at 577-78, 582-83, 593. "[M]erely being part of the militia" thus did not establish an entitlement to Second Amendment rights. *Bondi*, 61 F.4th at 1331; *see also Lara*, 91 F.4th at 137 (conceding that "a duty to possess guns in a militia or National Guard setting is distinguishable from a right to bear arms unconnected to such service").

In short, the District's restrictions on 18-to-20-year-olds possessing handguns are "consistent with the Second Amendment's text and historical understanding." *Bruen*, 597 U.S. at 26.

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[12] *See* Act of Mar. 6, 1810, ch. 107, § 28, 1810 Mass. Acts 151, 176; Act of Dec. 22, 1820, ch. 36, § 46, 1820 N.H. Laws 287, 321; Act of Mar. 20, 1797, ch. 81, No. 1, § 15, *reprinted in* 2 *The Laws of the State of Vermont, Digested and Compiled* 122, 131-32 (1808); 2 *The Code of North Carolina* ch. 35, § 3168, at 346-47 (William T. Dortch, John Manning, & John S. Henderson eds., 1883); An Act to organize, govern, and discipline the Militia of this State ch. 164, § 34, 1821 Me. Laws 687, 716; Act of July 4, 1825, ch. 1, § 24, 1825 Mo. Laws 533, 554.

CONCLUSION

WHEREFORE, the government respectfully submits that, with the exception of the merged convictions, the judgment of the Superior Court should be affirmed.

Respectfully submitted,

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District of Columbia
Court of Appeals

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Pursuant to Administrative Order No. M-274-21 (amended May 2, 2023), this certificate must be filed in conjunction with all briefs submitted in all criminal cases designated with a "CF" (criminal felony), "CM" (criminal misdemeanor), "CT" (criminal traffic), and "CO" (criminal other) docketing number. Please note that although briefs with above designations must comply with the requirements of this redaction certificate, criminal sub-case types involving child sex abuse, cruelty to children, domestic violence, sexual abuse, and misdemeanor sexual abuse will not be available for viewing online.

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A. All information listed in Super. Ct. Crim. R. 49.1(a) has been removed, including:

(1) An individual's social-security number
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B. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

C. All pre-sentence reports (PSRs); these reports were filed as separate documents and not attached to the brief as an appendix.

D. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

E. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

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Date

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing Brief to be served by electronic means, through the Court's EFS system, upon counsel for appellant, Matthew B. Kaplan, on this 29th day of February, 2024.

/s/
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Assistant United States Attorney