[J-29-2023]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

TODD, C.J., DONOHUE, DOUGHERTY, WECHT, MUNDY, BROBSON, JJ.

JONATHAN BARRIS,	:	No. 68 MAP 2022
	:	
Appellee	:	Appeal from the Commonwealth Court Order dated May 28, 2021 at No. 671 CD 2020 Reversing the
v.	:	Order of the Court of Common Pleas of Monroe County, Civil Division, at No. 6773 Civil 2015 dated May 26,
STROUD TOWNSHIP,	:	2020.
	:	
Appellant	:	ARGUED: May 24, 2023

OPINION

JUSTICE DOUGHERTY **DECIDED: February 21, 2024**

The Second Amendment to the United States Constitution states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. For the first time in this Court's history, we are called upon to interpret this language. Specifically, we consider the legality of a township ordinance that prohibits the discharging of firearms within the township — subject to certain exceptions, including the discharging of firearms at indoor and outdoor shooting ranges. Multiple zoning ordinances dictate when and where shooting ranges, whether for personal or commercial use, may be constructed. Practically speaking, these zoning ordinances combine with the discharge ordinance to preclude shooting ranges in approximately 65% of the township, including all residential districts. The question we face in this appeal is this: Does the discharge ordinance, when considered alongside the

zoning ordinances limiting shooting ranges to two non-residential districts in the township, violate the Second Amendment on its face? We hold it does not.

I. Legal Background

As this is our first foray into Second Amendment territory, we find it prudent to start by placing the matter in the relevant historical and legal context. Three decisions of the United States Supreme Court over the last sixteen years cover most of the terrain: *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago,* 561 U.S. 742 (2010); and *New York State Rifle & Pistol Assoc., Inc. v. Bruen*, 597 U.S. 1 (2022). The rest is captured by a slew of decisions by federal courts of appeals. We unpack all these cases below.

A. *Heller*

The Second Amendment to the United States Constitution was ratified in 1791. It is "unique" in our federal charter in that it is "divided into two parts: its prefatory clause and its operative clause." *Heller*, 554 U.S. at 577. The thirteen-word prefatory clause — "A well regulated Militia, being necessary to the security of a free State . . .," U.S. CONST. amend. II — "does not limit the latter grammatically, but rather announces a purpose." *Heller*, 554 U.S. at 577. More accurately, it announces "the purpose for which the right was codified: to prevent elimination of the [citizens'] militia." *Id*. at 599.

It has "always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a **pre-existing** right." *Id*. at 592 (emphasis in original); *see id*. at 605 ("the Bill of Rights codified venerable, widely understood liberties"). Indeed, "[t]he very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it 'shall not be infringed.'" *Id*. at 592. Considering the pre-existing nature of the right, at the time of the founding the "debate with respect to the right to keep and bear arms, as with other guarantees in the Bill of Rights, was not [about]

whether it was desirable (all agreed that it was) but [ ] whether it needed to be codified in the Constitution." *Id*. at 598. History strongly suggested it did.

In fact, "history showed that the way tyrants had eliminated" citizen militias "was not by banning the militia but simply by taking away the people's arms, enabling a select militia or standing army to suppress political opponents." *Id*. As *Heller* explained:

> Between the Restoration and the Glorious Revolution, the Stuart Kings Charles II and James II succeeded in using select militias loyal to them to suppress political dissidents, in part by disarming their opponents. Under the auspices of the 1671 Game Act, for example, the Catholic Charles II had ordered general disarmaments of regions home to his Protestant enemies. These experiences caused Englishmen to be extremely wary of concentrated military forces run by the state and to be jealous of their arms. They accordingly obtained an assurance from William and Mary, in the Declaration of Rights (which was codified as the English Bill of Rights), that Protestants would never be disarmed: "That the Subjects which are Protestants, may have Arms for their Defence suitable to their Conditions, and as allowed by Law." This right has long been understood to be the predecessor to our Second Amendment.
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> . . . .
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> And, of course, what the Stuarts had tried to do to their political enemies, George III had tried to do to the colonists. In the tumultuous decades of the 1760's and 1770's, the Crown began to disarm the inhabitants of the most rebellious areas. That provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms.

Id. at 592-94 (internal citations omitted).

This historical background informed the 1788 ratification debates. *See id*. at 598 ("the fear that the Federal Government would disarm the people in order to impose rule through a standing army or select militia was pervasive in Antifederalist rhetoric"); *id*. at 599 ("Federalists responded that because Congress was given no power to abridge the ancient right of individuals to keep and bear arms, such a force could never oppress the people."). All told, it "was understood across the political spectrum that the right helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down." *Id*. In other words, "the threat that

the new Federal Government would destroy the citizens' militia by taking away their arms was the reason th[e] right — unlike some other English rights — was codified in a written Constitution." *Id*.; *see id*. at 593 ("By the time of the founding, the right to have arms had become fundamental for English subjects.").

Importantly, though, the *Heller* Court went on to clarify the "prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting." *Id*. at 599. To this point, the Court explained that "apart from [a] clarifying function, a prefatory clause does not limit or expand the scope of the operative clause." *Id*. at 578; *see id*. at 578 n.4 ("a prologue can be used only to clarify an ambiguous operative provision"). So, the Court shifted its interpretive focus to the operative clause.[1]

The Court examined the fourteen-word operative clause — ". . . the right of the people to keep and bear Arms, shall not be infringed[,]" U.S. CONST. amend. II — phrase-by-phrase to determine its meaning. It observed the "first salient feature of the operative clause is that it codifies a 'right of the people.'" *Heller*, 554 U.S. at 579. "[T]he people," the Court continued, "unambiguously refers to all members of the political community, not an unspecified subset." *Id*. at 580; *but see id*. at 635 (describing the right as applying to "law-abiding, responsible citizens"). Moving on to the phrase "to keep and bear arms," the Court recognized "[a]t the time of the founding, as now, to 'bear' meant to 'carry.'" *Id*. at 584. However, when used with "arms," "the term has a meaning that refers to carrying for a particular purpose — confrontation." *Id*.; *see id*. at 581 ("arms" are "[w]eapons of offence, or armour of defence"; "any thing that a man wears for his defence, or takes into

[1] Actually, the Court went in reverse order; it interpreted the operative clause and then "return[ed] to the prefatory clause to ensure that [its] reading of the operative clause [wa]s consistent with the announced purpose." *Heller*, 554 U.S. at 578. For our purposes, it is enough (and more convenient) to discuss them in their sequential order.

his hands, or useth in wrath to cast at or strike another") (internal quotation marks and citations omitted). Together, then, to "bear arms" means to "wear, bear, or carry upon the person or in the clothing or in a pocket, for the purpose of being armed and ready for offensive or defensive action in a case of conflict with another person." *Id*. at 584 (internal quotation marks, citation, and ellipses omitted). And this definition "extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Id*. at 582.[2]

Putting "all of these textual elements together," the Court held "they guarantee the individual right to possess and carry weapons in case of confrontation." *Id*. at 592; *see id*. at 595 ("There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.").[3] Along the

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[2] While *Heller* made clear that "all firearms constitute[ ] 'arms[,]'" *id*. at 581, some courts have gone much further. *See, e.g.*, *Teter v. Lopez*, 76 F.4th 938, 949 (9th Cir. 2023) ("Because the plain text of the Second Amendment includes bladed weapons and, by necessity, butterfly knives, the Constitution presumptively guarantees keeping and bearing such instruments for self-defense.") (internal quotation marks omitted); *see also Bruen*, 597 U.S. at 28 (reiterating the "general definition [of 'arms'] covers modern instruments that facilitate armed self-defense" and citing a case about stun guns) (citation omitted).

[3] *Heller* was authored by Justice Scalia and joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito. Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, strongly disagreed with the majority's primary holding. *See Heller*, 554 U.S. at 646 (Stevens, J., dissenting) ("The 'right to keep and bear Arms' protects only a right to possess and use firearms in connection with service in a state-organized militia."). In a separate dissent, Justice Breyer, joined by the same group, agreed with the lead dissent that the Second Amendment "protects militia-related, not self-defense-related, interests." *Id*. at 681 (Breyer, J., dissenting). But he also argued the majority was wrong for a "second independent reason": because "the protection the Amendment provides is not absolute." *Id*. In Justice Breyer's view, Second Amendment claims should be subject to an "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." *Id*. at 689-90. The majority flatly rejected this proposal, underscoring that the Second Amendment "is the very **product** of an interest balancing by the people[.]" *Id*. at 635 (emphasis in original).

way to that conclusion, the Court identified self-defense as the "**central component** of the right itself." *Id*. at 599 (emphasis in original); *see id*. at 628 ("the inherent right of self-defense has been central to the Second Amendment right"); *id*. at 635 (the Amendment "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home").[4]

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[4] Interestingly, Pennsylvania played a sizable role in *Heller*. In support of its self-defense-centric interpretation of the Second Amendment, the Court pointed to the Pennsylvania Declaration of Rights of 1776, which was adopted at the first Pennsylvania Constitutional Convention held during the summer and early fall of 1776. *See Heller*, 554 U.S. at 601. It provided:

> That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And that the military be kept under strict subordination to, and governed by, the civil power.

PA. DECLARATION OF RIGHTS §13 (1776). According to the Court, this provision of our Declaration of Rights was an "analogue[ ]" to the Second Amendment and its "most likely reading" is that it "secured an individual right to bear arms for defensive purposes." *Heller*, 554 U.S. at 602. The language was changed during the next Pennsylvania Constitutional Convention, which met in 1789-90, to state more simply: "That the right of the citizens to bear arms in defence of themselves and the state shall not be questioned." PA. CONST. art. IX, §21. This "separate right-to-bear-arms provision has remained unchanged to today although in the Constitution of 1874 this same provision was moved to its current location in Article I, Section 21." Jeffrey P. Bauman*, The Right to Bear Arms: Article I, Section 21,* THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES §24.2 (Ken Gormley & Joy G. McNally eds., 2d ed. 2020).

Notably, "[o]nly on rare occasions have the courts of Pennsylvania construed the [state] constitutional provision providing for the right to bear arms." *Id*. at §24.3. In fact, we are aware of only two decisions in which this Court seriously entertained the provision at all. *See Ortiz v. Commonwealth*, 681 A.2d 152, 156 (Pa. 1996) (concluding "[b]ecause the ownership of firearms is constitutionally protected [by Article I, §21], its regulation is a matter of statewide concern" and "the General Assembly, not city councils, is the proper forum for the imposition of such regulation"); *Wright v. Commonwealth*, 77 Pa. 470, 471 (Pa. 1875) (*per curiam*) (upholding conviction of an individual who violated law prohibiting the carrying of a concealed weapon; "[s]uch an unlawful act and malicious intent as this has no protection under the 21st section of the Bill of Rights, saving the right of the citizens to bear arms in defence of themselves and the state").

(continued…)

Having resolved those threshold issues, the *Heller* Court finally turned to the laws being challenged. The District of Columbia, through a series of regulations, generally prohibited the possession of all handguns in the District, making it a crime for individuals to carry unregistered firearms while simultaneously prohibiting registration of handguns. *See id*. at 574-75. Still another law required residents to keep their lawfully owned firearms, like registered long guns, unloaded and disassembled or bound by a trigger lock or similar device unless located in a place of business or when used for lawful recreational activities. *See id*. at 575.

Heller struck them all. As the Court saw it, "[f]ew laws in the history of our Nation have come close to the severe restriction of the District's handgun ban[,]" which prohibited "an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose." *Id*. at 628-29; *see id*. at 629 ("the American people have considered the handgun to be the quintessential self-defense weapon"). What's more, the Court emphasized the "prohibition extends . . . to the home, where the need for defense of self, family, and property is most acute." *Id*. at 628. Given all this, the Court held the District's laws "banning from the home the most preferred firearm in the nation to keep and use for protection of one's home and family, [ ] fail constitutional muster" under "any" standard. *Id*. at 628-29 (internal quotation marks and citation omitted); *see id*. at 629 ("Whatever the reason, handguns are the most popular weapon chosen by Americans for self-

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To be perfectly clear, we recount this brief Pennsylvania history only for context. Although Barris in his amended complaint raised a claim under Article I, §21, the Commonwealth Court below recognized he did not argue in his appellate brief "any claims arising under the Pennsylvania Constitution" and, consequently, the court "consider[ed] those claims abandoned[.]" *Barris v. Stroud Twp.*, 257 A.3d 209, 217 n.10 (Pa. Cmwlth. 2021). Moreover, our grant of discretionary review encompassed only Barris's Second Amendment claim. Thus, our charter's right-to-bear-arms provision — and the *Heller* Court's belief it "clearly" "secured an individual right to bear arms for defensive purposes" — is not presently before us, and we have no occasion to consider it further. *Heller*, 554 U.S. at 601-02.

defense in the home, and a complete prohibition of their use is invalid."). The Court also deemed unconstitutional the District's law requiring that firearms in the home be rendered and kept inoperable at all times, because "[t]his makes it impossible for citizens to use them for the core lawful purpose of self-defense[.]" *Id*. at 630.[5]

One final aspect of *Heller* is particularly significant. The Court went out of its way to express, in no uncertain terms, that the Second Amendment right is "not unlimited, just as the First Amendment's right of free speech" is not. *Id*. at 595 (citation omitted). The Court cautioned that it did not "read the Second Amendment to protect the right of citizens to carry arms for **any sort** of confrontation, just as" it has never "read the First Amendment to protect the right of citizens to speak for **any purpose**." *Id*. (emphasis in original). It recognized that, "[f]rom Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id*. at 626.

While declining to undertake an exhaustive historical analysis of the full scope of the Second Amendment right, the *Heller* Court firmly declared that "nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id*. at 626-27. The Court "also recognize[d] another important limitation on the right to keep and carry arms": it announced the only "sorts of weapons protected" by the Second Amendment are those "in common use at the time," which necessarily excludes "dangerous and unusual weapons." *Id*. at 627 (internal

[5] Heller also raised a challenge to yet another District law that prohibits any person from carrying a handgun without a license. However, the High Court declined to address the District's licensing requirement since Heller conceded that, in the absence of the handgun ban, the licensing law "is permissible" and he would be eligible to obtain one. *Heller*, 554 U.S. at 631.

quotation marks and citations omitted); *see id*. at 624-25 ("the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns" and "machineguns").

B. *McDonald*

Two years after *Heller*, the High Court decided *McDonald*. Far less needs to be said about this decision — three quick points, to be exact. First, the Court held "the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*[,]" meaning the right applies equally to the States and the federal government. *McDonald*, 561 U.S. at 791. Second, the Court stressed that, in *Heller*, it "specifically rejected" Justice Breyer's plea to adopt an interest-balancing test for Second Amendment challenges. *Id*. Third, a plurality "repeat[ed] those assurances" from *Heller* that nothing in the Court's decisions should be read to "cast doubt on such longstanding regulatory measures as prohibitions on the possession of firearms by felons and the mentally ill, laws forbidding the carrying of firearms in sensitive places . . ., or laws imposing conditions and qualifications on the commercial sale of arms." *Id*. at 786 (internal quotation marks omitted).

C. Pre-*Bruen* Federal Courts of Appeals Decisions

After *Heller* pumped new life into the Second Amendment as an individual rather than a collective right, and *McDonald* made it applicable to the States, another pressing question began to emerge in courts across the country: What standard applies to Second Amendment challenges? In *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010), the Third Circuit Court of Appeals answered that question by holding *Heller* suggested a two-pronged approach:

> First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee. If it does not, our inquiry is complete. If it does, we evaluate the law under some form

> of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails, it is invalid.

Id. at 89 (internal citation omitted). Over the following decade, nearly all federal courts of appeals followed the Third Circuit's lead and adopted some form of this two-step, means-end scrutiny test. *See, e.g.*, *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010) (a "two-part approach to Second Amendment claims seems appropriate under *Heller*"); *United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010) (same). And although *Bruen* would later discard this universally accepted framework (as we'll discuss shortly), the way some courts previously applied the first step of the test remains relevant even after *Bruen*. An important decision from the Seventh Circuit demonstrates why.

Ezell v. City of Chicago, 651 F.3d 684 (7th Cir. 2011), involved a challenge to a Chicago ordinance that mandated one hour of range training as a prerequisite to lawful gun ownership, yet at the same time prohibited all firing ranges in the city. The plaintiffs contended the Second Amendment "protects the right to maintain proficiency in firearm use — including the right to practice marksmanship at a range — and" they argued "the City's total ban on firing ranges [wa]s unconstitutional." *Id*. at 690. The Seventh Circuit, after adopting a two-part test consistent with the one in *Marzzarella*, *see id*. at 702-03, agreed with the plaintiffs the ordinance was unconstitutional.

Of note, in conducting the initial step of the two-part test — determining "if the government can establish that a challenged firearms law regulates activity falling outside the scope of the Second Amendment right" — the *Ezell* court had to determine "whether range training is categorically unprotected by the Second Amendment." *Id*. at 702-04. The court answered that question in the negative. It reasoned the "right to possess firearms for protection **implies a corresponding right** to acquire and maintain proficiency in their use;" after all, quipped the court in a now-oft-repeated line, "the core right wouldn't mean much without the training and practice that make it effective." *Id*. at

704 (emphasis added); *see also Ezell v. City of Chicago*, 846 F.3d 888, 893 (7th Cir. 2017) ("Range training . . . lies close to the core of the individual right of armed defense."). On the Seventh Circuit's telling, "[s]everal passages in *Heller* support this understanding." *Ezell*, 651 F.3d at 704, *citing Heller*, 554 U.S. at 616, 619.

Multiple other federal courts of appeals facing different firearms-related challenges similarly determined "the Second Amendment protects ancillary rights necessary to the realization of the core right to possess a firearm for self-defense." *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017) (*en banc*). For example, the Ninth Circuit in *Teixeira*, echoing the Seventh Circuit in *Ezell*, opined the "core Second Amendment right to keep and bear arms for self-defense wouldn't mean much without the ability to **acquire** firearms." *Id*. (internal quotation marks omitted; emphasis added). As well, in *Jackson v. City and Cty. of San Francisco*, 746 F.3d 953 (9th Cir. 2014), the Ninth Circuit recognized that, although the Second Amendment "does not explicitly protect ammunition . . ., without bullets, the right to bear arms would be meaningless" — and so it held "the right to possess firearms for protection implies a corresponding right to obtain the bullets necessary to use them." *Id*. at 967 (internal quotation marks and citation omitted). Finally, the Third Circuit, in considering whether several township zoning ordinances that restricted where citizens could purchase and practice with firearms implicated the right to bear arms, likewise was persuaded by *Ezell*'s reasoning. *See Drummond v. Robinson Twp.*, 9 F.4th 217, 227 (3d Cir. 2021) (Second Amendment "implies a corresponding right to acquire and maintain proficiency with common weapons") (internal quotation marks and citation omitted).

In sum, in the years following *Heller* and *McDonald*, the federal courts of appeals "coalesced around a 'two-step' framework for analyzing Second Amendment challenges that combine[d] history with means-end scrutiny." *Bruen*, 597 U.S. at 17. While many,

if not most, of the challenges in those cases directly implicated the Second Amendment's "core lawful purpose of self-defense[,]" *Heller*, 554 U.S. at 630, not all did; some instead involved what have variously been termed "ancillary," "corollary," "subsidiary," "implied," or "corresponding" rights — rights that supposedly lie just beyond the "core" right to self-defense but still within the Second Amendment's protective ambit. In such cases, as in more straightforward "core" cases, courts found the first step of the two-part framework satisfied and proceeded to the second. That is, until *Bruen*.

D. *Bruen*

Bruen concerned a challenge to New York State's licensing scheme for carrying handguns in public. New York has long regulated the public carry of handguns, and it is one of only six States (plus the District of Columbia) that, at least previously, was known as a "may issue" jurisdiction, "under which authorities have discretion to deny concealed-carry licenses even when the applicant satisfies the statutory criteria, usually because the applicant has not demonstrated cause or suitability for the relevant license." *Bruen*, 597 U.S. at 13-15.[6] The petitioners in *Bruen*, who were denied licenses to carry under New York's "proper-cause" standard, argued this regulatory scheme violated their Second and Fourteenth Amendment rights. The High Court agreed.

Initially, and most relevant to us, the *Bruen* Court sought to make "more explicit" the constitutional standard it endorsed in *Heller*. *Id*. at 31. But then, to the surprise of

[6] The other five States are California, Hawaii, Maryland, Massachusetts, and New Jersey. "Meanwhile," the Court tallied 43 "'shall issue' jurisdictions, where authorities must issue concealed-carry licenses whenever applicants satisfy certain threshold requirements, without granting licensing officials discretion to deny licenses based on a perceived lack of need or suitability." *Bruen*, 597 U.S. at 13. Pennsylvania is among this group. *See* 18 Pa.C.S. §6109. The *Bruen* Court assured that its decision did not undermine such laws. *See Bruen*, 597 U.S. at 38 n.9 ("nothing in our analysis should be interpreted to suggest the unconstitutionality of the 43 States' 'shall-issue' licensing regimes"); *see also id*. at 79 (Kavanaugh, J., concurring) ("the Court's decision does not prohibit States from imposing licensing requirements for carrying a handgun for self-defense").

many, including the parties, *see id*. at 19 (acknowledging the parties "largely agree[d] with th[e] consensus"), the Court "decline[d] to adopt" the two-part test that federal courts had discerned from *Heller* and united behind. *Id*. at 17. It explained:

> Despite the popularity of this two-step approach, it 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* do not support applying means-end scrutiny in the Second Amendment context. Instead, the government must affirmatively prove that its firearm regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms.

Id. at 19.

In support of its rejection of the two-step framework, the High Court largely pivoted back to *Heller*. According to the Court, "*Heller*'s methodological approach" was "centered on constitutional text and history." *Id*. at 19, 22; *see id*. at 22 ("Whether it came to defining the character of the right (individual or militia dependent), suggesting the outer limits of the right, or assessing the constitutionality of a particular regulation, *Heller* relied on text and history."). And *Heller* "specifically ruled out" an intermediate-scrutiny test. *Id*. at 23; *see id*. ("when *Heller* expressly rejected [Justice Breyer's] 'interest-balancing inquiry,' it necessarily rejected intermediate scrutiny'") (internal citation omitted). As such, the *Bruen* Court determined the second step of the two-step framework "is inconsistent with *Heller*'s historical approach and its rejection of means-end scrutiny." *Id*. at 24.

So what test did *Heller* actually endorse? *Bruen* clarified the standard for applying the Second Amendment is as follows:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command.

Id. (internal quotation marks and citation omitted). This standard, said the *Bruen* Court, "accords with how we protect other constitutional rights" like the freedom of speech and

the right to confrontation. *Id*. at 24-25. Further, at least from the Court's perspective, "reliance on history to inform the meaning of constitutional text — especially text meant to codify a **pre-existing** right — is . . . more legitimate, and more administrable, than asking judges to make difficult empirical judgments about the costs and benefits of firearms restrictions[.]" *Id*. at 25 (emphasis in original; internal quotation marks and citation omitted); *see id*. at 26 ("It is this balance — struck by the traditions of the American people — that demands our unqualified deference.").[7]

After clarifying the applicable standard in broad strokes, the *Bruen* Court went on to offer specific guidance to help courts assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding. It predicted the inquiry in some cases "will be fairly straightforward." *Id*. at 26. For example,

> 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. Likewise, if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional. And if some jurisdictions actually attempted to enact analogous regulations during this timeframe, but those proposals were rejected on constitutional grounds, that rejection surely would provide some probative evidence of unconstitutionality.

Id. at 26-27. But the Court also recognized "other cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach." *Id*. at 27; *see id*. ("The regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction

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[7] *Bruen* was authored by Justice Thomas and joined in full by Chief Justice Roberts and Justices Alito, Gorsuch, Kavanaugh, and Barrett. As in *Heller*, Justice Breyer dissented, this time joined by Justices Sotomayor and Kagan. He argued, among other things, that the *Bruen* majority misread *Heller* as adopting an "unjustifiable and unworkable" "standard that relies solely on history[.]" *Bruen*, 597 U.S. at 115 (Breyer, J., dissenting); *see id*. at 106-07 (collecting cases and contending courts "regularly use means-end scrutiny in cases involving other constitutional provisions").

generation in 1868."). In such cases, the "historical inquiry that courts must conduct will often involve reasoning by analogy" and a determination as to whether two regulations are "relevantly similar." *Id*. at 28-29 (internal quotation marks and citation omitted).

Although *Bruen* did not "provide an exhaustive survey of the features that render regulations relevantly similar under the Second Amendment," it did identify two metrics: "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id*. at 29. Drawing from *Heller* and *McDonald*, the Court explained that "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are central considerations when engaging in an analogical inquiry." *Id*. (internal emphasis, quotation marks, and citation omitted). At the same time, it made clear that "analogical reasoning under the Second Amendment is neither a regulatory straightjacket nor a regulatory blank check." *Id*. at 30. What matters is whether there is "a well-established and representative historical **analogue**, not a historical **twin**." *Id*. (emphasis in original). "So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster." *Id*.

Having explicated the constitutional standard, the *Bruen* Court proceeded to apply it to New York's proper-cause requirement. We need not retrace the deep historical dive on which the Court embarked; to cut to the chase, it concluded New York "failed to meet [its] burden to identify an American tradition justifying [the] proper-cause requirement" and, therefore, the "proper-cause requirement violates the Fourteenth Amendment in that it prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms." *Id*. at 38-39, 71. However, what does demand close attention is how the Court reached that result. Five facets of the Court's interpretive approach are especially noteworthy for our purposes.

First, the *Bruen* Court had "little difficulty" concluding the plain text of the Second Amendment protected the petitioners' proposed course of conduct — carrying handguns publicly for self-defense. *Id*. at 32. However, the parties did not dispute this point, presumably in recognition of the fact that "[n]othing in the Second Amendment's text draws a home/public distinction with respect to the right to keep and bear arms[.]" *Id*.; *see id*. (definition of "bear" "naturally encompasses public carry"). Thus, notwithstanding the extensive guidance the Court provided with respect to its history-and-tradition test, it said comparatively little — because it was simply not at issue — about how courts should first determine "[w]hen the Second Amendment's plain text covers an individual's conduct" such that it is "presumptively protect[ed.]" *Id*. at 24.[8]

Second, in addressing the more difficult question regarding whether New York's proper-cause requirement was consistent with this Nation's historical tradition of firearm regulation, the Court reiterated this was the government's burden to bear. *See id*. at 34 ("Only if respondents carry that burden can they show 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."); *id*. at 58 n.25 ("the burden rests with the government to establish the relevant tradition of regulation"); *id*. at 60 ("Of course, we are not obliged to sift the historical materials for evidence. . . . That is [the government]'s burden."). Once again, however, even though these statements leave no room to doubt that the government shoulders the burden once the history-and-tradition

[8] It is perhaps significant the Court, even prior to "turn[ing] to whether the plain text of the Second Amendment protect[ed the] proposed course of conduct[,]" first considered (1) whether the petitioners were "part of 'the people' whom the Second Amendment protects" and (2) if the handguns at issue in that case were "weapons 'in common use' today for self-defense." *Bruen*, 597 U.S. at 32. *See* Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen*, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 97 (2023) (observing *Bruen* "did not expressly specify **what** must fall within the plain text"; "Does the first step include deciphering whether the challenged conduct, weapon, **and** person claiming a right are covered?") (emphasis in original).

test is triggered, the Court said nothing about who bears the initial burden to show the "plain text covers [the] individual's conduct[.]" *Id*. at 24.

Third, *Bruen* advises courts engaging in a historical inquiry to remain mindful that, "when it comes to interpreting the Constitution, not all history is created equal." *Id*. at 34. Recognizing the Second Amendment was adopted in 1791 and the Fourteenth in 1868, the Court cautioned that historical evidence "long predat[ing] either date may not illuminate the scope of the right if linguistic or legal conventions changed in the intervening years." *Id*. It also warned courts to "guard against giving postenactment history more weight than it can rightly bear." *Id*. at 35.[9] Yet, the Court expressly left open a critical question: "whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope[.]" *Id*. at 37. Put differently, which is the right benchmark for purposes of the historical analysis — 1791, when the Second Amendment was ratified, or 1868, when the States adopted the Fourteenth Amendment? The *Bruen* Court declined to resolve the issue, reasoning the answer was "the same" either way "with respect to public carry." *Id*. at 38.[10]

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[9] Justice Barrett authored a concurrence in which she highlighted the fact that "the Court does not conclusively determine the manner and circumstances in which postratification practice may bear on the original meaning of the Constitution." *Bruen*, 597 U.S. at 81 (Barrett, J., concurring).

[10] In acknowledging the "ongoing scholarly debate" surrounding this issue, the Court also remarked it has "generally assumed that the scope of the protection applicable to the Federal Government and the States is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791." *Bruen*, 597 U.S. at 37. We are aware of at least one federal court of appeals panel that has rejected this assumption, though further review before the full court is pending. *See Nat'l Rifle Ass'n v. Bondi*, 61 F.4th 1317, 1322 (11th Cir. 2023) ("[B]ecause the Fourteenth Amendment is what **caused** the Second Amendment to apply to the States, the Reconstruction Era understanding of the right to bear arms — that is, the understanding that prevailed when the States adopted the Fourteenth Amendment — is what matters.") (emphasis in original), *reh'g en banc granted, opinion vacated*, 72 F.4th 1346 (11th Cir., July 14, 2023).

Fourth, the Court's analysis demonstrates that, when considering whether a law is relevantly similar, in addition to temporal relevance, a proper historical inquiry should also take into account such matters as pervasiveness, longevity, and geographic coverage. *See id*. at 46 ("we doubt that three colonial regulations could suffice to show a tradition of public-carry regulation") (emphasis omitted); *id*. at 49 ("we cannot put meaningful weight on [a] solitary statute"); *id*. at 65 ("we will not give disproportionate weight to a single state statute and a pair of state-court decisions"); *id*. at 67 ("bare existence" of "localized restrictions" insufficient to prove a tradition); *id*. at 67 (same with respect to law "in effect in a single State, or a single city"); *id*. at 67-68 ("we will not stake our interpretation on a handful of temporary territorial laws that . . . governed less than 1% of the American population").

Fifth, the Court emphasized that, "to the extent later history contradicts what the text says, the text controls." *Id*. at 36; *see id*. ("post-ratification adoption or acceptance of laws that are inconsistent with the original meaning of the constitutional text obviously cannot overcome or alter that text") (internal quotation marks, emphasis, and citation omitted); *id*. at 66 ("late-19th-century evidence cannot provide much insight into the meaning of the Second Amendment when it contradicts earlier evidence"); *id*. at 66 n.28 (declining to "address any of the 20th-century historical evidence brought to bear" by New York since "it contradicts earlier evidence"). Yet, the Court emphasized that the Second Amendment is "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." *Id*. at 28 (internal quotation marks and citation omitted). So even though "its meaning is fixed according to the understanding of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." *Id*.

To recap, *Bruen* squarely shot down the two-step means-end framework the federal courts of appeals had been consistently applying. Now, state and federal courts alike must apply the history-and-tradition test initially endorsed in *Heller* and later clarified by *Bruen*. The first step of this test provides that "the Constitution presumptively protects" an individual's conduct "when the Second Amendment's plain text covers [that] conduct[.]" *Id*. at 17. At the second step, the government must "demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id*. "Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command." *Id*. (internal quotation marks and citation omitted).

E. Post-*Bruen* Landscape

Bruen, like *Heller* before it, clearly worked a dramatic sea change in Second Amendment law, and we think it's only fair to assume the true extent of its ripples have yet to be fully realized. So far, less than two years later, "more than three hundred lower federal court decisions" — plus additional state court cases, like this one — have already "assessed whether new and settled regulations survive" *Bruen*'s history-and-tradition test. *Charles*, *supra* note 8, at 78. The results have been, in a word, unsettling.

Although it's a bit like shooting at a moving target because the number seems to grow each day, already, well over "two dozen . . . rulings [have] concluded that *Bruen*'s test invalidates state or federal laws under the Second Amendment." *Id*. By and large, these decisions "have been scattered, unpredictable, and often internally inconsistent." *Id*. Some of the "cases have generated divergent rulings on the legality of key federal laws" concerning such issues as whether individuals with felony convictions can be prohibited from owning guns, whether those under felony indictment can be barred from acquiring new firearms, whether those subject to domestic violence restraining orders can

be disarmed, and whether the Second Amendment guarantees the right to a firearm with an obliterated serial number. *Id*.; *see id*. at notes 51-54 (collecting cases). Disputes also abound in cases in which courts have "weighed in on the constitutionality of recently enacted state laws, like those regulating large-capacity magazines, self-manufactured 'ghost guns,' and the sensitive places where guns can be outlawed." *Id*. at 78-79 (internal citations omitted); *see id*. at 79 notes 55-57 (collecting cases).

It is well beyond our present need to catalog the full field of post-*Bruen* cases and the various areas of uncertainty in *Bruen*'s method they portray.[11] But a quick sampling of just the federal courts of appeals that have already confronted *Bruen* — which, by our count (as of today anyway), includes the Second, Third, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits — illustrates both the harshness of *Bruen*'s test and the difficulty courts are having in applying it consistently. *See, e.g.*, *Antonyuk v. Chiumento*, 89 F.4th 271, 387-88 (2d Cir. 2023) (broadly upholding New York's carry-licensing regime and its prohibitions on guns in sensitive places such as parks, zoos, bars, and theaters); *Range v. U.S. Att'y Gen.*, 69 F.4th 96, 106 (3d Cir. 2023) (*en banc*) (in as-applied challenge, enjoining enforcement of 18 U.S.C. §922(g)(1), the federal felon-in-possession statute, against individual who was convicted of a single, non-violent offense of making false statements on a food stamp application); *Lara v. Comm'r Pa. State Police*, 91 F.4th 122, 127, 140 (3d. Cir. 2024) (concluding the "words 'the people' in the Second Amendment presumptively encompass all adult Americans, including 18-20-year-olds," and striking down Pennsylvania laws that effectively ban 18-to-20-year-olds from carrying firearms outside their homes during state of emergency); *Md. Shall*

[11] Not all Second Amendment cases are alike. *See* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443 (2009) (distinguishing among "who," "what," "where," "when," and "how" restrictions).

Issue, Inc., v. Moore, 86 F.4th 1038, 1040, 1049 (4th Cir. 2023) (enjoining Maryland law imposing handgun-licensure requirement where the approval process took up to thirty days), *reh'g en banc granted,* 2024 WL 124290 (4th Cir., Jan. 11, 2024); *United States v. Rahimi*, 61 F.4th 443, 451, 460-61 (5th Cir. 2023) (holding unconstitutional §922(g)(8), which makes it unlawful for an individual under a court order related to domestic violence to possess a firearm; noting ongoing "debate over the extent to which the [High] Court's 'law-abiding' qualifier constricts the Second Amendment's reach"); *United States v. Daniels*, 77 F.4th 337, 340 (5th Cir. 2023) (in as-applied challenge to §922(g)(3), which bars "unlawful user[s]" of a controlled substance from possessing a firearm, concluding history and tradition "does not justify disarming a sober citizen based exclusively on his past drug usage"); *Bevis v. City of Naperville*, 85 F.4th 1175, 1195 (7th Cir. 2023) (holding, in split decision, that AR-15s and other semiautomatic weapons are not protected by Second Amendment "because these assault weapons and high-capacity magazines are much more like machineguns and military-grade weaponry than they are like the many different types of firearms that are used for individual self-defense"); *United States v. Jackson*, 69 F.4th 495, 502 (8th Cir. 2023) (in conflict with *Range*, finding "no need for felony-by-felony litigation regarding the constitutionality of §922(g)(1)" and upholding statute as applied); *United States v. Cunningham*, 70 F.4th 502, 506 (8th Cir. 2023) (same in case involving felony conviction for driving under the influence); *United States v. Sitladeen*, 64 F.4th 978, 987 (8th Cir. 2023) (upholding §922(g)(5)(A), which makes it unlawful for those illegally in the United States to possess a firearm; "unlawful aliens are not part of 'the people' to whom protections of the Second Amendment extend"); *Lopez*, 76 F.4th at 942 (9th Cir. 2023) (holding Second Amendment protects "butterfly knives," a type of pocketknife with two components that "fully encase the blade when closed" but can be opened "with one hand"); *Vincent v. Garland*, 80 F.4th 1197, 1199 (10th Cir. 2023)

(also in conflict with *Range*, upholding the constitutionality of the federal ban on felons' possession of firearms even "when applied to individuals convicted of nonviolent felonies" — in that case, bank fraud); *Bondi*, 61 F.4th at 1322 (11th Cir. 2023) (prioritizing Reconstruction Era history to uphold Florida law requiring purchaser of a gun to be 21 years old).

We end this long journey with an observation: We are certain *Bruen* will not be the High Court's last word on the Second Amendment. In fact, it already granted *certiorari* and heard argument in one of the cases cited above, *see Rahimi*, 143 S.Ct. 268 (June 30, 2023) (*per curiam*), and it would hardly be surprising if others follow, particularly given the circuit splits that are only just beginning to emerge.[12] Needless to say, more guidance in this challenging and ever-shifting area of the law is welcome. In the meantime, *Bruen* is now "the North Star guiding our Second Amendment jurisprudence." *Drummond*, 9 F.4th at 225.

Mindful of this extensive historical and legal background, we are finally ready to explore the facts of the case before us.

II. Factual Background

Stroud Township ("Township"), the appellant in this matter, lies in the heart of the Poconos Mountains in Monroe County. The Township's population and total acreage are both "close to 20,000[.]"[13] Like most municipalities throughout this Commonwealth, the Township has long sought to control the density of its population in accordance with a

[12] Indeed, petitions for *certiorari* highlighting these circuit splits are pending in *Range,* No. 23-374, *Daniels*, No. 23-376, *Jackson*, No. 23-6170, and *Garland*, No. 23-683.

[13] Deposition of Township Supervisor Edward C. Cramer, 4/4/2019 at 41; *see also* United States Census Bureau, Stroud Township, Monroe County, Pennsylvania (2020), https://www.census.gov/quickfacts/fact/table/stroudtownshipmonroecountypennsylvania/PST045222 (last visited Feb. 16, 2024) (describing the Township's land area as 31.06 square miles, or 19,874 acres, with a population of 19,801 following the 2020 Census).

comprehensive zoning plan drawn to promote the welfare of the community.[14] That plan comprises more than a dozen zoning and "overlay" districts which were created with the intent "to concentrate the new and higher density development around the Boroughs of Stroudsburg and East Stroudsburg" while decreasing the "[d]ensity and intensity of development . . . from the Boroughs northward and southward." Zoning Ordinance §27-302(1). Three of these districts are implicated in this case: (1) the O-1 Open Space and Preservation District ("open space district"); (2) the S-1 Special and Recreational District ("recreational district"); and (3) the R-1 Low Density Residential District ("residential district").[15] Although the former two are aimed at preserving open space and the natural environment, they nevertheless permit "development of limited uses which are compatible with the unique and sensitive natural environment" and "[o]utdoor recreational facilities," respectively. *Id*. at §27-302(2)(A), (B). The residential district, in contrast, permits only "single-family residential development" for the purpose of fostering "privacy and a development pattern which will preserve the open space character and the physical and environmental amenities of these sections of the Township." *Id*. at §27-302(2)(C).

Appellee Jonathan Barris bought a 4.66-acre property in the Township's residential district in 2009. The property is roughly rectangular in shape and has a private driveway accessed by a public right-of-way. The property, which includes Barris's residence, is adjoined by woods and a water feature to the north; by a residentially zoned and occupied property to the east; by more than twenty residential zoned and occupied lots to the west;

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[14] The Township is "a municipal entity possessing only those powers expressly delegated by the Commonwealth," and it "derives its zoning power from the Pennsylvania Municipalities Planning Code, the Act of July 31, 1968, P.L. 805, No. 247, *as amended* ('MPC'), 53 P.S. §10101 *et seq*." *In re Realen Valley Forge Greenes Assocs.*, 838 A.2d 718, 729 (Pa. 2003).

[15] The remaining districts run the gamut from higher density residential, to commercial, to industrial, and so on. But our focus is solely on the three districts highlighted above.

and by a commercial shopping center 400 feet to the south. Barris, who lawfully owns registered firearms, including .40 and .45 caliber pistols, built a personal outdoor shooting range on his property the year after he moved in. Then the complaints began.

In May 2011, one of Barris's neighbors reported to police that Barris "was out for hours shooting various firearms[,]" one of which she believed might be "full auto." Police Incident Report, 5/10/11 at 3. A responding officer discovered the area where Barris was target shooting was approximately 100 to 150 yards from the neighbor's property. The officer observed that, while there "appear[ed] to be some type of backstop[,]" the targets were nonetheless "in line with the back of [a] Best Buy" store located in the commercial shopping center to the immediate south. *Id*.

But when the officer "checked the [C]rimes [C]ode" he found "no violation." *Id*. And when the upset neighbor contacted the Township, it "advised her there is no ordinance for target practicing/shooting." *Id*. Even the Game Commissioner had nothing to report. *See id*. So, the responding officer left without incident, though not without warning — presumably anticipating further disputes between Barris and his neighbors, he made a note in his report that officers responding to future calls should not "go all the way down Barris'[s] driveway because you will be in the crossfire of the targets." *Id*.

Only weeks later, the same neighbor made another report to police that Barris "was shooting high powered guns for over 40 minutes." Police Incident Report, 5/25/11 at 3. Police again investigated. Once more, they determined Barris "appeared to have a safe backstop in his shooting area" and, regardless, "there are no laws or ordinances prohibiting target shooting on his property." *Id*.

A little over two months later police received a "random shots fired" call, this time from the same neighbor's daughter. Police Incident Report, 7/30/11 at 3. As happened

the prior two times, an officer responded and ultimately informed the neighbors that "no laws or ordinances are being violated." *Id*.

That all changed in late 2011. The neighboring family that had thrice called police to complain about Barris's target shooting also contacted a member of the Township's Board of Supervisors to relay their discontent. *See* Deposition of Township Supervisor Daryl A. Eppley, 4/4/19 at 9. That same supervisor previously fielded a call from another worried resident in a different neighborhood about someone "shooting a gun out their back door at a small animal in a densely populated neighborhood." *Id*. at 13. "[T]he two complaints occurring very, very close together p[iqued]" the supervisor's concern because he believed it was a "serious public safety matter if people are shooting firearms in close proximity in densely populated areas[.]" *Id*. at 14. As another supervisor explained, the Township's population in recent years has become denser due to "a lot of people moving in from . . . New York, New Jersey, [and the] Metropolitan area." Deposition of Township Supervisor Edward C. Cramer, 4/4/19 at 41. All this led the supervisors "to see what other municipalities had done to address" the issue. Deposition of Township Supervisor Daryl A. Eppley, 4/4/19 at 14.

In the end, they determined a new ordinance was warranted — one regulating the discharging of firearms. On December 6, 2011, the Township's three-member Board of Supervisors enacted Ordinance No. 9-2011, titled "An Ordinance of Stroud Township, Monroe County, Pennsylvania, Setting Forth Regulations For the Discharging of Firearms, and Prescribing Penalties for Violations Thereof." The stated purpose of Ordinance No. 9-2011, which we will refer to as the "discharge ordinance," is to regulate the "discharging of firearms . . . for the protection of the public health and safety and general welfare of the residents, property owners, visitors and others within Stroud Township" due to the density of its population. Discharge Ordinance at §1. Under the

ordinance, it "shall be unlawful to fire or discharge any firearm within the Township" unless one of six exceptions applies. *Id*. at §3.[16] The only exception we are concerned with here is the "shooting range exception," which permits discharging firearms "on indoor or outdoor ranges[.]" *Id*. at §4(D).[17] In full the exception reads:

> The discharging of firearms shall be allowed on indoor or outdoor shooting ranges pursuant to applicable provisions of the Stroud Township Zoning Ordinance, as may be amended, under the supervision of the owner or occupant of that property or his or her duly appointed representative, provided that:
>
> 1. All shooting ranges shall be constructed and operated in a safe and prudent manner. If standards, regulations, and/or recommended procedures for operation are established or promulgated by any recognized body, such as the National Rifle Association or the American Trap Shooting Association, then such standards, regulations and/or procedures shall be adhered to.
>
> 2. Such range is issued zoning and occupancy permits by the township zoning officer, which permits shall specify the area or areas designated for shooting range purposes.

Id. at §4(D)(1)-(2).[18]

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[16] The discharge ordinance defines "firearm" broadly as including "any gun, shotgun, rifle, handgun, pistol, pellet gun, BB gun, crossbow, bow and arrow, slingshot or any other device which impels a projectile through the use of force." Discharge Ordinance at §2.

[17] The other exceptions, not at issue here, permit the discharging of firearms: (1) by law enforcement officers in the course of their duties; (2) by individuals when necessary as authorized by state and federal laws — *i.e.*, for self-defense; (3) for hunting in accordance with the gaming laws; (4) by farmers as needed to protect their agricultural commodity from animal predators in accordance with the Pennsylvania Right to Farm Act; and (5) for target shooting by members of any organization or affiliated club incorporated under the laws of this Commonwealth. Discharge Ordinance at §§4(A)-(C), (E)-(F).

[18] There's an overarching caveat to all exceptions listed in the discharge ordinance: "in no case shall a firearm be discharged before dawn or after dusk and/or within 150 yards of an adjacent occupied structure, camp or farm[.]" Discharge Ordinance at §4. But there's also a caveat to the caveat: "except" for law enforcement, by individuals for self-defense, by farmers, and for indoor (though not outdoor) shooting ranges. *Id*.

As can be seen above, the discharge ordinance is not fully self-contained; rather, it tethers itself "to applicable provisions of the Stroud Township Zoning Ordinance[.]" *Id*. at §4(D); *see id*. at §4(D)(2) (requiring "zoning and occupancy permits"). Hence, we must also examine the terms of those "applicable" zoning ordinances that are triggered by the discharge ordinance's shooting range exception.[19]

Previously, we explained the Township is governed by a comprehensive zoning plan that divides it into more than a dozen districts and overlays; that is accomplished by Zoning Ordinances §27-301 (general districts) and §27-303 (zoning map). In turn, Zoning Ordinance §27-402 establishes four "types of uses" in any given area: (1) permitted uses, which "shall require no special action . . . before a zoning permit is issued"; (2) conditional uses, which "shall require individual consideration in each case because of their unique characteristics"; (3) special exception uses, which also require individual consideration in each case; and (4) prohibited uses. *Id*. at §27-402(1)-(4). Attached to Zoning Ordinance §27-402 — indeed, a critical part of it — is Schedule 27-I, a chart which lists all manner of "land use activities" and indicates the "types of uses" for those activities in each district within the Township. In short, the chart lets residents know what, if any, permit they need to conduct certain activities in the different areas of the Township. Here, the chart tells us that all shooting ranges (indoor and outdoor), like hunting and fishing, are considered an "amusement service" and are confined to two districts: the open space district and the recreational district. And even there, shooting ranges are permissible only by "special

[19] Some of the ordinances we discuss next, while cited variously throughout the parties' filings and the record, are not fully contained therein. Nevertheless, "[o]f this we may take judicial notice." *Thompson v. Phila. Transp. Co.*, 53 A.2d 120, 121 (Pa. 1947); *accord* 42 Pa.C.S. §6107(a) ("The ordinances of municipal corporations of this Commonwealth shall be judicially noticed."). To that end, we observe all the Township's zoning ordinances fall under Chapter 27 of its Code of Ordinances, the full body of which is available online. *See* Code of Ordinances, available at https://ecode360.com/ST3854 (last visited Feb. 16, 2024). The discharge ordinance, meanwhile, is the only provision situated within Chapter 6 of the Code, titled "Conduct."

exception," meaning they must be "referred to the Planning Commission for review and recommendation and shall be permitted only after a public hearing and determination by the Township Zoning Hearing Board[.]" *Id*. at §27-402(3).

So what does it take to get a special exception to build a shooting range in one of the two permissible districts? The answer lies in yet another zoning ordinance. Zoning Ordinance §27-503 collectively governs commercial outdoor sports, shooting ranges, and outdoor exhibitions. It instructs that the "following standards, requirements and criteria shall apply" to these land use activities:

> A minimum parcel size of five acres is required for development or operation of these uses. Minimum lot width shall be 250 feet. These activities shall be developed and operated so as to create no hazards or safety problems for adjacent properties. All general performance standards as required in §27-604 of this chapter shall be met. All structures and activity areas shall be set back a minimum of 50 feet from all public roads and property boundaries. Maximum building height shall be 2½ stories or 35 feet. Maximum lot coverage shall be 20%. Copies of any required federal or state permits or licenses for structures or activities shall be provided to the Township. A landscape plan and landscaping is required for this land use activity as per §27-603 of this chapter.

Id. at §27-503(8)(F).

From this dizzying web of cross-referencing zoning and conduct ordinances we extract the following: the discharge ordinance allows for the discharging of firearms at indoor and outdoor shooting ranges in the Township. But a shooting range may lawfully be built in only two areas — the open space and recreational districts. Within those zones, moreover, ranges may be built only on parcels that are at least five acres in size and have a lot width of 250 feet. All ranges must be set back at least 50 feet from all public roads and boundaries, cannot cover more than 20% of the entire lot, and cannot contain any building higher than 2½ stories or 35 feet. Outdoor shooting ranges are subject to two additional requirements: they cannot be built within 150 yards of any adjacent occupied structure, camp, or farm, and they cannot be used before dawn or after dusk. Finally, all

ranges must be constructed and operated in a safe and prudent manner — including compliance with any standards, regulations, and procedures for operation established or promulgated by recognized bodies such as the National Rifle Association ("NRA") — and require issuance of proper zoning and occupancy permits by the Township following the submission of a landscape plan, a public hearing, and approval by the Township Zoning Hearing Board.

The discharge ordinance and its various zoning ordinance offshoots combine to allow for shooting ranges on several hundred parcels within the Township's open space and recreational districts. Affidavit of Daryl A. Eppley, 2/13/20 at ¶¶13-14. More than 250 lots in those areas — which collectively cover 7,117.8 acres — sit on the required minimum parcel size of five acres. *Id*. at ¶13. Of these, 234 lots "are 6.2 acres or larger." *Id*. at ¶14.[20] This number is significant, because it is undisputed that "all or substantially all of the lots in excess of 6.2 acres would be eligible for construction of [a] shooting range, despite the 150-foot separation requirement." *Id*. at ¶16.[21] Those 234 lots sit on a total

[20] Eppley, who has served as a supervisor, manager, and treasurer for the Township at different points throughout this litigation, counted 233 lots over 6.2 acres and 259 lots over five acres. Affidavit of Daryl A. Eppley, 2/13/20 at ¶14. However, our review of the listing of lots, which Eppley attached to his affidavit, puts the numbers at 234 and 264, respectively. The difference appears to be due to a simple miscount by Eppley; indeed, notwithstanding the slight discrepancy in the relevant **number** of lots, our calculation of the total **acreage** of lots sitting on at least five acres is precisely the same as Eppley's: 7,117.8 acres.

[21] On the other hand, while there is good reason to assume "[m]any of the lots between 5 and 6.2 acres in size would be suitable[,]" Affidavit of Daryl A. Eppley, 2/13/20 at ¶15, "[i]t is impossible to specifically verify the exact number of eligible lots in excess of 5 acres without a field survey of each of the properties." *Id*. at ¶17. For this reason, and since the Township prevailed on its motion for summary judgment, moving forward we will give Barris the benefit of the doubt as the nonmoving party and use the numbers associated with those lots sitting on at least 6.2 acres, even though we realize that doing so may result in a slight undercount of the true number of available lots suitable for a shooting range. *See Starling v. Lake Meade Prop. Owners Ass'n, Inc.*, 162 A.3d 327, 330 n.2 (Pa. 2017) (on appeal from the grant of summary judgment "[w]e review the record in the light most favorable to the nonmoving party").

of 6,951 acres.[22] And with that number in hand, we can calculate another that puts the matter in clearer perspective: at least 35% of all land in the Township remains suitable for the development of an indoor or outdoor shooting range in compliance with all criteria established by the discharge ordinance and its associated zoning ordinances.[23]

Now we return to Barris. Unfortunately for him, his property in a residential district falls within the approximately 65% of the Township where a shooting range is prohibited. Still, despite the discharge ordinance's passage, he continued to use his home-built range — at least until someone "reported gunfire coming from his property" in May 2012. Police Incident Report, 5/18/12 at 2. That report led police to investigate Barris for a fourth time. Unlike the prior three times, police responded to this report with a distinctly different message: an officer told Barris about the discharge ordinance's passage and warned him that "if found to be firing weapons he would be cited." *Id*. In truth, though, far more than a mere citation was on the line. The discharge ordinance provides that "[a]ny person or persons discharging a firearm in violation of any of the provisions of this ordinance shall be subject to a fine of not more than [$600] plus court costs, including reasonable attorney fees." Discharge Ordinance at §7. It also authorizes law enforcement "to seize, for evidentiary purposes, any firearm, as defined herein, which shall be fired or discharged within the limits of the Township . . . in violation of this ordinance." *Id*. at §6.

The threat worked. Barris ceased target shooting on his home range and instead filed a zoning permit application, along with the required fee and site plan, on December

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[22] Again, this calculation is our own, rather than Eppley's, and is based on the uncontested listing of lots attached to his affidavit.

[23] This number is derived by dividing the combined acreage of lots on which a shooting range conceivably could be built (6,951) by the Township's total acreage (19,874). That calculation yields 35%. The Township in its brief asserts for the first time that the number is 46%, but it does not explain how it reaches this result. *See* Township's Brief at 2. To quote most (if not all) math teachers who have been here before: "you get no points if you fail to show your work."

27, 2012. Barris explained in his application that he was willing to move his "target rack," which was "in front of a 15' high x 30' wide earth b[e]rm," to another site on his property located approximately 800 feet "away from the irritated neighbor's property[.]" Zoning Permit Application, 12/27/12 at unpaginated 3-4.

Barris's application for a zoning permit was denied less than a month later. A Township zoning officer explained via letter that Barris's problem is fourfold: his property is .34 acres too small; it is too close to adjacent structures; it is not located in one of the two approved zoning districts; and he failed to attach to his application "standards and regulations promulgated by the [NRA] or the American Trap Shooting Association" relating "to the firearms to be discharged." Zoning Application Denial Letter, 1/23/13 at 1.[24] The zoning officer notified Barris he could either address the deficiencies identified in the letter (an impossibility given the size of Barris's lot) or file an administrative appeal with the Zoning Hearing Board within thirty days. Barris did neither.

Instead, in September 2015, Barris filed in the Monroe County Court of Common Pleas a complaint seeking declaratory and injunctive relief based on, *inter alia*, a claimed violation of the Second Amendment. An initial round of litigation resulted in the dismissal of his complaint and, later, the Commonwealth Court *en banc*'s partial reversal of that decision. *See Barris v. Stroud Twp.*, 218 C.D. 2016, 2017 WL 5505510, at *4 (Pa.

[24] Parenthetically, we note the "American Trap Shooters Association," the governing body for the sport of American-style trapshooting, now identifies as the "Amateur Trapshooters Association." Yet, it's unclear to us why the zoning officer denied Barris's application for not "includ[ing]" with his submission ATA or NRA standards "specific to the firearms to be discharged." Zoning Application Denial Letter, 1/23/13 at 1. As we read the discharge ordinance, it merely requires "adhere[nce] to" "standards, regulations, and/or recommended procedures for operation" if adopted by groups like the ATA or NRA; but it does not require their physical production, and it says nothing about regulations needing to be "specific to the firearms to be discharged." Discharge Ordinance at §4(D)(1). In any event, we need not explore these issues further as they are beyond, and irrelevant to, the facial challenge now before us.

Cmwlth. Nov. 17, 2017) (*en banc*) (unpublished memorandum) (concluding trial court "failed to conduct any constitutional analysis of the gist of Barris's claim — *i.e.*, that the [discharge o]rdinance, which restricts his ability to practice firing his firearms on his property . . . unconstitutionally infringes on his [Second Amendment] rights . . . either facially or as applied").

Barris filed an amended complaint in January 2018. In addition to pleading many of the facts discussed above, he elaborated on his position that "[f]amiliarity with firearms, and proficiency in their use, promotes public safety." Amended Complaint, 1/8/18 at ¶5. According to Barris, "[g]un owners trained in and familiar with the operation of their guns are less likely to be involved in accidental shootings, and more likely to successfully use their firearms in self-defen[s]e in case of need." *Id*. Moreover, he averred "[r]ecreational shooting is a traditional lawful use of firearms in the United States of America." *Id*. at ¶6. Yet, in Barris's view, the discharge ordinance essentially "outlaws firearm practice and safe shooting ranges on residential property and limits firearm discharge to large-scale commercial and/or private enterprises and/or to affluent persons or entities." *Id*. at ¶11. More precisely, he stated the discharge ordinance

> unlawfully impedes and has a chilling effect on bearing arms by limiting experience inherently necessary to the exercise of Second Amendment rights and limits and impedes the ability of persons to remain secure in their homes by limiting firearm proficiency to those willing and able to travel, incur cost and expense, obtain memberships[,] and [satisfy] other obligations imposed by commercial or private shooting ranges.

Id. at ¶18.

Based on all this, in the first count of his complaint (the only one at issue in this appeal), Barris claimed the Second Amendment "secures the right to bear arms **and the corresponding right** to learn and gain proficiency with and about firearms and obtain

training required for firearm ownership." *Id*. at ¶17 (emphasis added).[25] He alleged that, "so long as" the Township continues to enforce its discharge ordinance, he will continue to be "deprived of his Constitutional right to bear, gain proficientcy [sic] and learn of [sic] firearms." *Id*. at ¶19. Thus, he sought an order preliminarily and permanently enjoining the Township from enforcing the ordinance.

The Township responded by filing preliminary objections. It argued the relevant count of Barris's complaint failed to state a claim for relief because nothing in the Second Amendment "prohibits reasonable regulation upon the discharge of firearms." Preliminary Objections, 4/13/18 at ¶1. As the Township described in a later filing, any "right . . . to gain proficiency in the use of firearms must be balanced against the dangers created to the Township by the discharge of said firearms in improper and unsafe locations." Answer to Complaint, 6/6/18 at ¶19. The Township also noted the discharge ordinance "allow[s] other means for an individual to discharge firearms, assuming . . . such a Constitutional right even exists." *Id*. at ¶32.

After discovery, the parties proceeded to file cross-motions for summary judgment. Those filings offered more of the same, but worth mentioning is the Township's remark in its motion that the discharge ordinance imposes "no interference with [Barris's] ability to own as many firearms as he wishes" — it simply prohibits him from "discharg[ing] them wherever he wants." Cross-Motion for Summary Judgment, 10/9/19 at 9. The Township reiterated it has "authorized construction of ranges on many tracts of ground within the Township." *Id*.; *see also* Second Motion for Summary Judgment, 2/18/20 at 5 ("The Township has demonstrated that it provides several hundred parcels of property which [he] could use for firearms purposes."). The Township asserted this uncontested fact

[25] Barris's use of the bolded language above regarding a "corresponding right" should by now be familiar. *See, e.g.*, *Ezell*, 651 F.3d at 704.

suggests Barris "is not interested in the overall number of shooting range opportunities in the Township; he is interested in establishing a private range on his own property." Cross-Motion for Summary Judgment, 10/9/19 at 12. "This[,]" the Township argued, "is a fundamentally different goal[.]" *Id*.

The trial court initially denied summary judgment to both parties after finding there were still "material questions of fact present[.]" Trial Court Op., 1/23/20 at 9. The court explained "[n]either party ha[d] identified in the record what area of the [T]ownship is available for outdoor or indoor shooting ranges, or the number of properties in those zones that are larger than five acres and would qualify for a permit." *Id*. at 8-9. The Township thereafter remedied this factual deficit by submitting Eppley's affidavit and accompanying exhibits, which, as we have already discussed, reveal that approximately 35% of all land in the Township is suitable for the development of an indoor or outdoor shooting range, albeit not in any residential district.

Armed with Eppley's numbers-laden affidavit, the Township filed a second motion for summary judgment. This time the trial court granted relief. It agreed with Barris that the ability "to practice with a weapon is an important aspect of gun ownership" and opined "[t]here is little question that a complete ban of shooting ranges in the [T]ownship would violate the Second Amendment[.]" Trial Court Op., 5/26/20 at 9. However, applying the two-step framework later discarded in *Bruen*, the court determined "the right to have a shooting range on residential property is not a central tenet of the Second Amendment." *Id*. at 10. Working on that assumption, the court proceeded to apply intermediate scrutiny and upheld the discharge ordinance's shooting range exception. *See id*. at 12 (declaring

it "reasonably related to the important government interest of protecting [T]ownship residents from being injured by the irresponsible use of firearms").[26]

Barris appealed a second time. And for a second time, the Commonwealth Court reversed in his favor. Two jurists on a three-judge panel, in a published opinion authored by then-President Judge, now-Justice P. Kevin Brobson, and joined by Judge Mary Hannah Leavitt, agreed the discharge ordinance is facially unconstitutional because it "burdens more conduct than is necessary to meet the important government interests in this case." *Barris v. Stroud Twp.*, 257 A.3d 209, 224 (Pa. Cmwlth. 2021).[27] The two-judge majority expressed it did "not believe that an individual's right under the Second Amendment to maintain proficiency in firearm use via a personal shooting range on one's property should be contingent on owning property or residing in" one of the two approved districts. *Id*. at 225. More to the point, the majority concluded the discharge ordinance failed to survive intermediate scrutiny because "[t]he Township has not justified why an outright ban" of ranges in all but two zoning districts "was necessary . . . in order to protect the public." *Id*.

Senior Judge Bonnie Brigance Leadbetter authored a dissent. As she interpreted it, nothing in the Second Amendment gives Barris "the right to have a shooting range in his backyard regardless of where he lives or the surroundings of his property." *Id*. at 227

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[26] As for Barris's as-applied Second Amendment challenge, the court found he waived it "because he did not pursue an appeal from the denial of his permit request for a target range on [ ]his property." Trial Court Op., 5/26/20 at 14; *accord, e.g.*, *Lehman v. Pa. State Police*, 839 A.2d 265, 275 (Pa. 2002) ("facial challenges to a statute's constitutionality need not be raised before the administrative tribunal to be reviewed by an appellate court; challenges to a statute's application, however, must be raised before the agency or are waived for appellate review").

[27] Before reaching this conclusion the panel adopted the two-step framework that, at least at that point, had been approved by nearly every federal court of appeals. Since *Bruen* squarely rejected this holding, and the lower court obviously did not have the benefit of *Bruen*'s later guidance, we do not discuss this part of the lower court's opinion.

(Leadbetter, S.J., dissenting). She concisely explained: "Even if the right to bear arms carries with it the right to become proficient in the use of firearms, all that should require is that some practice facilities be allowed within a reasonable distance of the gun owner, not that they be permitted in every zoning district in the community, particularly residential districts." *Id*.[28]

The Township sought our discretionary review. We granted allowance of appeal on June 6, 2022, to consider the following rephrased question:

> Whether an ordinance that limits target shooting to two non-residential zoning districts, and thus does not provide for shooting ranges at all private residences, is facially unconstitutional under the Second Amendment to the United States Constitution?

Barris v. Stroud Twp., 279 A.3d 507 (Pa. 2022) (*per curiam*). In so doing, we directed the parties to address a series of subsidiary issues related to the lower court's rationale. *See id*. Then, only weeks later, the High Court decided *Bruen*. Recognizing the seismic shift wrought by that decision, we withdrew our earlier briefing directive and ordered the parties "to address the question presented under the standards announced in" *Bruen*. Order, 7/6/22 at 1. We turn now to their arguments.

III. Arguments

A. The Township

The Township argues this case is "entirely different" from *Bruen*. Township's Brief at 37. This is so, says the Township, for two reasons: because its discharge ordinance (1) does not implicate the plain text of the Second Amendment, and (2) even if it does, there is extensive historical precedent supporting it.

[28] For its part, the majority, despite striking down the ordinance as facially unconstitutional precisely because it is "contingent on owning property or residing in" one of the approved non-residential districts, refuted Senior Judge Leadbetter's premise and declared it was not "holding that every person needs to have the ability to have a personal shooting range on his property." *Barris*, 257 A.3d at 225.

Starting with step one of *Bruen*'s test, the Township emphasizes "[t]his case is about [the] **discharge** of firearms — an[d] in particular whether a local government can reasonably regulate the venue where firearms may be discharged." *Id*. at 32 (emphasis in original).[29] Meanwhile, the Township sees the Second Amendment, and the phrase "to keep and bear [a]rms" in particular, as protecting only "rights of ownership and terms of physical possession." *Id*. The Township claims its discharge ordinance "disturbs neither right[.]" *Id*. at 37; *see id*. at 32 (stating "[o]wnership (or even legal possession) is not necessary to discharge a firearm" and "[t]his case would present the same issue if [ ] Barris owned no firearms"). Referencing several pre-*Bruen* cases out of the Third Circuit, the Township asserts "[n]ot every activity associated with firearms is automatically protected[,]" and repeats its belief that the discharge ordinance does not implicate a "right identified in the plain text." *Id.* at 37; *see id*. at 45 ("asserted right to discharge weapons on an unsuitable shooting range is not covered by the plain text").

Proceeding to *Bruen*'s second step merely as a backup, the Township maintains "there is a strong tradition of regulation of the place and manner of" discharging firearms. *Id*. at 45. Initially, it asks us to "take judicial notice as required by the circumstances of this litigation and the scope of the matters at issue[,]" *id*. at 42, explaining *Bruen* was not decided until shortly after we granted *allocatur* and it "inject[ed] a novel concept into American jurisprudence" that requires consideration of a "national tradition." *Id*. at 44. Assuming our willingness to do so, the Township then offers a mountain of sources — to be precise, 26 pages' worth of summaries of over 100 statutes and ordinances emanating from cities spanning more than 40 States and covering all time periods of our Nation's history — that it argues proves an American tradition in line with its discharge ordinance.

[29] Without citing any authority, the Township submits "it is the burden of the party asserting a Second Amendment right to show that the proposed conduct is protected by the 'plain text' of the" Second Amendment. Township's Brief at 31.

See id. at 4-29 (collecting 77 self-described "historical prohibitions on firing in cities" and 36 "historical regulations on ranges and shooting galleries").

B. The Office of Attorney General

The Pennsylvania Office of Attorney General ("OAG") filed an *amicus curiae* brief in support of the Township.[30] Notably, the OAG sees things in a slightly different way than the Township. Rather than viewing the issue as generally concerning the ability of the government to regulate the discharging of firearms, or the ability of individuals to obtain practice with firearms, the OAG asserts "the precise issue presented here — as correctly framed by this Court — is whether individuals possess a right to set up shooting ranges at all private residences." OAG's Brief at 12 (internal quotation marks and citation omitted); *see id*. at 2 ("This case asks whether the Second Amendment provides a right to operate a shooting range at any private residence."). Framing aside, the OAG reaches the same conclusions as the Township: it claims the plain text of the Second Amendment does not cover Barris's conduct and, in any event, the discharge ordinance is entirely consistent with this Nation's historical tradition.

First, the OAG explains, "[j]ust because an activity involves a firearm does not automatically place it within the plain text of the [Second] Amendment." *Id*. at 11.[31] According to the OAG, the Commonwealth Court's determination that target practice is merely a **corollary** to the right to possess firearms necessarily means it is not **plainly** protected by the Second Amendment's text. *See id*. at 11-12. The OAG distinguishes *Ezell* on the ground that range training was a prerequisite to lawful gun ownership in

[30] The OAG also participated as *amicus* at oral argument after we granted its unopposed motion to that effect.

[31] Like the Township, the OAG tells us it is the plaintiff challenging a firearm regulation who bears the burden to "demonstrate that his or her conduct is covered by the plain text of the Second Amendment." OAG's Brief at 2. Unlike the Township, the OAG cites *Bruen* for this proposition, though it conspicuously omits a pincite or quote. *See id*.

Chicago, yet there was a citywide ban on all firing ranges. Given those extraordinary circumstances, the OAG contends "the ability to practice was inextricably intertwined with the right to possess" — but there "is no such connection here." *Id*. at 12. In sum, the OAG argues the "plain text of the Second Amendment does not prohibit States and their municipalities from regulating the location of shooting ranges or from prohibiting target practice in residential areas, where the risk of accidental injury and death is highest." *Id*. at 13; *see id*. at 2 (observing that "[e]very shooting range consigns someone else to a life lived downrange").

As for *Bruen*'s second step, the OAG asserts "[n]umerous laws during our Nation's founding, antebellum, and postbellum periods banned the discharg[ing] of firearms — and specifically target practicing — in residential or populated areas." *Id*. at 3. The OAG then walks us through each time period, highlighting a bevy of regulations from each in support of its central position that "the Township's ordinances are consistent with this Nation's historical tradition of firearm regulation." *Id*. at 3; *accord id*. at 14-15 (founding era); *id*. at 15-18 (antebellum); *id*. at 19-22 (postbellum). The OAG closes by examining the fit between the Township's discharge ordinance and the alleged historical analogues it has amassed; it concludes they are identical.

> Both the historical laws discussed above and the Township's ordinances here regulate the same type of activity: the non-self-defense discharge of a firearm, including for target practice, within the municipality's borders. And both the historical laws and the Township's ordinances regulate this activity for comparable reasons[:] . . . safety risks, property damage, and nuisance concerns inherent in firearm practicing.

Id. at 23; *see id*. ("History and common sense are intertwined: cities have long banned the non-emergency discharge of firearms in populated areas precisely because those regulations represent deep-rooted common sense.").[32]

[32] CeaseFirePA also filed an *amicus* brief on behalf of the Township. We do not describe its arguments in detail because they mirror those raised by the Township and the OAG. (continued…)

C. Barris

Barris's position is puzzling. He argues both *Heller* and *Bruen* "are self-limiting in scope" insofar as "[n]either speak to Second Amendment concerns considered subsidiary or corollary in nature." Barris's Brief at 6. Although he recognizes *Bruen* now demands a historical analysis "when the Second Amendment's 'bearing arms' text [is implicated] or when 'core' interests are challenged[,]" *id*., Barris questions whether such an approach is appropriate here since, he admits, no Second Amendment text explicitly "references firearm training." *Id*. at 10. In other words, Barris takes the position that we must first decide whether *Bruen*'s "historical analysis applies to what ha[ve] been termed 'corollary' or 'subsidiary'" rights. *Id*. (footnote omitted); *see id*. at 6 ("*Heller* and *Bruen*'s self-imposed limitations leave open what 'non-core' interests, if such exist, may be.").

Surprisingly, Barris suggests we answer this question in the negative. He opines that requiring a historical analysis for "**all** Second Amendment issues" would "invite[ ] absurd results[.]" *Id*. (emphasis in original). More surprising still, he asks us to (or, more accurately, he predicts the High Court would) employ "means/end scrutiny as a means [for] rejecting" the Township's discharge ordinance. *Id*. at 14. In support of this bold proposition, Barris submits that "[w]e are guided by several post-*Heller*, pre-*Breun* [sic] dissents [from petitions denying *certiorari* authored] by Justice Clarence Thomas" in which he discussed intermediate scrutiny. *Id*. at 12-13, *citing, e.g.*, *Silvester v. Becerra*, 138 S.Ct. 945 (2018) (Thomas, J., dissenting from the denial of *certiorari*).

Aside from his novel proposal that we (re)adopt a means-end scrutiny test for non-core Second Amendment cases, Barris attacks the stack of historical sources proffered

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See, e.g., CeaseFirePA's Brief at 2 (contending "the ordinance at issue here presents an easy case because the historical record is replete with examples of limitations on where an individual may discharge a firearm" and these historical examples similarly "focused on safety of other members of the community").

by the Township.[33] He says the Township "takes a scattershot approach" that "confuses simple history with historical analysis." *Id*. at 10-11. In his view, *Heller* and *Bruen* relied on "learned studies, treatises and state caselaw" whereas the Township provides only "a hodge podge [sic] of regulation[s that are] wildly disparate in scope and circumstances, *i.e.*, quantity over quality." *Id*. at 11-12. Barris then attempts to swat away the Township's proposed historical analogues by declaring they imposed only "minimal prohibitions" or were merely in the nature of "licens[ing] or permission" schemes. *Id*. at 11. As Barris sees it, this "falls far short of . . . an American tradition of the broad prohibition of home target ranges." *Id*. at 12.

D. Firearms Policy Coalition & FPC Action Foundation

A joint *amici* brief in support of Barris was filed by the Firearms Policy Coalition and the FPC Action Foundation (collectively, "FPC"), the former describing itself as "the nation's first and largest public interest legal team focused on the right to keep and bear arms." FPC's Brief at 1. *Amici* explain they are "interested in this case because training is an essential element of the right to keep and bear arms." *Id*. at 2.[34]

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[33] Barris does not even acknowledge, much less refute, any of the OAG's arguments or historical analogues.

[34] A second joint *amici* brief in support of Barris was filed by the Allegheny County Sportsmen's League, the Beaver County Sportsmen's Conservation League, Firearms Owners Against Crime – Institute for Legal, Legislative, and Educational Action, Unified Sportsmen of PA, and USCCA Legal Defense Foundation. We decline to address this brief because it improperly invites us to consider an array of issues that are not before us in this appeal. *See* Joint Sportsmen's Brief at 3-4 (urging us to affirm "on the grounds of the express firearm preemption provided by 18 Pa.C.S. §6120, . . . based upon the field preemption of the Uniform Firearms Act[,]" or pursuant to "Article I, Section 26 of the Pennsylvania Constitution, vagueness doctrine, or the rule of lenity"). We did not grant *allocatur* to consider any of these issues, "and it is settled that an *amicus* cannot raise issues that have not been preserved by the parties." *All. Home of Carlisle*, *PA v. Bd. of Assessment Appeals*, 919 A.2d 206, 221 n.8 (Pa. 2008) (internal quotation marks and citation omitted).

The FPC begins where Barris himself declined to go: it argues "training **is covered** by the plain text" of the Second Amendment. *Id*. at 3 (emphasis added). In fact, the FPC claims the High Court in *Heller* already "established" this interpretation. *Id*. at 5. There, the FPC elaborates, the Court referenced training while analyzing both the prefatory and operative clauses. Starting with the prefatory clause, claims the FPC, the Court explained "the militia was thought to be 'necessary to the security of a free State'" in part because of a belief that "when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny." *Heller*, 554 U.S. at 597-98. As for the operative clause, the FPC highlights that, in analyzing "bear arms," the Court cited self-defense and hunting as lawful purposes for carrying arms and provided an example that concerned practicing with "bows and arrows on Sundays[.]" *Id*. at 581, 599 (internal quotation marks, emphasis, and citations omitted).

Moving beyond *Heller*, the FPC directs our attention to several State constitutions it claims "confirm that the Founders understood that the people must be trained to form an effective militia." FPC's Brief at 6, *citing, e.g.*, VA. DECLARATION OF RIGHTS §13 (1776) ("That a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural and safe defence of a free State."). The FPC also explores the drafting history of the Second Amendment, which it reads to "reveal[ ] that both Federalists and Antifederalists agreed that an armed and trained populace was the best defense against a tyrannical government." *Id*. at 8; *see id*. at 8-12 (discussing sources).

The FPC next provides a colorful historical narrative in an attempt to demonstrate how essential training supposedly was regarded during relevant periods of our Nation's history. It identifies well-known historical figures like John Adams, Thomas Jefferson, John Quincy Adams, James Madison, and John Hancock as major gun enthusiasts who supported firearm training and shooting competitions. *See id*. at 13-31. Without getting

into some of the more boastful portrayals of history painted by the FPC, its version generally goes like this:

> In colonial America, where arms proficiency was required for survival, training and shooting competitions were among the most popular and important activities. As tensions rose with Great Britain, Americans' emphasis on training intensified. And during the Revolutionary War, their lifelong familiarity with arms provided a critical advantage.
>
> As the postenactment history reveals, after learning how valuable lifelong firearms practice was for resisting a tyrannical government, the Founders were sure to protect the right to train when forming their own government.

Id. at 3-4.

As a final point, the FPC contends the only "18th-century restrictions that limited where training could occur were intended to prevent fires or to ensure that people did not fire guns into crowded public areas such as streets and walkways." *Id*. at 32. It references one colonial restriction, relied upon by the OAG, *see* OAG's Brief at 15 n.4, and states it was plainly "designed to prevent fires." FPC's Brief at 33, *citing An Act for the More Effectual Preventing Accidents Which May Happen by Fire, and for Suppressing Idleness, Drunkenness, and Other Debaucheries*, 1750 Pa. Laws 208. Beyond that, the FPC agrees "[m]ost colonial restrictions" — as well as most of the "19th-century laws" cited by the OAG — "were designed to prevent shooting into crowded public areas." *Id*. at 33-34. But rather than explain how such laws differ from the Township's discharge ordinance in purpose or scope, the FPC abruptly concludes: "Because laws preventing shooting into crowded areas . . . do not support the Township's broad regulation, no historical tradition has been established." *Id*. at 35.

IV. Analysis

We begin our analysis by reiterating that presently before us is a facial challenge to the shooting range exception to the Township's discharge ordinance.[35] Ordinarily, a law "is facially unconstitutional only where no set of circumstances exist[s] under which [it] would be valid." *Clifton v. Allegheny Cnty.*, 969 A.2d 1197, 1222 (Pa. 2009), *citing Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008). But *Bruen* teaches that Second Amendment challenges are different, and not subject to the difficult-to-mount standard that typically applies to facial attacks. *See* Charles, *supra* note 8, at 72-73 ("*Bruen* . . . subjects Second Amendment claims to an entirely different set of rules."). Indeed, the challengers in *Bruen* also "levied a facial challenge[.]" *Rahimi*, 61 F.4th at 453; *Chiumento*, 89 F.4th at 316 ("*Bruen* was a facial challenge[.]"). And yet, rather than engage any of its precedents touching upon facial challenges, the *Bruen* Court simply announced it was setting "**the** standard for applying the Second Amendment" without drawing any distinction between facial and as-applied claims. *Bruen*, 597 U.S. at 24 (emphasis added). We thus proceed to apply *Bruen*'s standard as it is.[36]

Lest there be any confusion about what *Bruen*'s standard entails, we quote it in its entirety one last time before we proceed:

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[35] As the Township hinted in one of its filings below, Barris may have had an easier time of it if he simply appealed the order denying his request for a zoning permit. *See* Second Motion for Summary Judgment, 2/18/20 at 6 ("If the owner of a residentially-zoned property had a very large lot and wished to have a shooting range, he could apply to the zoning hearing board for a variance, under the theory that the strict application of the zoning ordinance to his property created a hardship by unreasonably restricting the use of his property because of unique physical factors affecting his property."); *accord*, *e.g.*, *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928) ("[t]he governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited"). Not only did Barris decline to pursue that route, but his counsel at one point conceded his "complaint is limited to whether the enactment of the [discharge] ordinance is constitutional or not[.]" Deposition of Township Supervisor Daryl A. Eppley, 4/4/19 at 22.

(continued…)

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

Id. (citation omitted).

A. *Bruen* Step One

Straight out of the gate we face a dilemma. Before looking to Barris's "conduct," must we decide whether he is part of "the people" protected by the Second Amendment and whether the firearms he plans to use for target practice are "arms" "in common use" today? Fortunately, while some courts have struggled with such issues, *see, e.g.*, *Rahimi*, 61 F.4th at 451-52, we need not concern ourselves with them here. There has never been any suggestion during this lengthy litigation that Barris is not part of "the people," nor is there evidence he seeks to use anything other than the type of "arms" the Second Amendment plainly protects.[37] So, to the extent *Bruen* demands consideration of these preliminary matters (which is not at all clear to us), we nevertheless find them satisfied and advance onward.

Bruen is far more explicit that the first step requires us to determine whether the "plain text covers [the] individual's conduct[.]" *Bruen*, 597 U.S. at 24. But here too we

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[36] Of course, we still adhere to the longstanding precept that, "in reviewing the grant or denial of a motion for summary judgment, this Court's standard of review is *de novo*, and our scope of review is plenary." *Khalil v. Williams*, 278 A.3d 859, 871 (Pa. 2022). We "may reverse a grant of summary judgment only if the trial court erred in its application of the law or abused its discretion." *Id*.

[37] True, Barris's neighbor once reported to police that Barris was allegedly using a firearm she believed was "full auto," and the resulting police report mentions it possibly being a "military firearm." Police Incident Report, 5/10/11 at 3. But police never confirmed those accusations; all the record shows is Barris possesses ordinary .40 and .45 caliber **pistols**. *See id*. These are surely covered by the Second Amendment. *See Heller*, 554 U.S. at 581 ("all firearms constitute[ ] 'arms'") (citation omitted); *Bruen*, 597 U.S. at 32 ("handguns are weapons 'in common use' today for self-defense").

face a quandary: what's the "conduct" at issue? The Township describes it broadly as the ability to "discharge firearms in a particular place[,]" Township's Brief at 33 (emphasis omitted); the OAG views it more narrowly as concerning "a right to operate a shooting range at one's private residence[,]" OAG's Brief at 2; and Barris's pleadings invoked themes of both depictions, as well as a more global concern about his right to bear arms. *Compare* Amended Complaint, 1/8/18 at ¶17 (alleging Second Amendment "secures the right to bear arms and the corresponding right to learn and gain proficiency with and about firearms and obtain training required for firearm ownership") *with id*. at ¶18 (averring discharge ordinance's shooting range exception "unlawfully impedes and has a chilling effect on bearing arms . . . and limits and impedes the ability of persons to remain secure in their homes by limiting firearm proficiency to those willing and able to travel, incur cost and expense, obtain memberships, and [satisfy] other obligations imposed by commercial or private shooting ranges"). Further muddying the waters, Barris practically concedes training is not covered by the Second Amendment's plain text, while his *amici* argue the precise opposite. *Compare* Barris's Brief at 10 ("No Second Amendment 'text' references firearm training.") *with* FPC's Brief at 6 ("training is covered by several aspects of the Second Amendment's plain text").

Ultimately, we find it doesn't matter which proposed framing is most accurate; we conclude Barris's conduct — whether viewed generally as his ability to gain proficiency with firearms or more specifically as his ability to do so on his own property — is covered by the Second Amendment's plain text. However, as we explain below, we reach this result without deciding whether the Second Amendment protects "ancillary" rights related to the core right to self-defense, or if "training" properly falls within that category.

We are tempted by the Township and the OAG's argument that the phrase "to keep and bear arms" fails to **plainly** provide a right to train with firearms, let alone a right to do

so on one's property. Our research reveals some post-*Bruen* federal district courts have been persuaded by the simplicity of this reasoning. *See, e.g.*, *Oakland Tactical Supply, LLC v. Howell Twp.*, No 18-CV-13443, 2023 WL 2074298, at *4 (E.D. Mich., Feb. 17, 2023) (concluding "plain text of the Amendment says nothing about long-range firing or even, for that matter, training more broadly" and thus holding "the proposed course of conduct, construction and use of an outdoor, open-air 1,000-yard shooting range, is not covered"); *United States v. King*, No. 5:22-CR-00215-001, 2022 WL 17668454, at *3 (E.D. Pa., Dec. 14, 2022) ("the Court looks at the Second Amendment's plain text; it does not consider 'implicit' rights that may be lurking beneath the surface of the plain text"); *see also United States v. Tilotta*, No. 3:19-CR-04768-GPC, 2022 WL 3924282, at *5 (S.D. Cal., Aug. 30, 2022) ("textually, the ordinary meaning of 'keep and bear' does not include 'sell or transfer'"). The partial dissent adopts a similar position. *See* Concurring and Dissenting Opinion at 9 ("There is nothing in the plain text of the Second Amendment that guarantees a specific location for where one may train with their firearms; there exists merely the implication, as suggested by the High Court, that one cannot be prohibited from training in general.").

Yet, there are also numerous signs pointing in the opposite direction, a fact the partial dissent openly concedes. S*ee id*. at 10 ("the High Court may similarly consider that firearms proficiency training at one's home fits broadly within the implicit right to train and maintain proficiency with one's firearms"). *Heller* in particular gives us serious pause. There, as Barris's *amici* correctly note, *see* FPC's Brief at 5, the High Court twice discussed training while interpreting the Second Amendment's prefatory clause. First, the Court explained "the militia was thought to be 'necessary to the security of a free State'" based in part on a belief that "when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny." *Heller*, 554 U.S. at 597-98.

Second, it interpreted the adjective "well-regulated" as "impl[ying] nothing more than the imposition of proper discipline and training." *Id*. at 597 (citations omitted). As for the Amendment's operative clause, when analyzing the term "bear arms," the Court cited "Timothy Cunningham's important 1771 legal dictionary[,]" *id*. at 581, which notably "gave as an example of its usage a sentence unrelated to military affairs ("Servants and labourers shall use bows and arrows on *Sundays*, & c. and not bear other arms.")." *Id*. at 588, *quoting* 1 Timothy Cunningham, *A NEW AND COMPLETE LAW DICTIONARY* (1771) (unpaginated). To quote the partial dissent, all of this "certainly" could be characterized as "support from the High Court that firearms training would by itself satisfy *Bruen*'s threshold inquiry[.]" Concurring and Dissenting Opinion at 8; *see also Heller*, 554 U.S. at 577 (explaining the Amendment's prefatory clause may be used "to resolve an ambiguity in the operative clause"); Dissenting Opinion at 6 ("The core self-defense protections of the Amendment, as identified in *Heller* and subsequent cases, would be severely limited if regulation of the ability to safely train in the use of a firearm at one's home prevented or overly burdened an individual's ability to effectively use the firearm.").

We add three points. First, we observe *Heller* invalidated a District of Columbia law requiring that firearms in the home always be rendered inoperable. In striking down the law, the Court explained it was unconstitutional because it "makes it impossible for citizens to use them for the core lawful purpose of self-defense[.]" *Id*. at 630. It's difficult to ignore how closely this reasoning resembles the concept of "ancillary" rights. *See, e.g.*, *Teixeira*, 873 F.3d at 677 ("Second Amendment protects ancillary rights necessary to the realization of the core right to possess a firearm for self-defense"). Second, and relatedly, we acknowledge Justice Thomas has expressly endorsed (albeit pre-*Bruen*) the notion that firearm training is protected by the Second Amendment. *See Luis v. United States*, 578 U.S. 5, 26 (2016) (Thomas, J., concurring) ("Constitutional rights [ ] implicitly protect

those closely related acts necessary to their exercise. . . . The right to keep and bear arms, for example, implies a corresponding right to obtain the bullets necessary to use them, . . . and to acquire and maintain proficiency in their use[.]") (internal quotation marks and citations omitted). Third, we are aware there are some reputable historical sources that support this position. *See, e.g.*, THOMAS M. COOLEY, *GENERAL PRINCIPLES ON CONSTITUTIONAL LAW* 271 (1880) ("[T]o bear arms implies something more than the mere keeping; it implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use."); *see also Heller*, 554 U.S. at 617 ("Cooley understood the right . . . as securing the [citizens'] militia by ensuring a populace familiar with arms").

In the end, though, unlike the partial dissent and the dissent, we see no need to decide in this case whether ancillary rights, including training with arms (either at home or elsewhere), are protected by the Second Amendment. As we see it, Barris's conduct implicates the Amendment's plain text for a broader reason: the discharge ordinance "deprive[s him] of his Constitutional right **to bear** . . . firearms." Amended Complaint, 1/8/18 at ¶19 (emphasis added). In this respect, we observe the discharge ordinance authorizes law enforcement "**to seize**" "any firearm" that is "fired or discharged within the limits of the Township . . . in violation of this ordinance." Discharge Ordinance at §6 (emphasis added). Stated another way, although the express purpose of the ordinance is to regulate when and where firearms may be discharged, if violated, it operates to physically disarm violators. *Contra* Township's Brief at 37 (conceding Amendment's text covers "physical possession" but arguing the discharge ordinance does not "disturb[ ]" this right).

So here, then, where Barris seeks to engage in the conduct of firearm practice, he runs the risk of having his lawfully owned handguns confiscated if he practices anywhere

the Township says is prohibited. In this way, the discharge ordinance "impedes and has a chilling effect on [Barris's right to] bear[ ] arms[.]" Amended Complaint, 1/8/18 at ¶18. Indeed, the practical effect of the discharge ordinance is that it "inextricably intertwine[s Barris's] right to possess" and use his firearms with his "ability to practice" with them, much in the same way as the ordinance at issue in *Ezell*. OAG's Brief at 12. It's also similar to the District of Columbia law struck down in *Heller* requiring that firearms in the home always be rendered inoperable. Just as that law "ma[de] it impossible for citizens to use" firearms, so too does the discharge ordinance here, by threatening confiscation of any firearms that Barris seeks to use for target practice. *Heller*, 554 U.S. at 630. This remains true whether we zoom out and view his conduct more generally as gaining proficiency in firearms, or we zoom in and view it as a right to obtain such practice on his own land. Either way, Barris's conduct potentially leads to his being stripped by the government — even if only temporarily — of his lawful handguns, "the most popular weapon chosen by Americans for self-defense in the home[.]" *Id*. at 629. This alone is enough, in our view, to satisfy *Bruen*'s first step for purposes of this case.[38] *See Md.*

[38] The partial dissent contends we have "failed to correctly conduct the first inquiry under *Bruen*." Concurring and Dissenting Opinion at 2. In its view, we improperly focus on the "penalty imposed for violation of the challenged" ordinance rather than Barris's proposed conduct. *Id*. at 3. That conduct, according to the partial dissent, is very narrow: "training on his home shooting range." *Id*. at 6. On the partial dissent's telling, "[a]t no point has Barris sought to invoke his possession of firearms as the basis for his Second Amendment challenge." *Id*. at 5; *see id*. (alleging he never "argued in any other way that the [discharge o]rdinance deprived him of possession of his firearms"); *see also* Dissenting Opinion at 4 ("I do not say that the issue of confiscation of weapons might not present a separate inquiry, but it is not one the parties have pursued.").

We respectfully disagree. It is certainly true Barris challenged the discharge ordinance, in part, based on a claimed "right to learn and gain proficiency with and about firearms and obtain training required for firearm ownership." Amended Complaint, 1/8/18 at ¶17. But the partial dissent ignores his broader claim that the ordinance "deprive[s] him of his Constitutional right to bear . . . firearms." *Id*. at ¶19; *see id*. at ¶17 (invoking "the right to bear arms"); *id.* at ¶18 (arguing the ordinance "unlawfully impedes and has a chilling effect on bearing arms"). His claim thus encompasses the allegation that the ordinance (continued…)

Shall Issue, 86 F.4th at 1044-45 ("Nothing in the Amendment's text or *Bruen* says that it protects only against laws that **permanently** deprive people of their ability to keep and bear arms. . . . So the temporary deprivation that Plaintiffs allege is a facially plausible

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impinges upon his right to possess firearms. *See Bruen*, 597 U.S. at 32 (right to bear arms refers, *inter alia*, to right to wear, bear, or carry guns). The conduct at issue includes not only Barris's firearms training but his very possession of his firearms. It is on this broader basis that we find *Bruen*'s first step satisfied for purposes of this discrete case.

To be sure, as we have acknowledged, *see supra* at 16, "*Bruen* leaves the step-one 'plain text' inquiry unspecified." Charles, *supra* note 8, at 95; *see id*. at 132 (in "assessing the first step of *Bruen*'s test . . . courts have disagreed over the nature of the inquiry"). Given this uncertainty and lack of guidance, perhaps a prudent course would be for us to simply assume *arguendo* the first step is satisfied; other courts have done exactly that. *See, e.g.*, *Bondi*, 61 F.4th at 1324 ("For purposes of this opinion, we assume without deciding that the Second Amendment's plain text covers persons between eighteen and twenty years old when they seek to buy a firearm."); *United States v. Rice*, 662 F.Supp.3d 935, 945 (N.D. Ind. 2023) ("For the purposes of this motion the Court will assume, without deciding, Mr. Rice's possession of a firearm is facially covered by the protective ambit of the Second Amendment."). However, we are satisfied the unique terms of the discharge ordinance before us, coupled with Barris's explicit claim that it violates his right to bear arms, presents a sufficient and independent basis upon which to conclude *Bruen*'s first step is satisfied.

The partial dissent, in contrast, would have us dive headfirst into uncharted waters and reach a conclusion that even the partial dissent admits is likely to be rejected by the High Court. Meanwhile, the dissent advocates we reach the opposite conclusion and become the first court in the nation to "deem the ability to safely train with a weapon at one's own premises as itself implicating the text of the Second Amendment's right to keep arms[.]" Dissenting Opinion at 6. Respectfully, under the circumstances, we think a dose of restraint is more than warranted. *See Zilka v. Tax Rev. Bd., City of Philadelphia*, 304 A.3d 1153, 1180 (Pa. 2023) (Wecht, J., concurring) (cautioning judicial restraint where there is a "very real possibility that the Supreme Court will modify its precedent in [a given] area" and it is difficult "to predict the next twist or turn in the [ ] Court's ever-changing . . . jurisprudence"); *see also Commonwealth v. Molina*, 104 A.3d 430, 458 (Pa. 2014) (Castille, C.J., dissenting) ("State courts should proceed cautiously when asked to be the engine of innovation in federal constitutional law, since mistaken predictive judgments can be disruptive of Pennsylvania law and can cause substantial injustice where the predictive judgments are erroneous.").

Second Amendment violation.") (emphasis in original; citation omitted). We therefore continue to the second and final step.[39]

B. *Bruen* Step Two

Despite the several bumps we encountered at *Bruen*'s first step, its second step is a simpler matter in this case. *Bruen* tells us we may find Barris's conduct falls outside the Second Amendment's unqualified command only if the Township has met its burden to "justify its [ordinance] by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 24. It has easily done so.

We have combed the hundred-plus purported historical analogues provided by the Township and the OAG,[40] and our painstaking review confirms the Township's discharge ordinance is fully consistent with this Nation's historical tradition of firearm regulation. A few examples each from the colonial, founding, antebellum, and postbellum periods suffice to prove the point.[41]

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[39] If the Township and the OAG are correct that a challenger bears the burden of proof at the "plain text" step, *see supra* notes 29 & 31, Barris's claim would likely fail right off the bat because he no longer argues his conduct implicates his right "to keep and bear arms" and, moreover, he freely admits "[n]o Second Amendment 'text' references firearm training." Barris's Brief at 10. However, we decline to decide the issue. Neither the Township nor the OAG have provided any authority for their proposition and our close inspection of *Bruen* confirms its silence on the matter. Given how quickly the Second Amendment sands are shifting, and since we do not need to answer this question to resolve the present dispute, we leave it for another day.

[40] In response to the Township's unopposed request that we take judicial notice of the historical sources it and the OAG have provided, *see* Township's Brief at 42, we agree that is entirely proper. *See* 42 Pa.C.S. §5327(b) ("In determining the law of any jurisdiction or governmental unit thereof outside this Commonwealth, the tribunal may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the rules of evidence.").

[41] Call us gun-shy, but we also decline to answer another question *Bruen* clearly left open: "whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope[.]" *Bruen*, 597 U.S. at 37. On the one hand, we find highly persuasive the now-withdrawn Eleventh (continued…)

Start with American colonial views leading up to the founding. In 1642, in response to "diverse abuses committed in the colony by unlawful shooting on the Sabbath day," Colonial Virginia prohibited shooting on that day except "for the safety of . . . plantations or corn fields or for defense against the Indians[.]"[42] Others had similar restrictions. In 1697, for example, Colonial Massachusetts ordained that no person "in any town or garrison, shall presume to discharge or shoot off any gun or guns after the shutting in of the daylight in the evening, or before daylight in the morning, unless in case of alarm, approach of the enemy, or other necessary defense[.]"[43] So too in Colonial Connecticut, where in 1715 the "firing [of] any Gun" was prohibited "in any . . . Plantations, at any time between the shutting in the Evening or break of the Day" because it was found to be "prejudicial to the comfort and safety of the Plantations[.]"[44] A similar restraint was

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Circuit opinion in *Bondi*, 61 F.4th 1317, which held "the understanding of the Second Amendment right that ought to control in this case — where a State law is at issue — is the one shared by the people who adopted the Fourteenth Amendment, not the Second." *Bondi*, 61 F.4th at 1322 (internal quotation marks and citation omitted). But on the other, we cannot ignore the *Bruen* Court's apparent attempt to put its heavy thumb on the scale by stating it has "generally assumed" the controlling understanding is "when the Bill of Rights was adopted in 1791." *Bruen*, 597 U.S. at 37. Regardless, as in *Bruen*, "[w]e need not address this issue today because . . . the public understanding of the right to keep and bear arms in both 1791 and 1868 was, for all relevant purposes, the same" with respect to regulating the discharging of firearms. *Id*. at 38.

[42] *Acts of March 2nd*, 1642, Act XXXV, 1642 Va. Acts 261.

[43] *An Act for Putting the Militia of This Providence into a Readiness Defence of the Same*, 1697 Mass. Acts 268.

[44] *False Alarms*, DUKE CENTER FOR FIREARMS LAW, https://firearmslaw.duke.edu/laws/1672-1714-conn-acts-3-false-alarms/ (last visited Feb. 16, 2024), *citing* 1672-1714 Conn. Pub. Acts 3.

imposed in 1740 in Colonial South Carolina, where "an ill custom ha[d] prevailed . . . of firing guns in the night time[.]"[45]

Of course, the colonies did far more than regulate **when** firearms could be used for non-self-defense purposes; they also often dictated **where** they could be discharged. *Heller* acknowledged a few of these regulations in responding to Justice Breyer's dissent, wherein he observed:

> Boston, Philadelphia, and New York City, the three largest cities in America during that period, all restricted the firing of guns within city limits to at least some degree. *See* Churchill, *Gun Regulation, the Police Power, and the Right To Keep Arms in Early America*, 25 LAW & HIST. REV. 139, 162 (2007). Boston in 1746 had a law prohibiting the "discharge" of "any Gun or Pistol charged with Shot or Ball in the Town [of Boston, or in any part of the Harbor]" on penalty of 40 shillings, a law that was later revived in 1778. *See* Act of May 28, 1746, ch. X, Acts and Laws of Mass. Bay, p. 208; An Act for Reviving and Continuing Sundry Laws that are Expired, and Near Expiring, 1778 Mass. Sess. Laws ch. V, pp. 193, 194. Philadelphia prohibited, on penalty of five shillings (or two days in jail if the fine were not paid), firing a gun or setting off fireworks in Philadelphia without a "governor's special license." *See* Act of Aug. 26, 1721, § IV, in 3 Stat. at Large of Pa. 253–254 (J. Mitchell & H. Flanders comm'rs 1896). And New York City banned, on penalty of a 20-shilling fine, the firing of guns (even in houses) for the three days surrounding New Year's Day. 5 Colonial Laws of New York, ch. 1501, pp. 244-246 (1894); *see also* An Act to Suppress the Disorderly Practice of Firing Guns, & c., on the Times Therein Mentioned (1774), in 8 Stat. at Large of Pa. 410-412 (1902) (similar law for all "inhabited parts" of Pennsylvania). *See also* An Act for preventing Mischief being done in the Town of *Newport*, or in any other Town in this Government, 1731 Rhode Island Session Laws, pp. 240-241 (prohibiting, on penalty of five shillings for a first offense and more for subsequent offenses, the firing of "any Gun or Pistol . . . in the Streets of any of the Towns of this Government, or in any Tavern of the same, after dark, on any Night whatsoever").

Heller, 552 U.S. at 683-84 (Breyer, J., dissenting) (some citations omitted). *See id*. at 632-33 (recognizing existence of these sources but concluding they "provide no support

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[45] *1731-43 S.C. Acts 174, §41*, DUKE CENTER FOR FIREARMS LAW, https://firearmslaw.duke.edu/laws/1731-43-s-c-acts-174-%c2%a7-41/ (last visited Feb. 16, 2024).

for the severe restrictions in the present case" because, unlike the District of Columbia's laws, they would have permitted exceptions for self-defense).

But such restrictions were not limited to the largest cities in America — smaller ones, as well as territories that were larger though less populated at the time, enacted comparable laws. For instance, in 1785 the city of Newburyport, Massachusetts forbade any person from "fir[ing] off any sort of gun, pistol or other thing . . . in array of the streets, lanes or public ways in this town[.]"[46] And, in 1790, one year before the Second Amendment was ratified, Ohio prohibited the discharging of firearms within "at least one-quarter of a mile from the nearest building of any [ ] city, town, village or station[.]"[47] Even while allowing exceptions for self-defense, military exercises, and hunting, the law made clear that, in the latter situation, discharges should be "employed in a direction . . . towards the country so as such ball or balls, missile weapon, or shot, shall . . . go clear of the buildings pertaining to the same."[48] These are just some of many examples. There are surely more, but the bottom line is our history shows the colonial and founding generations recognized the longstanding power of States to regulate when and where firearms could be discharged for non-self-defense purposes.

That didn't change after the Second Amendment was ratified; on the contrary, the number of firearm discharge regulations proliferated. Take a local example. In 1824, the township of the Northern Liberties — one of two municipalities that would later make up

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[46] Mark Frassetto, *Firearms and Weapons Legislation Up to the Early Twentieth Century*, SSRN (Jan. 15, 2013), https://ssrn.com/abstract=2200991 (identifying law passed on March 29, 1785 "[a]t a legal meeting of the freeholders and other inhabitants of the town of Newburyport").

[47] *1 Statutes of Ohio & Northwestern Territory 106*, DUKE CENTER FOR FIREARMS LAW, https://firearmslaw.duke.edu/laws/1-statutes-of-ohio-northwestern-territory-106-salmon-p-chase-ed-1833/ (last visited Feb. 16, 2024), *citing Act of Aug. 4, 1790, ch. XIII, §4*, 1790 Ohio Laws 106.

[48] *Supra* note 47.

the City of Philadelphia — prohibited anyone from "prov[ing] any pistol, gun, [or] musket barrels" in the incorporated part of the township "without permission from the president of the board of commissioners[.]"[49] Meanwhile, during the same year in New York, the city of Schenectady prohibited the firing of "any gun [or] pistol" "in any street, lane or alley, **or in any yard**, garden or other enclosure, or in any place where persons frequent to walk[.]"[50] By 1836, Brooklyn had banned the discharging of firearms (which it described as an "evil practice") "within the first six wards, and in so much of the seventh ward as lies westerly of Clinton avenue and the Jamaica turnpike" — *i.e.*, in residential areas.[51] Moving southward, New Orleans in 1817 outlawed the firing of "any gun, pistol, fowling piece or firearm . . . in any street, court yard, lot, walk or public way, within the city or suburbs, . . . or near any house or other inhabited part of said city or suburbs[.]"[52] That

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[49] *An Act of Incorporation for that Part of the Northern Liberties, Lying between the Middle of Sixth Street and the River Delaware, and between Vine Street and Cohocksink Creek, with Ordinances for the Improvement of the Same*, DUKE CENTER FOR FIREARMS LAW, https://firearmslaw.duke.edu/laws/an-act-of-incorporation-for-that-part-of-the-northern-liberties-lying-between-the-middle-of-sixth-street-and-the-river-delaware-and-between-vine-street-and-cohocksink-creek-with-ordinances-for-the/ (last visited Feb. 16, 2024).

[50] *Laws of the State of New-York, Relating to the City of Schenectady: And the Laws and Ordinances of the Common Council of the City of Schenectady*, DUKE CENTER FOR FIREARMS LAW, https://firearmslaw.duke.edu/laws/laws-of-the-state-of-new-york-relating-to-the-city-of-schenectady-and-the-laws-and-ordinances-of-the-common-council-of-the-city-of-schenectady-page-58-image-58-1824-available-at-the-making-of-mod/ (last visited Feb. 16, 2024) (emphasis added).

[51] *Acts Relating to the City of Brooklyn, and the Ordinances Thereof*, DUKE CENTER FOR FIREARMS LAW, https://firearmslaw.duke.edu/laws/acts-relating-to-the-city-of-brooklyn-and-the-ordinances-thereof-together-with-an-appendix-containing-the-old-charters-statistical-information-c-c-page-25-image-222-1836-available-at-the-m/ (last visited Feb. 16, 2024).

[52] *Ordinances Ordained and Established by the Mayor & City Council of the City of New Orleans*, DUKE CENTER FOR FIREARMS LAW, https://firearmslaw.duke.edu/laws/ordinances-ordained-and-established-by-the-mayor-city-council-of-the-city-of-new-orleans-page-68-image-68-1817-available-at-the-making-of-modern-law-primary-sources/ (last visited Feb. 16, 2024).

same year, South Carolina passed a similar ordinance, explaining "the practice of firing small arms within the town of Columbia is extremely dangerous to the lives; as well as the property of the inhabitants thereof, and ought to be strictly prohibited[.]"[53] We could go on and on because ordinances and laws of this kind were common and widespread during the antebellum period. *See* OAG's Brief at 17 (citing additional examples from Portsmouth, New Hampshire (1823); Portland, Maine (1833); Quincy, Illinois (1841); New Haven, Connecticut (1845); Detroit, Michigan (1848); Chicago, Illinois (1855); Jefferson, Indiana (1855); Winchester, Virginia (1856); and St. Paul, Minnesota (1858)).

What's more, a number of regulations during this time were aimed specifically at shooting ranges and target practice. For example, Tennessee in 1821 banned "shoot[ing] at a mark within the bounds of any town, or within two hundred yards of any public road of the first or second class within the state[.]"[54] Rhode Island in 1851 mandated that "[n]o pistol gallery or rifle gallery, or any other building or enclosure, where fire arms are used for practicing in firing with ball or shot, shall hereafter be kept in the compact part of the town of Newport[.]"[55] And the City of Burlington, Iowa in 1856 restricted the construction of a "shooting battery," and the ability "to shoot at a mark or fire any gun at said battery,"

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[53] *Ordinances, of the Town of Columbia, (S.C.) Passed Since the Incorporation of Said Town: To Which are Prefixed, the Acts of the General Assembly, for Incorporating the Said Town, and Others in Relation Thereto*, DUKE CENTER FOR FIREARMS LAW, https://firearmslaw.duke.edu/laws/ordinances-of-the-town-of-columbia-s-c-passed-since-the-incorporation-of-said-town-to-which-are-prefixed-the-acts-of-the-general-assembly-for-incorporating-the-said-town-and-others-in-relati/ (last visited Feb. 16, 2024).

[54] *An Act to Prohibit the Improper Practice of Shooting at Marks within the Limits of the Towns of this State*, 1821 Tenn. Pub. Acts 78-79.

[55] *An Act in Amendment of an Act Entitled an Act Relating to Theatrical Exhibitions and Places of Amusement*, 1851 R.I. Pub. Laws 9.

to approved gunsmiths "for whose special benefit this privilege is granted."[56] These laws reveal that the dangers of discharging firearms — particularly in or near residential or crowded areas — were well known among antebellum lawmakers across the country.

In the early years after the Fourteenth Amendment was ratified in 1868, even more cities enacted prohibitions on the firing of pistols within municipal limits. *See, e.g.*, OAG's Brief at 19-20 (collecting laws from Peoria, Illinois (1869); St. Joseph, Missouri (1869); Dover, New Hampshire (1870); New Orleans, Louisiana (1870); Marietta, Ohio (1872); Denver, Colorado (1875); Meriden, Connecticut (1875); Montgomery, Alabama (1879); and Rutland, Utah (1894)). As well, it remained common during the postbellum period for municipalities to prohibit unlicensed shooting ranges in an effort to curb the obvious dangers and nuisances they presented. *See id*. at 20-21 (collecting laws from Bluffs, Iowa (1887); Martinsburg, West Virginia (1875); St. Joseph, Missouri (1879); Fort Worth, Texas (1880); Indianapolis, Indiana (1895); and Salem, North Carolina (1896)). In short, postbellum history tells the same story as our colonial, founding, and antebellum histories: this Nation has a long tradition of regulating when and where firearms may be discharged for non-emergency purposes.[57]

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[56] *Chas. Ben. Darwin, Ordinances of the City of Burlington,* DUKE CENTER FOR FIREARMS LAW, https://firearmslaw.duke.edu/laws/chas-ben-darwin-ordinances-of-the-city-of-burlington-with-head-notes-and-an-analytic-index-page-149-150-image-149-150-1856-available-at-the-making-of-modern-law-primary-sources/ (last visited Feb. 16, 2024).

[57] The partial dissent assails our foregoing historical analysis as "totally disconnected" "from the conduct [we] identified as giving Barris'[s] proposed conduct presumptive Second Amendment protection." Concurring and Dissenting Opinion at 10, 11; *see also* Dissenting Opinion at 2-3 & n.3. This criticism is misguided, for several reasons. First, there is no disconnect. The discharge ordinance, like the many historical analogues we have discussed, implicates Barris's right to bear and use arms.

Second, the partial dissent misunderstands the nature of *Bruen*'s second step. The second step shifts the analytical focus solely to the regulation at issue, not the proposed conduct. *See Bruen*, 597 U.S. at 24 (explaining that where the first step is satisfied, the "Constitution presumptively protects that conduct" and "[t]he government must then justify (continued…)

In the face of all this, Barris and his *amici* insist it still is not enough. Barris alleges the laws above only imposed "minimal prohibitions" or were merely akin to "licens[ing] or permission" schemes. Barris's Brief at 11. Stated differently, he invokes *Bruen*'s "how" metric — *i.e.*, "whether modern and historical regulations impose a comparable burden

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its regulation by demonstrating that **it** is consistent with the Nation's historical tradition of firearm regulation") (emphasis added). The partial dissent would rewrite *Bruen*'s second step by replacing the word "it" in the prior sentence with "the way in which the regulation impacts the proposed conduct." *See* Concurring and Dissenting Opinion at 12 (arguing the relevant question under *Bruen*'s second step as applied to this case is "whether disarming an individual for violating the [discharge o]rdinance, is consistent with the Nation's historical tradition of firearm regulation"). Obviously, we are not at liberty to tinker with the High Court's test in this manner. The test we are obliged to follow simply requires that we consider whether the government has met its burden to "justify its regulation by demonstrating that it" — meaning the regulation itself — "is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 24. We have done precisely that.

Third, not only is the partial dissent's position legally incorrect, it's also factually mistaken. Although *Bruen* does not demand such similarity, we note some of the regulations we have discussed did in fact authorize disarming those who discharged firearms in prohibited areas. *See, e.g.*, *Ordinances, of the Town of Columbia, (S.C.) Passed Since the Incorporation of Said Town: To Which are Prefixed, the Acts of the General Assembly, for Incorporating the Said Town, and Others in Relation Thereto*, DUKE CENTER FOR FIREARMS LAW, https://firearmslaw.duke.edu/laws/ordinances-of-the-town-of-columbia-s-c-passed-since-the-incorporation-of-said-town-to-which-are-prefixed-the-acts-of-the-general-assembly-for-incorporating-the-said-town-and-others-in-relati/ (last visited Feb. 16, 2024) ("it shall be lawful for the intendant, either of the Wardens or constables, who shall see such person offending against this ordinance, to seize and take into possession the gun or pistol, or other small arms so fired or discharged"); *An Act to Prevent the Firing of Guns Charged with Shot or Ball in the Town of Boston*, ch. 10 (May 28, 1746), reprinted in *Acts and Laws of the Massachusetts Bay* 208 (Kneeland ed. 1746) ("[F]or the more effectual conviction of any person or persons so offending [this ordinance prohibiting the discharge of any gun or pistol in the town of Boston], it shall be lawful for any person to seize and take into custody any gun so fired off, and deliver the same to one of the next Justices of the Peace."); *see also An Act for Preventing Accidents that may Happen by Fire, §IV,* DUKE CENTER FOR FIREARMS LAW, https://firearmslaw.duke.edu/laws/john-c-lowber-ordinances-of-the-corporation-of-the-city-of-philadelphia-to-which-are-prefixed-the-original-charter-the-act-of-incorporation-and-other-acts-of-assembly-relating-to-the-city-with/ (last visited Feb. 16, 2024) (prohibiting the firing of "any gun or other fire-arms" within Philadelphia and permitting the applicable fine of five shillings to "be levied by distress and sale of the offender[']s goods").

on the right of armed self-defense[.]" *Bruen*, 597 U.S. at 29. The FPC, in turn, claims all regulations "that limited where training could occur were intended to prevent fires or to ensure that people did not fire guns into crowded public areas[.]" FPC's Brief at 32. This invokes *Bruen*'s "why" metric — *i.e.*, "whether th[e] burden is comparably justified[.]" *Bruen*, 597 U.S. at 29. Neither position is convincing.

As the High Court explained, "features that render regulations relevantly similar under the Second Amendment" include "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id*. Starting with the latter, the Township's discharge ordinance unambiguously identifies the societal problem it seeks to address: "Due to the density of the population in the Township . . ., it is necessary that the discharging of firearms be regulated for the protection of the public health and safety and general welfare of the residents, property owners, visitors, and others within [the] Township[.]" Discharge Ordinance at §1. As our voyage through history revealed above, our founding generation — indeed, lawmakers of every period — similarly regulated the discharging of firearms due to safety risks, property damage, and nuisance concerns. *See also* BENJAMIN VAUGHAN ABBOTT, JUDGE AND JURY: A POPULAR EXPLANATION ON THE LEADING TOPICS IN THE LAW OF THE LAND 333 (1880) (explaining an individual "exercises his individual right" when he "keeps a gun or pistol under judicious precautions" and "practi[c]es **in safe places** the use of it") (emphasis added). The "why" of such regulation is precisely the same today as it has been since before the founding of this Nation.

The "how" is more nuanced. As *Bruen* cautioned, even "if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional." *Bruen*, 597 U.S. at 26-27. Here the government faces a small hurdle because the discharge ordinance's shooting range exception is basically distilled to a series of zoning regulations, yet

"[b]uilding zone laws are of modern origin" considering that, until approximately 125 years ago, "urban life was comparatively simple[.]" *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 386 (1926); *see also Bruen*, 597 U.S. at 78 (Alito, J., concurring) ("In 1791, . . . many families lived alone on isolated farms or on the frontiers.").

Nevertheless, analogical reasoning under *Bruen*'s history-and-tradition test is not a "regulatory straightjacket" and we need only find "a well-established and representative historical analogue, not a historical twin" or a "dead ringer[.]" *Bruen*, 597 U.S. at 30 (emphasis omitted). Thus, although it is true some of the many historical regulations that prohibited the discharging of firearms achieved that end in various ways — for example, by requiring licenses — in effect, they operated no differently than the discharge ordinance's shooting range exception. Moreover, most regulations functioned exactly as the Township's shooting range exception, by banning the discharging of firearms in certain areas where safety and nuisance concerns are at their zenith, including public spaces and residential areas. Some even went further, prohibiting the non-emergency discharge of firearms in entire cities. Considering all this, it would be unreasonable to say that earlier generations regulated the problem "through materially different means[.]" *Id*. at 26. On the contrary, they regulated the problem just as we do today, even if they didn't yet employ "zoning districts" in the modern sense. *Cf. Drummond*, 9 F.4th at 228 (recognizing founding-era cities "forbade firearms . . . practice in populated places" and "[s]imilar rules — in the form of Euclidean zoning ordinances — have been widespread for at least a century").[58]

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[58] The dissent believes the historical analogues we have discussed "are clearly not analogous in purpose or effect to the Township's restrictions[.]" Dissenting Opinion at 10; *see id*. at 12 ("None of the examples present the type of restrictive zoning ban, divorced from independent and individualized safety concerns, that the Township[']s regulations impose."). Respectfully, the dissent requires more than *Bruen* demands. *See, e.g.*, *Bevis*, 85 F.4th at 1210 (Brennan, J., dissenting) ("In performing [*Bruen*'s] analogical (continued…)

Finally, for good measure we have also considered several other metrics that, although not explicitly required by *Bruen*, were arguably employed by the Court during its analysis. This includes pervasiveness, longevity, and geographic coverage. Again, all boxes are checked in favor of the government. There is no need to traverse the historical record a second time in order to conclude the historical regulations brought forth by the Township and the OAG are anything but "scattershot[.]" Barris's Brief at 10. Indeed, together they demonstrate a sustained and wide-ranging effort by municipalities, cities, and States of all stripes — big, small, urban, rural, Northern, Southern, etc. — to regulate a societal problem that has persisted since the birth of the Nation. To put it simply, by all accounts the Township's discharge ordinance appears to be exactly the type of sensible firearm regulation the Second Amendment permits. *See, e.g.*, *Bruen*, 597 U.S. at 80 (Kavanaugh, J., concurring) ("Properly interpreted, the Second Amendment allows for a 'variety' of gun regulations.") (citation omitted).

V. Conclusion

We hold the Second Amendment's plain text covers Barris's conduct based on the specific terms of the discharge ordinance before us, which permits the confiscation of lawfully owned arms. Nonetheless, we further hold the government has met its burden to justify the discharge ordinance's shooting range exception by showing it is consistent with the Nation's historical tradition of firearm regulation. As such, Barris's conduct falls

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inquiry, it is critical to fly at the right level of generality. . . . Fly too low, and we risk myopia — nitpicking differences because a historical regulation is not a 'dead ringer.'"), *quoting* *Bruen*, 142 S.Ct. at 2133 (citations omitted). *Bruen* merely calls for historical analogues that "are 'relevantly similar'" to the challenged law, *Bruen*, 597 U.S. at 29 (citation omitted), and that is exactly what the government has proffered, as we have discussed at length.

outside the Second Amendment's unqualified command, and the Township's discharge ordinance is facially constitutional. We therefore reverse and remand.[59]

* * * *

We close by adding our voice to the ever-growing chorus of courts across the country that have implored the High Court to answer some of the many questions *Bruen* both created and left unresolved — or even to reconsider its path entirely.[60] Our Nation is gripped by a level of deadly gun violence our founders never could have conceived, and, respectfully, some of the Court's actions in recent years have done little to quell the legitimate fears of "the people." Doubtless, the federal Constitution is king, and the heavy burden of interpreting that all-important document falls solely to the head of the federal judiciary. Still, to many, the *Bruen* Court's word that the Second Amendment is meant "to be adapted to the various crises of human affairs" largely rings hollow since the Court has frozen its meaning in time in the ways that matter most. *Bruen*, 597 U.S. at 28. Worse yet, the Court seemingly moves the goalposts with each new case it takes, most recently by *sua sponte* discarding a test that was uniformly embraced by courts across the country and replacing it with a harsh "history-and-tradition" test no one asked for. We cannot help but wonder (and fear, really): What's next?

Chief Justice Todd and Justice Wecht join the opinion.

Justice Donohue files a concurring and dissenting opinion.

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[59] Although Barris abandoned his Article I, §21 challenge in the lower court, he preserved other claims, including under substantive and procedural due process. The lower court did not address those claims given its disposition. *Barris*, 257 A.3d at 226 n.18. It should do so on remand.

[60] *See, e.g.*, *Daniels*, 77 F.4th at 358 (Higginson, J., concurring) (writing separately "to highlight what has become increasingly apparent — that courts, operating in good faith, are struggling at every stage of the *Bruen* inquiry" and identifying several known problems); *Atkinson v. Garland*, 70 F.4th 1018, 1036 (7th Cir. 2023) (Wood, J., dissenting) ("As other courts have begun to apply *Bruen*, th[e] need for further research and further guidance has become clear.").

Justice Mundy files a dissenting opinion.

Justice Brobson did not participate in the consideration or decision of this matter.