No. S24A0131

In the Supreme Court of Georgia

CHRISTOPHER MASSEY,
Appellant,

v.

THE STATE,
Appellee.

On Interlocutory Appeal from
the Superior Court of Crisp County
in No. 22R199

Hon. Robert W. Chasteen, Presiding

Brief of the Georgia Association of Criminal Defense Lawyers as Neutral Amicus Curiae

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INTRODUCTION

This Court has asked *Amicus* to provide the "appropriate analytical framework for deciding Second Amendment claims" such as that brought by Appellant Christopher Massey, who has been charged under with possession of a firearm while a First Offender.[1] *See* O.C.G.A. § 16-11-131 (b) ("Section 131 (b)"). The U.S. Supreme Court has held that if

[1] Order, Dec. 1, 2023; R.23–24.

conduct is facially covered by the Second Amendment—as is the conduct for which Mr. Massey has been charged—then the only permissible restrictions are those with proper historical antecedents. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2126 (2022). These antecedents have to line up with the modern restriction's justification (its *why*) and its contours (its *how*). No antecedents properly support Section 131 (b).

INTEREST OF AMICUS CURIAE

A frequent friend of this Court, the Georgia Association of Criminal Defense Lawyers (GACDL) is a domestic nonprofit corporation whose members routinely execute the only office of the court dignified in the Bill of Rights: defending the life and liberty of the accused against the powers of organized society and ensuring the processes of law that they are due. GACDL's membership comprises both public defenders and private counsel. They are united in their dedication to the rule of law, the fair and impartial administration of criminal justice, the improvement of our adversarial system, the reasoned and informed advancement of criminal jurisprudence and procedure, and the preservation and fulfillment of our great constitutional heritage.

VIEWS OF AMICUS CURIAE

I. When conduct is facially covered by the Second Amendment, restrictions need historical antecedents.

The first step for assessing a Second Amendment claim is determining whether the conduct at issue is covered by the provision's plain text. *Bruen*, 142 S. Ct. at 2126. If so, then the conduct is "presumptively protect[ed]" by the Amendment's "unqualified command." *Id.* (citation omitted); *see also Nunn v. State*, 1 Ga. 243, 250 (1846) (seeing nothing in the Amendment's words restricting its meaning). The Second Amendment's text provides: "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. This text does not have "secret or technical meanings that would not have been known to ordinary citizens in the founding generation"; it should be understood in its "normal and ordinary" sense. *District of Columbia v. Heller*, 554 U.S. 570, 576–77 (2008) (citation omitted). The "central component" of the right it protects is individual self-defense. *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) (citation omitted). It covers the possession of handguns—Mr. Massey's alleged act. *Heller*, 554 U.S. at 628; *see also* R.23–24.

The aspect of the Second Amendment's text likeliest to be at issue is whether Mr. Massey qualifies as part of "the people." *See, e.g.*, *Range v. Atty. Gen. of U.S.*, 69 F.4th 96, 101–02 (3d Cir. 2023) (en banc)

(discussing this question). Mr. Massey "is not a felon or mentally ill," so he "has presumptive Second Amendment rights." *United States v. Daniels*, 77 F.4th 337, 343 (5th Cir. 2023). However, U.S. Supreme Court dicta has referred to Second Amendment rights as belonging to "law-abiding, responsible citizens" and said that the Court's holdings do not "cast doubt on longstanding prohibitions on the possession of firearms by felons." *Bruen*, 142 S. Ct. at 2131 (citation omitted); *McDonald*, 561 U.S. at 786; *Heller*, 554 U.S. at 626; *Range*, 69 F.4th at 101 ("[T]he criminal histories of the plaintiffs in *Heller*, *McDonald*, and *Bruen* were not at issue in those cases."); *United States v. McCane*, 573 F.3d 1037, 1048 (10th Cir. 2009) (Tymkovich, J., concurring) (calling this "*deus ex machina* dicta").

Even assuming that this language suggests excluding Mr. Massey from Second Amendment protections because of his First Offender status (he is not a convicted felon), it is wrong. As this Court has noted, "[e]stablishing a new legal test based on dicta regarding legal assumptions made by the Supreme Court comes with risks, and we should not presume that, if the Supreme Court actually decided the issue . . . its holding would match its assumption." *Alexander v. State*, 313 Ga. 521, 531 (2022). Respectfully, the dicta as to this point should not be followed. *Cf. Heller*, 554 U.S. at 625 n.25 ("It is inconceivable that we would rest our interpretation of the basic meaning of any guarantee of the Bill of Rights upon such a footnoted dictum in a case

where the point was not at issue and was not argued."). The Second Amendment's own language extends protection to "the people." U.S. CONST. amend II. The U.S. Supreme Court noted that this phrase appears in six other constitutional provisions, each meaning "all members of the political community, not an unspecified subset" such as non-offenders. *Heller*, 554 U.S. at 580; *see also id.* at 644 (Stevens, J., dissenting) (noting the inconsistency); *Range*, 69 F.4th at 102 (considering, among other provisions, the First and Fourth Amendments and declining "to adopt an inconsistent reading of 'the people'"). For Second Amendment purposes, the Court has defined "the people" as "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community," regardless of whether they would qualify as part of the militia. *Heller*, 554 U.S. at 580 (citation omitted).[2] The Court therefore presumed that the Second Amendment right "belongs to all Americans." *Heller*, 554 U.S. at 581.

Regarding its dicta, the Court disclaimed undertaking any "exhaustive historical analysis" regarding felon disarmament. *Id.* at 627 n.6. That sort of analysis was conducted by then-Judge Barrett and Judge Bibas in two dissenting opinions in cases later abrogated by *Bruen*. *Kanter v. Barr*, 919 F.3d 437 (7th Cir. 2019), *abrogated by*

[2] *Cf. United States v. Vongxay*, 594 F.3d 1111, 1117 (9th Cir. 2010) (stating that felons have historically been ineligible for militia duty).

Bruen, 142 S. Ct. 2111; *Folajtar v. Atty. Gen. of U.S.*, 980 F.3d 897, 921 (3d Cir. 2020), *abrogated by Bruen*, 142 S. Ct. 2111, *as recognized by Range*, 69 F.4th at 100. Judge Barrett determined that "Founding-era legislatures did not strip felons of the right to bear arms simply because of their status as felons." *Id.* at 451 (Barrett, J., dissenting) (noting that this was true in "1791—and for well more than a century afterward"). Felon disarmament laws were not enacted before 1897 and federal law did not extend that prohibition to all felons until the 1960s. *Daniels*, 77 F.4th at 340; *Range*, 69 F.4th at 104; *McCane*, 573 F.3d at 1048 (noting flaws in earlier research concluding the opposite); Carlton F. W. Larson, *Four Exceptions in Search of a Theory:* District of Columbia v. Heller *and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1376 (2009).[3]

While early legislators did impose virtue qualifications for certain *civic* rights, including jury service and voting, they did not do so for *individual* rights like keeping and bearing arms. *Kanter*, 919 F.3d at 451 (Barrett, J., dissenting); *see also id.* at 463–64 (noting none of the nine constitutions with gun-rights provisions adopted between 1790 and 1820 excluded offenders from their protection, even though seven of these mentioned the disenfranchisement of criminals).[4] Judge Barrett's

[3] Because felon-disarmament measures "significantly postdate both the Second Amendment and the Fourteenth Amendment," this Court need not determine which provision's original meaning would control in the event of a conflict. Larson, *supra*, at 1376.

[4] *Cf. Lewis v. United States*, 445 U.S. 55, 66 (1980) (comparing a ban on firearm possession by felons with various civic and economic rights without undertaking modern Second Amendment or historical analysis). The first state constitution to exempt felons from gun rights was Idaho's, in 1978. *See* Larson, *supra*, at 1375. The idea that only virtuous citizens have Second Amendment rights "is

distinction between civic and natural rights is supported by U.S. Supreme Court precedent describing the protections enshrined by the Second Amendment as not "granted by the Constitution," nor "dependent upon that instrument for its existence," but "*pre-existing*." *Heller*, 554 U.S. at 592 (citation omitted). This Court, too, in one of its earliest decisions referred to the Second Amendment right of self-defense as "natural," part of the English Constitution, and "one of the fundamental principles, upon which rests the great fabric of civil liberty." *Nunn*, 1 Ga. at 249, 251, *cited favorably by Heller*, 554 U.S. at 612–13.[5]

The first debates about the Constitution did not change this, although some authorities incorrectly cite three proposals made during ratification conventions as supporting categorical disarmament. First, New Hampshire proposed a protection for gun rights allowing for the disarmament of those who "are or have been in actual rebellion."

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closely associated with pre-*Heller* interpretations" rejected by that decision. *Binderup v. Atty. Gen. of U.S.*, 836 F.3d 336, 371 (3d Cir. 2016) (en banc) (Hardiman, J., concurring in part and concurring in the judgments).

[5] *See also* 1 WILLIAM BLACKSTONE, COMMENTARIES *139 (describing self-defense as a "natural right" ensured by the right to have arms); Stephen P. Halbrook, *To Bear Arms for Self-Defense: A "Right of the People" or a Privilege of the Few?*, 21 FEDERALIST SOC'Y REV. 46, 51 (2020) (quoting a 1791 statement to the same effect by Rep. Roger Sherman).

People should not be stripped of their natural rights by the mere fact of having committed an offense. *See McCane*, 573 F.3d at 1049 (Tymkovich, J., concurring) ("Non-violent felons . . . certainly have the same right to self-defense in their homes as non-felons."); 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, 1449 (2009) ("Felons may need arms for lawful self-defense just as much as the rest of us do."). Neither should the people they live with. *See* Volokh, *supra*, at 1449 (". . . Those people might be unable to safely possess guns in their homes because of the possibility that their felon housemate will be seen as 'constructively possessing' the gun, and that they themselves will therefore be seen as criminally aiding this illegal possession.").

Folajtar, 980 F.3d at 915 (Bibas, J., dissenting) (emphasis and citation omitted). This is not analogous to disarming offenders, as explained more fully in the first subsection of Part II below. Next is Massachusetts' proposal that gun rights be guaranteed only to "peaceable citizens"; somewhat similarly, a proposal of the Pennsylvania minority allowed for disarmament "for crimes committed or real danger of public injury from individuals." *Id.* (citations omitted). However, two *failed* proposals—one of which did not even receive the endorsement of its own delegation's majority—"would surely be inconclusive at best in other constitutional contexts." Larson, *supra*, at 1375. After all, as the Fifth Circuit held when considering these proposals, "when the relevant lawmaking body does not adopt language in a draft, we presume that the stricken language was not intended." *Daniels*, 77 F.4th at 352. These proposals do not "affirmatively prove that [Section 131 (b)'s] regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Bruen*, 142 S. Ct. at 2127.

Judge Barrett concluded that the Second Amendment should be understood to categorically exclude "certain weapons or activities," not "certain *people*." *Kanter*, 919 F.3d at 452 (Barrett, J., dissenting). "Neither felons nor the mentally ill are categorically excluded from our national community." *Id.* at 453. Therefore, they are within "the people" protected by the Second Amendment. *Id.*

Reading the Constitution otherwise, she continued, would prove unworkable and illogical: "Arms and activities would always be in or out. But a person could be in one day and out the next: the moment he was convicted of a violent crime . . . his rights would be stripped as a self-executing consequence of his new status," even without state action. *Id.* As a district court recently elaborated, this could result in a felon lacking Second Amendment standing to challenge a disarmament even if it was not legislatively authorized. *See United States v. Goins*, 647 F. Supp. 3d 538, 547 (E.D. Ky. 2022).

Besides, as the Third Circuit recently held, "the phrase 'law-abiding, responsible citizens' is as expansive as it is vague." *Range*, 69 F.4th at 102. Surely the U.S. Supreme Court did not mean to exclude from the enjoyment of a "fundamental" right everyone who has ever been ticketed for a petty crime. *McDonald*, 561 U.S. at 776; *Range*, 69 F.4th at 102; *United States v. Rahimi*, 61 F.4th 443, 453 (5th Cir. 2023), *cert. granted* No. 22-915, 2023 U.S. LEXIS 2830 (U.S. June 30, 2023) ("Could speeders be stripped of their right to keep and bear arms? Political nonconformists? People who do not recycle or drive an electric vehicle?").

Just as arbitrary can be legislative classification of someone as a felon. *Folajtar*, 980 F.3d at 921 (Bibas, J., dissenting) ("[A] felony is whatever the legislature says it is. The category is elastic, unbounded, and manipulable by legislatures . . . ."); *Kanter*, 919 F.3d at 459

(Barrett, J., dissenting) (noting that this was true even by the time of the Founding); Royce de R. Barondes, *The Odious Intellectual Company of Authority Restricting Second Amendment Rights to the "Virtuous,"* 25 TEX. REV. L. & POL'Y 245, 279–81 (2021) (detailing serious crimes that were not considered capital in the Founding Era). Legislative designation of acts as felonies is left to near-unbridled discretion, but such judicial deference in the Second Amendment context "would contravene *Heller*'s reasoning that 'the enshrinement of constitutional rights necessarily takes certain policy choices off the table.'" *Range*, 69 F.4th at 103 (*quoting Heller*, 554 U.S. at 636). Courts "defer far less when a fundamental right is at stake." *See Folajtar*, 980 F.3d at 921 (Bibas, J., dissenting).[6]

Complete deference to state felony classifications would also leave prosecutors with great power over defendants' Second Amendment rights, especially because Georgia prosecutors frequently have the option to charge either a felony or a lesser included misdemeanor. *See id.* (discussing such options). The protections guaranteed by the Second Amendment should not "depend on the vagaries of states' criminal codes." *Id.* at 922.

Numerous courts have held that convicted felons are among "the people" protected by the Second Amendment. *See United States v. Carrero*, 635 F. Supp. 3d 1210, 1212 (D. Utah 2022); *United States v.*

[6] *Range* cited approvingly Judge Bibas's criticism of such deference. *See* 69 F.4th at 102–03.

Coombes, 629 F. Supp. 3d 1149, 1156 (N.D. Okla. 2022). So is Mr. Massey, whose criminal history does not even rise to this level.

Both Mr. Massey and the activity of which he has been accused are facially covered by the Second Amendment. Section 131 (b) can stand only if there is a proper historical antecedent. There is not.

II. Historical antecedents need to support the modern restriction in terms of why and how.

The government bears the burden of showing that Section 131 (b) "is consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2126. This inquiry is not means-end scrutiny. *Id.* at 2127; *see also id.* at 2131 ("The Second Amendment 'is the very product of an interest balancing by the people' and it 'surely elevates above all other interests the right of law-abiding, responsible citizens to use arms' for self-defense." (*quoting Heller*, 554 U.S. at 635)); *cf. McDonald*, 561 U.S. at 783 ("The right to keep and bear arms . . . is not the only constitutional right that has controversial public safety implications. All of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes fall into the same category."). The relevant inquiry concerns whether Section 131 (b) and historical regulations are "comparably justified" (in terms of *why*) and "impose a comparable burden on the right of armed self-defense" (in terms of *how*). *Bruen*, 142 S. Ct. at 2133; *see also*

United States v. Daniels, 77 F.4th 337, 354 (5th Cir. 2023) (using "why" and "how").

Both questions ask whether there is "a well-established and representative historical analogue" for Section 131 (b). *Bruen*, 142 S. Ct. at 2133 (emphasis omitted). Neither courts nor challengers are "obligated to sift the historical materials for evidence"—the government has the burden of doing so. *Id.* at 2150.

Further, "not all history is created equal." *Id.* at 2136. The issue is the meaning of the Second (or Fourteenth) Amendment at the time of its adoption. *Id.*; *see also id.* at 2138 (noting—as is also true for the issue in this case—that "the public understanding of the right to keep and bear arms in both 1791 and 1868 was, for all relevant purposes, the same"). Precedent for Founding Era practices dating back to English legal history can be relevant, but this does not extend to English norms that lacked colonial applications and fell out of use in the mother country before the Framing. *See id.* at 2136.

Post-enactment history should not be given "more weight than it can rightly bear." *Id.*; *see also Heller*, 554 U.S. at 614 ("Since those discussions took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources."). Some weight should be given to state constitutions contemporaneous with the Second Amendment and authorities interpreting that provision during the nineteenth century.

See Bruen, 142 S. Ct. at 2127–28. However, where "later history contradicts what the text says, the text controls." *Id.* at 2137.

The relevant historical inquiry "will be fairly straightforward" in cases where "a challenged regulation addresses a general societal problem that has persisted since the 18th century." *Id.* at 2131. In such cases, "the lack of a distinctly similar historical regulation addressing that problem" shows that the modern restriction is unconstitutional. *Id.*; *see also Daniels*, 77 F.4th at 344 ("[W]hen the historical record reveals no regulations of a particular kind, we could . . . say that it means nothing (i.e., neither approval nor disapproval), or we could count silence as evidence that the public did not approve of such a regulation. *Bruen* says we should make the latter inference, at least when the public experienced the harm the modernday regulation attempts to address."). The same is true "if earlier generations addressed the societal problem, but did so through materially different means." *Bruen*, 142 S. Ct. at 2131.

This is the standard that should guide the Court here. As then-Judge Barrett and Judge Bibas detailed in part, consequences have been assigned to legally offending behavior since time immemorial. *See Folajtar*, 980 F.3d at 920–21 (Bibas, J., dissenting); *Kanter*, 919 F.3d at 458–61 (Barrett, J., dissenting). Concerns about wrongdoers possibly doing wrong again are not borne of modern technology, social

conditions, egalitarianism, or other developments; they are as old as law itself.

In the alternative, for restrictions that *do* respond to problems of more recent provenance, the question is whether they are "relevantly similar" to historical antecedents. *Bruen*, 142 S. Ct. at 2132.

Either way, no historical antecedents properly support Section 131 (b), in terms of either why or how.

There is no historical antecedent for why Section 131 (b) disarms all First Offenders.

Historical antecedent does not exist for disarming all offenders (convicted or First Offender) simply because they have offended. *See Folajtar*, 980 F.3d at 912 (Bibas, J., dissenting) ("Even historically, there is no evidence that all felons were disarmed as part of their punishment."); Halbrook, *supra*, at 50 ("In the Founding period, no laws restricted the peaceable carrying of arms. . . . The great exception was the slave codes . . . .").[7] The closest—dubious—historical antecedents concern class disarmaments based on political danger. These precedents may well have been "gravely wrong" the moment they were enacted. *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (rejecting the class-based vitiation of constitutional rights sanctioned by *Korematsu v.*

[7] This Court saw disarmament as one of the consequences of free Blacks not being state citizens. *See Cooper v. Mayor & Aldermen of City of Savannah*, 4 Ga. 68, 72 (1848). For more regarding historical Black disarmament, see Emma Luttrell Shreefter, *Federal Felon-in-Possession Gun Laws: Criminalizing a Status, Disparately Affecting Black Defendants, and Continuing the Nation-s Centuries-Old Methods to Disarm Black Communities*, 21 CUNY L. REV. 143, 164–70 (2018).

United States, 323 U.S. 214 (1944)). At the very least, they do not authorize disarming all offenders.

Early American governments did not claim freewheeling authority to disarm people they deemed dangerous. *Daniels*, 77 F.4th at 350. However, there were "statutes disarming discrete classes of persons at various points in history." *Id.* The rationales used to draw such classifications were political. Target classes included loyalist opponents of the American Revolution, religious minorities—"especially Catholics"—and racial minorities, including "slaves, free blacks, and Indians." *Id.* at 350–51 & n.33. *All* of these groups purportedly threatened wartime resistance, political rebellion, or social revolt. *See id.*; *Range*, 69 F.4th at 115 (Shwartz, J., dissenting) ("[T]he founders categorically disarmed the members of these groups because the founders viewed them as disloyal to the sovereign."); *Rahimi*, 61 F.4th at 457 ("Laws that disarmed slaves, Native Americans, and disloyal people may well have been targeted at groups excluded from the political community—i.e., written out of 'the people' altogether . . . ."); Joseph G. S. Greenlee, *Disarming the Dangerous: The American Tradition of Firearm Prohibitions*, 16 DREXEL L. REV. (forthcoming).[8] They were not perceived as merely "unwilling to obey the law" or threats to "the orderly functioning of society."[9] They were seen as

[8] Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4317000.
[9] *Range*, 69 F.4th at 112 (op. of Ambro, J.); *id.* at 122 (Krause, J., dissenting); *cf. Folajtar*, 980 F.3d at 908 n.11 (deeming potentially treasonous behavior not to be dangerous per se).

existential threats. *See Folajtar*, 980 F.3d at 914 (Bibas, J., dissenting) ("Loyalists were potential rebels . . . .").

These prohibitions are offensive to the Constitution. *See, e.g.*, *Daniels*, 77 F.4th at 352 ("[T]he 1689 English Bill of Rights expanded the right to bear arms in order to . . . limit the Crown's politically motivated disarmaments. Our Second Amendment is a direct descendant of that latter guarantee." (internal citation and quotation marks omitted)); *id.* at 353 ("[T]he legislature cannot have unchecked power to designate a group of persons as 'dangerous' and thereby disarm them. Congress could claim that immigrants, the indigent, or the politically unpopular were presumptively 'dangerous' and eliminate their Second Amendment rights without judicial review."); *cf. Heller*, 554 U.S. at 593 (describing class-based disarmaments from English history that "caused Englishmen to be extremely wary of concentrated military forces run by the state and to be jealous of their arms" and helped inspire the English Bill of Rights and Second Amendment); *id.* at 606 (noting that St. George Tucker omitted "religious and class-based restrictions" in discussing the Second Amendment).

Class-based disarmaments fell out of use quickly: the Alien Act of 1798 (one of the infamous Alien and Sedition Acts) allowed the president to expel "dangerous" aliens and impose sureties on their

remaining in the country—but did not provide for disarmament.[10] Similarly, Congress disarmed southern militias after the Civil War, partly because they were terrorizing Blacks, but refused to disarm their members on Second Amendment grounds.[11]

Such "historical travesties" as class-wide disarmaments based on race, religion, and politics should not be used to take away rights today. *United States v. Hicks*, 649 F. Supp. 3d 357, 364 (W.D. Tex. 2023); Marshall, *supra*, at 726 ("The treatment of free blacks, like that of Tories and Roman Catholics, involved wholesale deprivation of civil liberties, so, if it justified an exception to the Second Amendment, it also would justify exceptions to other basic rights."). But to the extent they have any persuasive value, it should be limited to restrictions based on national-security rationales. Any analogy between them and Mr. Massey "would be far too broad." *Range*, 69 F.4th at 105; *see also Rahimi*, 61 F.4th at 457 ("[W]hy they disarmed people was different. The purpose of laws disarming 'disloyal' or 'unacceptable' groups was ostensibly the preservation of political and social order . . . .").

There is no historical antecedent for how Section 131 (b) disarms all First Offenders.

The *how* of Section 131 (b) is as historically deficient as the *why*. There is no proper antecedent for completely disarming people based on

[10] C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 727 (2009).
[11] *Id.*

their prior offenses or out of fear that they pose non-political danger. Historical gun-forfeiture laws concerned only those used in offenses. Surety laws required only the posting of bond before arms could be carried. Direct firearm regulations concerned the manner of keeping and carrying arms—not who was entitled to do so. The existence of harsher punishments for felons at the time of the Founding is historically and logically inadequate as well.

English and American law did sometimes provide for the forfeiture of arms, but these were limited to specific weapons used in an offense—not others a person might acquire in the future. *See Heller*, 554 U.S. at 633–34 ("[W]e do not think that a law imposing . . . forfeiture of the gun would have prevented a person in the founding era from using a gun to protect himself or his family from violence, or that if he did so the law would be enforced against him."); *Range*, 69 F.4th at 105 ("Founding-era laws often prescribed the forfeiture of the weapon used to commit a firearms-related offense without affecting the perpetrator's right to keep and bear arms generally."); de R. Barondes, *supra*, at 287 ("This author has searched in vain for any reference in the English authority Chitty to a collateral consequence involving a permanent forfeiture of firearms rights . . . .").

Further, forfeiture was also rejected altogether by some American governments. *Rahimi*, 61 F.4th at 458 (both noting that several early jurisdictions discarded forfeiture as a penalty and deeming it an

"outlier" inadequate under *Bruen*); *Jennings v. State*, 5 Tex. App. 298, 300 (1878) (rejecting legislative authority to impose forfeiture); *see also United States v. Quiroz*, 629 F. Supp. 3d 511, 522 (W.D. Tex. 2022) ("[D]isarming someone was likely unthinkable at the time—no firearm in the wilderness meant almost certain death."). Forfeiture is not a proper antecedent for Section 131 (b).

Nor are surety laws. *Bruen* noted that in the mid-nineteenth century, "many jurisdictions began adopting surety statutes that required certain individuals to post bond before carrying weapons in public." 142 S. Ct. at 2148. However, these measures merely required someone to post bond for good behavior after being "reasonably accused of intending to injure another or breach the peace"—all the while presuming that people "had a right" to keep and bear arms. *Id.* at 2148–49. What is more, the sole historical case *Bruen* identified declined to impose a surety. *Id.* at 2149. (Though *Bruen* also noted reports of possibly-racially-motivated sureties imposed on Black defendants. *See id.*)

Surety laws are not a proper antecedent for Section 131 (b) because, even assuming their rationales to be analogous, the restrictions employ "materially different means." *Hicks*, 649 F. Supp. 3d at 366. That is especially so here, as Mr. Massey has been charged with possessing arms and not carrying them—which was what surety laws regulated.

For similar reasons, direct firearm regulations also fail to serve as proper antecedents for Section 131 (b). Such laws regulated the manner of carrying arms, and occasionally of keeping them, but not who could do so. *See Bruen*, 142 S. Ct. at 2142–43 (discussing laws like the Statute of Northampton against "bearing arms to terrorize the people"); *id.* at 2152 (noting a similar law from the Reconstruction Era); Halbrook, *supra*, at 49 (noting that the Statute of Northampton's intent requirement "would have applied to persons not considered 'of quality.'"); Marshall, *supra*, at 710 ("[E]ssentially every case in the first century after the Second Amendment's adoption concerned just a regulation of the manner of carrying arms . . . .").[12]

This distinction is germane under *Bruen*. *See Daniels*, 77 F.4th at 340 ("[O]ur history and tradition may support some limits on an *intoxicated* person's right to carry a weapon, but it does not justify disarming a sober citizen based exclusively on his *past* drug usage." (emphases added)). Historical jurisprudence drew the same line. This Court affirmed early on that a statute that, "under the pretence of regulating, amounts to a destruction of the right . . . would be clearly unconstitutional." *Nunn*, 1 Ga. at 249 (citation omitted).

[12] One post-Civil War military restriction on carry by disorderly people, vagrants, and disturbers of the peace may have referred to how guns were borne. *See Bruen*, 142 S. Ct. at 2152 (quoting another contemporary source saying people could be disarmed "if convicted of making an improper or dangerous use of weapons," but no "class of people" could be disarmed (citation omitted)); *cf.* Marshall, *supra*, at 711 (explaining that the Ohio Supreme Court's approval in dicta from 1900 of a "tramp"-targeting prohibition relied on the rule against terrorizing others and referred to such people as wandering beggars).

Lastly, the existence of more severe punishments for felonies is not a proper antecedent for Section 131 (b). Technically, felonies were capital crimes, punishable by death and a complete estate forfeiture. *See United States v. Jackson*, 69 F.4th 495, 503 (8th Cir. 2023). Some courts have held that this supports the constitutionality of lesser punishments, such as a ban on firearm possession.[13] However, as the Third Circuit held in an en banc case, "The greater does not necessarily include the lesser." *Range*, 69 F.4th at 105.

Besides, as a historical matter, Americans began to reform their understandings of felonies even before Independence. *See Folajtar*, 980 F.3d at 920 (Bibas, J., dissenting). Executions became rare, and property crimes—including even robbery (*see* R.23–24)—were not treated as capital. *See Kanter*, 919 F.3d at 459 (Barrett, J., dissenting). "[T]he argument that the severity of punishment at the founding implicitly sanctions the blanket stripping of rights from all felons, including those serving a term of years, is misguided." *Id.* at 461. Offenders "retained some rights." *Id.* One natural right that would have been a matter of life and death on the frontier—as, unfortunately, remains the case in some settings today—would have been keeping and bearing arms; for this reason, "disarming someone was likely unthinkable" in early American history. *See Quiroz*, 629 F. Supp. 3d at 522. It is one thing to approve of restrictions on weapons in jails. *See*

[13] *See id.*; *Folajtar*, 980 F.3d at 905.

Folajtar, 980 F.3d at 912 (Bibas, J., dissenting). But stripping all offenders of their Second Amendment rights based solely on the "obvious point that the dead enjoy no rights" is anachronistic and unreasonable. *Kanter*, 919 F.3d at 462 (Barrett, J., dissenting).

In 1868, Judge Thomas Cooley wrote that "there has been very little occasion to discuss" firearm regulations because there were so few of them. *Quoted in Heller*, 554 U.S. at 617. None of those that did exist are proper antecedents for Section 131 (b).[14]

CONCLUSION

"Wherever . . . the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction." *Heller*, 554 U.S. at 606 (quoting St. George Tucker). This Court should reaffirm that the "right of the whole people . . . to keep and bear *arms* . . . shall not be *infringed*, curtailed, or broken in upon, in the smallest degree": "Lexington, Concord, Camden, River Raisin, Sandusky, and the laurel-crowned field of New Orleans"—and the centuries of patriotic endeavor since—"plead eloquently for this interpretation!" *Nunn*, 1 Ga. at 251.

[14] In the alternative, Section 131 (b)'s application should be subject to individualized findings of dangerousness. *Cf. Folajtar*, 980 F.3d at 912, 922 (Bibas, J., dissenting) (proposing "narrow tailoring to public safety" and focus on the individual sentences for predicate offenses). Section 131 (b)'s application should be restricted to only violent predicate offenses and not all felonies. *See id.* at 922; *Kanter*, 919 F.3d at 464–66 (Barrett, J., dissenting). As-applied challenges should be available, allowing a challenger to "presents facts about himself and his background that distinguish his circumstances from those of" other offenders. *Binderup*, 836 F.3d at 347.

The decision below should be reversed.

This submission does not exceed the word-count limit imposed by Rule 20.

Respectfully submitted on January 16, 2024, by:

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Certificate of Service

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