23-1251

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JARED POLIS, in his official capacity as Governor of the State of Colorado,

Defendant - Appellant,

v.

ROCKY MOUNTAIN GUN OWNERS, TATE MOSGROVE, and ADRIAN S. PINEDA,

Plaintiffs - Appellees.

On Appeal from the United States District Court, District of Colorado
The Honorable Phillip A. Brimmer
Chief District Judge

District Court Case No. 23-cv-01077-PAB-NRN

APPELLANT'S BRIEF

PHILIP J. WEISER
Attorney General
GRANT T. SULLIVAN*
Assistant Solicitor General
MICHAEL T. KOTLARCZYK *
Senior Assistant Attorney General
MATTHEW J. WORTHINGTON*
Assistant Attorney General

Colorado Department of Law
1300 Broadway, 6th Floor
Denver, Colorado 80203
Telephone: 720-508-6349
E-Mail: grant.sullivan@coag.gov; mike.kotlarczyk@coag.gov; matt.worthington@coag.gov
*Counsel of Record
Attorneys for Governor Polis

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

STATEMENT OF ISSUES 1

STATEMENT OF THE CASE..3

A. Background and Procedural History 3

B. The Parties' Evidence..4

C. The District Court's Order..6

SUMMARY OF THE ARGUMENTS 9

JURISDICTION..13

ARGUMENT 13

I. Plaintiffs' declarations were insufficient to establish Plaintiffs' standing. 13

II. The district court abused its discretion when it held Plaintiffs were likely to succeed under *Bruen*. 15

A. Plaintiffs failed to demonstrate that the Second Amendment's text covers their proposed conduct. 16

1. The Second Amendment's plain text was never understood to cover gun purchases by those under 21. 18

a) Plaintiffs failed to carry their burden at *Bruen*'s first step. 18

b) Courts cannot imply rights under the Second Amendment's plain text without considering historical evidence. 24

2. The plain text of the Second Amendment does not cover 18-to-20-year-olds. 31

a) 18-to-20-year-olds were not part of the "political community" at the Founding. 31

b) The Second Amendment does not displace the States' power to set reasonable minimum age limits for activities that involve a constitutional right. 34

3. Age-restrictions on commercial sales are "presumptively lawful," and the district court erred by abandoning *Heller*'s "presumptively lawful" categories of gun regulations. 37

a) SB23-169's age-restriction is a "presumptively lawful" gun regulation. 38

b) The district court wrongly evaluated the Supreme Court's "presumptively lawful" category at *Bruen*'s second step.........41

B. Even if Plaintiffs were likely to succeed on *Bruen*'s first step, this Court should reverse because SB23-169 is relevantly similar to historic regulations on firearms at *Bruen*'s second step. 43

1. The Governor's evidence demonstrated a "relevantly similar" tradition of firearm regulation from the Founding through the 19th century. 45

2. The district court applied the wrong standard at *Bruen*'s second step. 50

a) The district court wrongly required identification of a "total prohibition" from the Founding era, *i.e.* a "dead ringer." 50

b) The district court wrongly rejected the Governor's Reconstruction-era evidence, despite its consistency with earlier traditions. 54

III. The remaining factors do not support the preliminary injunction. 59

CONCLUSION 62

STATEMENT REGARDING ORAL ARGUMENT 62

District Court's Order Granting Preliminary Injunction .... Exhibit A

TABLE OF AUTHORITIES

Page(s)

Cases

Andrews v. State,
50 Tenn. 165 (Tenn. 1871) 29, 30

Atkinson v. Garland,
70 F.4th 1018 (7th Cir. 2023) 28

Att'y Gen. of Okla. v. Tyson Foods, Inc.,
565 F.3d 769 (10th Cir. 2009) 16

Bevis v. City of Naperville, Ill.,
*85 F.4*th 1175 (7th Cir. 2023) 17

Bond v. United States,
572 U.S. 844 (2014) 34

Bonidy v. U.S. Postal Serv.,
790 F.3d 1121 (10th Cir. 2015) 33, 41

Brown v. Ent. Merchs. Ass'n,
564 U.S. 786 (2011) 33, 35, 45, 52, 53

NYSRPA v. Bruen,
597 U.S. 1 (2022) 7-11, 15-18, 21-29, 32-34, 38-48, 50-52, 54-58, 60

Cacchillo v. Insmed, Inc.,
638 F.3d 401 (2d Cir. 2011) 15

Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.,
447 U.S. 557 (1980) 38

Chiafalo v. Washington,
140 S. Ct. 2316 (2020) 37

Coleman v. State,
32 Ala. 581 (Ala. 1858) 49

Colo. Outfitters Ass'n v. Hickenlooper,
823 F.3d 537 (10th Cir. 2016) 13

Def. Distributed v. Bonta,
2022 WL 15524977 (C.D. Cal. Oct. 21, 2022) 25

Denver Homeless Out Loud v. Denver,
32 F.4th 1259 (10th Cir. 2022) 22

District of Columbia v. Heller,
554 U.S. 570 (2008) ...7, 8, 10, 11, 18-20, 24-27, 31-33, 37-43, 45, 55, 56, 58, 60

Elrod v. Burns,
427 U.S. 347 (1976) 61

Ezell v. City of Chicago,
651 F.3d 684 (7th Cir. 2011) 29-31, 58

Ezell v. City of Chicago,
846 F.3d 888 (7th Cir. 2017) 30

Firearm Pol'y Coal., Inc. v. McCraw,
623 F. Supp. 3d 740 (N.D. Tex. 2022) 36

Fish v. Kobach,
840 F.3d 710 (10th Cir. 2016) 61

Free the Nipple-Fort Collins v. City of Fort Collins, Colo.,
916 F.3d 792 (10th Cir. 2019) 16, 59

Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,
546 U.S. 418 (2006) 21

Hanson v. D.C.,
2023 WL 3019777 (D.D.C. Apr. 20, 2023) 57

Harmon v. City of Norman, Okla.,
981 F.3d 1141 (10th Cir. 2020) 21

Heideman v. S. Salt Lake City,
348 F.3d 1182 (10th Cir. 2003) 59

Jones v. Jones,
72 F.2d 829 (D.C. Cir. 1934) 34

Lara v. Evanchick,
534 F. Supp. 3d 478 (W.D. Pa. 2021) 40

Lassiter v. Northampton Cnty. Bd. of Elections,
360 U.S. 45 (1959) 35

Lenahan v. Pittston Coal Mining Co.,
218 Pa. 311 (Pa. 1907) 34, 35

Lopez v. Candaele,
630 F.3d 775 (9th Cir. 2010) 15

Lujan v. Nat'l Wildlife Fed'n,
497 U.S. 871 (1990) 15

Maryland v. King,
567 U.S. 1301 (2012) 61

Maynard v. Hill,
125 U.S. 190 (1888) 35

McCulloch v. Maryland,
4 Wheat. 316 (1819) 58

McDonald v. Chicago,
561 U.S. 742 (2010) 19, 33, 55, 58, 60

Mitchell v. Atkins,
483 F. Supp. 3d 985 (W.D. Wash. 2020) 40

Morse v. Frederick,
551 U.S. 393 (2007) 33

N.M. Dep't of Game & Fish v. U.S. Dep't of the Interior,
854 F.3d 1236 (10th Cir. 2017) 15, 60

Nat'l Ass'n for Gun Rts. v. Lamont,
2023 WL 4975979 (D. Conn. Aug. 3, 2023)...22

Newland v. Gentry,
57 Ky. 666 (Ky. 1857)..48

Nken v. Holder,
556 U.S. 418 (2009) 61

Nova Health Sys. v. Gandy,
416 F.3d 1149 (10th Cir. 2005)...14

NRA v. BATFE,
700 F.3d 185 (5th Cir. 2012) 47

NRA v. Bondi,
61 F.4th 1317 (11th Cir. 2023)... 28, 48, 58

Obergefell v. Hodges,
576 U.S. 644 (2015) 35

Ocean State Tactical, LLC v. Rhode Island,
646 F. Supp. 3d 368 (D.R.I. 2022) 22

Or. Firearms Fed'n v. Kotek,
2023 WL 4541027 (D. Or. July 17, 2023) 57

Peterson v. Martinez,
707 F.3d 1197 (10th Cir. 2013) 28

Range v. Att'y Gen. U.S. of Am.,
69 F.4th 96 (3d Cir. 2023) 28, 33

Reese v. BATFE,
647 F. Supp. 3d 508 (W.D. La. 2022) 47

Renna v. Bonta,
2023 WL 2846937 (S.D. Cal. Apr. 3, 2023) 29

Rocky Mountain Gun Owners v. Polis,
2023 WL 8446495 (D. Colo. Nov. 13, 2023).. 29, 60

Rocky Mountain Peace & Just. Ctr. v. U.S. Fish & Wildlife Serv.,
40 F.4th 1133 (10th Cir. 2022)..13

Saltonstall v. Riley,
28 Ala. 164 (Ala. 1856)...48

Schrier v. Univ. of Colo.,
427 F.3d 1253 (10th Cir. 2005) 21

State v. Allen,
94 Ind. 441 (Ind. 1884)..49

State v. Callicutt,
69 Tenn. 714 (1878) 20, 30, 49

Stevison v. Enid Health Sys.,
920 F.2d 710 (10th Cir. 1990) 23

Summers v. Earth Island Inst.,
555 U.S. 488 (2009) 14

Tankesly v. Comm.,
9 S.W. 702 (Ky. 1888)..49

Tashjian v. Republican Party of Conn.,
479 U.S. 208 (1986) 35

Teixeira v. Cnty. of Alameda,
873 F.3d 670 (9th Cir. 2017) 27, 29-31

United States v. Hosford,
843 F.3d 161 (4th Cir. 2016) 40

United States v. Huitron-Guizar,
678 F.3d 1164 (10th Cir. 2012) 28, 32

United States v. Manzanares,
956 F.3d 1220 (10th Cir. 2020) 43

United States v. McCane,
573 F.3d 1037 (10th Cir. 2009) 41

United States v. McNulty,
2023 WL 4826950 (D. Mass. July 27, 2023) 29, 43

United States v. Minter,
635 F. Supp. 3d 352 (M.D. Pa. 2022) 43

United States v. Price,
635 F. Supp 455 (S.D. W. Va. 2022) 43

United States v. Rahimi,
61 F.4th 443 (5th Cir.) 28

United States v. Sineneng-Smith,
140 S. Ct. 1575 (2020)..23

Vincent v. Garland,
80 F.4th 1197 (10th Cir. 2023)... 42, 43

Warwick v. Cooper,
37 Tenn. 659 (1858) 20, 48

Winter v. Nat. Res. Def. Council, Inc.,
555 U.S. 7 (2008) 15

Statutes

18 U.S.C. § 922 3

28 U.S.C. § 1292 13

28 U.S.C. § 1331 13

1856 Ala. Acts 17... 47, 48

1859 Ky. Acts 245 .... 47, 48
1875 Ind. Acts 59 48
1897 Tex. Gen. Laws 221 56
Colo. Rev. Stat. § 2-4-401 .... 3, 36
Colo. Rev. Stat. § 13-22-101 36
Colo. Rev. Stat. § 18-12-112 .... 3, 38
Mo. Rev. Stat. § 1247 (1883) 49
S.B. 169, 74th Gen. Assemb., 1st Reg. Sess (Colo. 2023) 1, 3, 4, 6, 8, 10, 12, 14, 17, 20, 37, 38, 40, 43, 47, 49-51, 54, 60-62
Tenn. Code § 4864 .... 47, 48

Constitution

U.S. Const. amend. I 33, 38, 45
U.S. Const. amend. II 1, 3-5, 7-11, 13, 16-34, 36, 37, 41, 45, 47, 49, 53, 55, 56, 58-60
U.S. Const. amend. XIV 35, 54-56, 58, 59
U.S. Const. amend. XV 35
U.S. Const. amend. XIX 35
U.S. Const. amend. XXIV 35
U.S. Const. amend. XXVI 35-37

Other Authorities

42 Am. Jur. 2d Infants § 6 (Oct. 2023 Update) 34
James Kent, 2 COMMENTARIES ON AMERICAN LAW 259 (3d ed., 1836) 32
Thomas M. Cooley, *Treatise on Constitutional Limitations* (5th ed. 1883) 20, 30

Related Appeals

Rocky Mountain Gun Owners, et al v. Polis, 23-1380 (10th Cir.)

STATEMENT OF ISSUES

1. Whether the district court erred by finding Plaintiffs have standing when they did not state concrete plans to purchase guns after Colorado's Senate Bill 23-169 ("SB23-169") went into effect.

2. Whether the district court erred by finding the Second Amendment's plain text covers Plaintiffs' desire to buy guns before they turn 21, when Plaintiffs failed to provide any evidence on the text's meaning, Plaintiffs failed to rebut the Governor's historical evidence, and the district court implied a right under the Second Amendment contrary to the text's historic meaning.

3. Whether the district court erred by finding SB23-169's minimum age restriction is not "presumptively lawful," and requiring the government to justify the constitutionality of all "presumptively lawful" gun regulations by showing they are consistent with our Nation's historical tradition of gun regulation.

4. Whether the district court erred by finding SB23-169's minimum age restriction is not consistent with our Nation's historical tradition of gun regulation because Colorado did not identify a "total prohibition" from the Founding era and laws similar to SB23-169 enacted by nineteen states in the 19th century were too late to be considered.

5. Whether the district court erred by finding Plaintiffs satisfied the remaining preliminary injunction factors.

STATEMENT OF THE CASE

A. Background and Procedural History

On April 28, 2023, Governor Polis signed SB23-169 into law, which sets 21 as the minimum age for the sale of guns in Colorado. App. Vol. 1 at 15. Federal law has long prohibited licensed gun dealers from selling guns to anyone under 21, except shotguns or rifles can be sold to those over 18. 18 U.S.C. § 922(b)(1). Colorado's SB23-169 sets the minimum age for the sale of all guns at 21, consistent with Colorado's long-held view that 21 is the default age of majority. Colo. Rev. Stat. § 2-4-401(6). SB23-169 prohibits gun dealers and private sellers from selling guns to those under 21 but does not prohibit anyone from *possessing* or *using* guns. And an 18-year-old may still acquire guns, such as receiving it as a gift from a family member. Colo. Rev. Stat. § 18-12-112(6). SB23-169 also exempts certain individuals, such as active military and on-duty police officers.

SB23-169's effective date was August 7, 2023. App. Vol. 1 at 18. On April 28, 2023, Plaintiffs, two 18-to-20-year-old Coloradans and a gun advocacy group, filed this lawsuit asserting one claim that SB23-169 violates the Second Amendment. *Id.* at 9. On June 7, 2023, Plaintiffs moved for a preliminary injunction. *Id.* at 65.

B. The Parties' Evidence

Plaintiffs presented no expert testimony or historical evidence to support their motion for a preliminary injunction. Plaintiffs asserted, without proffering any evidence, that "[t]he right to keep arms necessarily implies the right to acquire arms." App. Vol. 1 at 69. The rest of Plaintiffs' motion argued that the government could not demonstrate SB23-169 was consistent with our Nation's history of gun regulation based on historic militia obligations. *Id.* at 69–73. The Individual Plaintiffs' only evidence supporting their standing and their motion's merits were identical one-paragraph declarations stating they are "over the age of 18 but under the age of 21" and "[i]t is my present intention and desire to lawfully purchase a firearm for lawful purposes[.]" *Id.* at 85–88.

The Governor, by contrast, submitted over 320 pages of sworn declarations and supporting exhibits from four leading experts:

- Dr. Saul Cornell, the Chair in American History at Fordham University: Dr. Cornell explained that the Second Amendment was not understood at the Founding to apply to 18-to-20-year-olds, who were minors without full legal rights. *Id.* at 153, 160–164. Minors' service in early militias was also under parents' supervision. *Id.* at 178–182. States conscripting minors into the militia was consistent with the government's intense

regulation of minors, not an indicator that minors held a broad Second Amendment right to purchase guns. *Id.*

- Dr. Robert Spitzer, Professor of Political Science Emeritus at the State University of New York at Cortland: Dr. Spitzer explained that restrictions on 18-to-20-year-olds' ability to use and possess firearms were ubiquitous in our Nation's history. App. Vol. 2 at 244. These included, for example, over 100 Founding- and Reconstruction-era restrictions by 46 States and cities. *Id.* at 232–238; *see also id.* at 283–286 (chart of historical state laws). The Nation's early universities and colleges, including public institutions, also enacted bans on students possessing firearms, starting as early as 1655 and continuing through Reconstruction. *Id.* at 240–243.
- Dr. Brennan Rivas, Ph.D. in history from Texas Christian University: Dr. Rivas explained that the rise in state statutes in the 19th century prohibiting gun sales to those under 21 were due to dramatic societal changes, unprecedented violence, and evolution in gun technology, manufacturing, and distribution not present during the Founding era. *Id.* at 346, 348–63, 368–72.

- Dr. Laurence Steinberg, Professor of Psychology and Neuroscience at Temple University: Dr. Steinberg explained that risk-taking peaks in the late teens and early 20s because the human brain is still developing before the age of 21. *Id.* at 384–85, 395–97. SB23-169 is likely to reduce the number of gun-related homicides, suicides, and accidental deaths in Colorado and is consistent with scientific consensus on adolescent development. *Id.* at 399.

C. The District Court's Order

On August 7, 2023, the district court preliminarily enjoined enforcement of SB23-169. Ex. A, District Court's Order Granting Preliminary Injunction ("Order"). The district court did not hold a hearing to take testimony or hear argument on Plaintiffs' motion.

On standing, the district court found that the two Individual Plaintiffs "do not state that they will purchase firearms after the law goes into effect, that they have previously purchased firearms, [] that they have taken any steps to prepare to purchase firearms," or that they would still be under 21 when the law went into effect. Order at 12 n.6, 14 n.8. Despite these deficiencies, the district court found Plaintiffs' allegations sufficient for standing "[a]t this phase of the proceedings" but "[did] not pass" on Plaintiffs' standing "for purposes of other stages of the

case." Order at 12 n.6. The district court also held that the organizational Plaintiff Rocky Mountain Gun Owners ("RMGO") lacked standing, which Plaintiffs have not appealed. Order at 10–12.

On the merits, the district court held that Plaintiffs were likely to succeed on their challenge under the framework announced in *NYSRPA v. Bruen*, 597 U.S. 1 (2022).

At *Bruen*'s first step, the district court held that the Second Amendment's plain text "includes the right to acquire firearms" without citing any supporting evidence in the record. The district court held that the Governor's evidence showed only "that states could have regulated 18-to-20 year olds" during the Founding era consistent with the Second Amendment. Order at 25. The district court found, however, "that the Governor has not shown a historical tradition of firearm regulation of 18-to-20 year olds during the founding era." *Id.* (internal quotation and citation omitted).

With respect to the "presumptively lawful" categories of gun regulations announced in *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008), the district court stated it would evaluate them at *Bruen*'s second step. Order at 29. The district court held that, under *Bruen*, the government "must justify the constitutionality of any law regulating conduct covered by" the Second

Amendment, even those laws that *Heller* said are "presumptively lawful." *Id.* at 29–30. Turning to SB23-169, the district court said the law was not "presumptively lawful" as a commercial regulation because it did not "affect only those who regularly sell firearms." *Id.* at 30. (quotation omitted).

As to *Bruen*'s second step, the district court held that the Governor did not demonstrate that SB23-169 is consistent with our Nation's historical traditions of firearm regulations. *Id.* at 40. The district court rejected Plaintiffs' argument that Founding era militia laws showed those under 21 enjoyed a right to possess guns outside militia duty. *Id.* at 36. However, the Governor's historical analogues, the district court said, were insufficiently analogous because the Governor did not point to a "total prohibition" on the sale of guns to minors "during the founding era." *Id.* at 39. The district court also gave no consideration to the Governor's post-Founding-era historical analogues. *Id.* at 40.

SUMMARY OF THE ARGUMENTS

This Court should reverse the district court's preliminary injunction because the Second Amendment does not prohibit Colorado from adopting a minimum age to purchase guns. Guns are now the leading cause of death among 18-to-20-year-olds in Colorado. The Constitution does not leave the people of Colorado helpless to address this loss of life. To the contrary, the Second Amendment has never been understood to prohibit States from adopting a minimum age for gun sales, and our Nation's history is full of examples where States set that minimum age at 21.

First, the Plaintiffs failed to demonstrate they have standing. Plaintiffs' bare allegations in their declarations were devoid of any specific facts to show a concrete and actual injury. This alone requires reversing the district court's preliminary injunction.

Second, Plaintiffs are not likely to succeed on their claim. Pursuant to *Bruen*, the Court considers whether the plain text of the Second Amendment covers Plaintiffs' conduct, and if so, whether Colorado's law is historically analogous to our Nation's history and traditions of gun regulation.

On *Bruen*'s first step, the Governor's substantial evidence shows that the Second Amendment never covered gun purchases before the age of 21 and those under the age of 21 were not part of the "political community" that the Second

Amendment protected. Colorado's law is also presumptively lawful under Supreme Court precedent because it is a condition and qualification on the sale of guns. The Court can thus reverse the injunction at *Bruen*'s first step.

But if the Court proceeds to *Bruen*'s second step, the Governor demonstrated our Nation's unbroken historical tradition restricting guns from those under 21. At the Founding, the common law viewed those under 21 as "infants" without Second Amendment rights. During the Reconstruction era, nearly half the States enacted laws similar to SB23-169, restricting gun sales to those under 21.

While *Bruen* announced a new test for lower courts to apply to Second Amendment claims, the district court made multiple errors in applying *Bruen* that warrant reversal. Specifically, the district court:

- Held Plaintiffs demonstrated that the Second Amendment's text covered their conduct without Plaintiffs presenting any evidence or authority;
- Failed to consider the only historical evidence in the record on the meaning of the Second Amendment's text, including sources the Supreme Court has previously relied on in its textual analysis;
- Implied a right under the Second Amendment, contrary to *Bruen*, *Heller*, and the historical evidence in the record;

- Held Plaintiffs were part of "the people" covered by the Second Amendment, despite the undisputed historical evidence to the contrary;
- Held the absence of an express age limit in the Second Amendment prohibits Colorado from adopting one, contrary to how courts interpret other constitutional rights;
- Held Colorado's minimum age limit on gun sales was not a condition and qualification on commercial sales of guns;
- Held *Heller*'s "presumptively lawful" categories are no longer presumptively lawful, contrary to binding Supreme Court and Tenth Circuit precedent;
- Required Colorado to demonstrate a "total prohibition" (i.e. a "dead ringer") from the Founding era to establish a historical tradition instead of a "historical analogue;"
- Ignored all historical evidence and historical analogies after the Founding era, despite *Bruen* and *Heller* finding such evidence a "critical tool."

Third, Plaintiffs are unable to satisfy the remaining preliminary injunction factors. Their bare-bones declarations did not establish an irreparable injury.

Moreover, the evidence showed that the public interest favors denying the injunction because SB23-169 will save lives in Colorado by reducing gun-related homicides, accidents, and suicides.

JURISDICTION

This Court has jurisdiction to review the district court's preliminary injunction under 28 U.S.C. § 1292(a)(1). Plaintiffs alleged the district court had jurisdiction under 28 U.S.C. § 1331.

ARGUMENT

I. Plaintiffs' declarations were insufficient to establish Plaintiffs' standing.

Plaintiffs did not meet their burden to establish standing. This issue was raised and ruled on below. Order at 5–16. This Court "review[s] a district court's rulings on Article III standing de novo." *Rocky Mountain Peace & Just. Ctr. v. U.S. Fish & Wildlife Serv.*, 40 F.4th 1133, 1151 (10th Cir. 2022) (quotations omitted).

To establish the required injury-in-fact, a plaintiff must show an injury that is "concrete, particularized, and actual or imminent." *Colo. Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537, 544 (10th Cir. 2016). In *Colorado Outfitters*, a similar Second Amendment case, this Court held that certain plaintiffs lacked standing because they had no "concrete plans to engage in conduct" that violated Colorado's ban on large capacity magazines. *Id.* at 551. Plaintiffs' allegations that they would purchase a large capacity magazine "some day" were insufficient to establish an imminent injury. *Id.*

The same rationale should have applied here. The Individual Plaintiffs' bare allegation of an intent to purchase guns at some unspecified time in the future falls short of establishing a concrete plan to engage in allegedly protected conduct. A court is "powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing." *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1154 (10th Cir. 2005) (citation omitted).

Instead of holding Plaintiffs to their burden under *Colorado Outfitters*, the district court erroneously lowered it. The court recognized that Plaintiffs did "not state that they will purchase firearms after the law goes into effect, that they have previously purchased firearms, or that they have taken any steps to prepare to purchase firearms," Order at 12 n.6. Plaintiffs also did not state whether they already owned guns for self-defense, what guns they intended to purchase, or whether they would be under 21 when the law became effective. *Id.* at 14 n.8.[1] Nevertheless, the court held that "***[a]t this phase of the proceedings***, the Individual Plaintiffs have done enough" to establish standing, even though the district court

[1] RMGO also failed to identify any members who would be affected by SB23-169 or any direct injury. Order at 10–12. The district court correctly held that RMGO lacked standing. *Id.* (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009)).

did "not pass on the Individual Plaintiffs' showing for purposes of other stages of the case." *Id.* at 12 (emphasis added).

The district court incorrectly applied a lower burden to establish standing at the preliminary injunction stage. But "[w]hen a preliminary injunction is sought, a plaintiff's burden to demonstrate standing 'will normally be no less than that required on a motion for summary judgment.'" *Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 404 (2d Cir. 2011) (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 907 n.8 (1990)). This is consistent with the "general rule that a preliminary injunction should not issue on the basis of affidavits alone." *N.M. Dep't of Game & Fish v. U.S. Dep't of the Interior*, 854 F.3d 1236, 1253 (10th Cir. 2017) (internal quotation omitted). At the preliminary injunction stage, a court is not testing the sufficiency of the allegations but whether the plaintiff's proffered evidence establishes a "'clear showing' of [their] injury in fact." *Lopez v. Candaele*, 630 F.3d 775, 785 (9th Cir. 2010) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008)).

Plaintiffs' conclusory statements were insufficient to establish their standing and the Court should reverse.

II. The district court abused its discretion when it held Plaintiffs were likely to succeed under *Bruen*.

This Court should reverse the preliminary injunction because the district court erred at every step of its *Bruen* analysis. Under the two-step test announced

in *Bruen*, a court must first determine if the Second Amendment's plain text covers plaintiffs' proposed conduct. 597 U.S. at 17. If the conduct is covered, "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id*. When a state law addresses "unprecedented societal concerns" not present at the Nation's Founding, the "lack of a distinctly similar historical regulation" is not dispositive. *Id*. at 26–27. Instead, a court must "reason[] by analogy" and the government need only "identify a well-established and representative historical *analogue*, not a historical *twin*." *Id.* at 28–30.

This Court reviews the grant of preliminary injunction for abuse of discretion, "examin[ing] the court's factual findings for clear error and its legal conclusions de novo." *Free the Nipple-Fort Collins v. City of Fort Collins, Colo.*, 916 F.3d 792, 796-97 (10th Cir. 2019). A district court abuses its discretion if it "commits an error of law or makes clearly erroneous factual findings." *Att'y Gen. of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 775 (10th Cir. 2009).

A. Plaintiffs failed to demonstrate that the Second Amendment's text covers their proposed conduct.

This Court should reverse at *Bruen*'s first step because Plaintiffs failed to establish that the Second Amendment's text covers their intent to buy guns before they turn 21. The parties did not dispute, and the district court correctly held, that

Plaintiffs have the burden at *Bruen*'s first step to demonstrate that the Second Amendment's text covers their proposed conduct. Order at 20; *see also Bevis v. City of Naperville, Ill.*, 85 F.4th 1175, 1179 (7th Cir. 2023) ("In order to show a likelihood of success on the merits … [plaintiffs] have the burden of showing" the text covers their conduct). However, the district court erred by finding Plaintiffs were substantially likely to succeed at this step.

The district court committed at least three errors at *Bruen's* first step, each of which independently requires reversal. *First*, the Governor's evidence established that the Second Amendment was never understood to cover purchases by those under 21. In the absence of any historical evidence proffered by Plaintiffs on the public understanding of the Second Amendment's text, the district court erred by concluding that "the Second Amendment includes the [implied] right to acquire firearms." Order at 28. *Second*, Plaintiffs presented no evidence that they were part of "the people" under the Second Amendment. Instead, the absence of an express age limit in the Second Amendment leaves to the States the power to set a reasonable minimum age for gun purchases. *Third*, SB23-169 is a presumptively lawful regulation under the Supreme Court's precedent, and the district court erred by giving it no presumptive weight. These issues were raised and ruled on below. Order at 20–31.

1. The Second Amendment's plain text was never understood to cover gun purchases by those under 21.

The Supreme Court has not held that the Second Amendment's text covers gun purchases by those under 21. Both *Heller* and *Bruen* did "not undertake an exhaustive historical analysis … of the full scope of the Second Amendment." *Bruen*, 597 U.S. at 31; *Heller*, 554 U.S. at 626. Justice Alito wrote separately that *Bruen* "decides nothing about … the requirements that must be met to buy a gun" and did not change federal law prohibiting "the sale of a handgun to anyone under the age of 21." 597 U.S. at 72–73 (Alito, J., concurring).

Despite Plaintiffs arguing for a new right to purchase guns before the age of 21, the district court incorrectly relieved Plaintiffs of their burden to demonstrate that the Second Amendment's text was publicly understood to cover that conduct. The district court also ignored the historical evidence before it and wrongly implied what conduct is included under the Second Amendment.

a) Plaintiffs failed to carry their burden at *Bruen*'s first step.

Plaintiffs must first demonstrate that the Second Amendment's plain text covers the Individual Plaintiffs' desire to purchase guns before they turn 21. *See Bruen*, 597 U.S. at 17. *Heller* instructs how a court performs that textual analysis. A court must give the Second Amendment's text its "[n]ormal meaning … [as]

known to ordinary citizens in the founding generation." *Heller,* 554 U.S. at 576–77. A court also looks to how the text was interpreted after its ratification. *Heller* described "a court's interpretative task" as "the examination of a variety of legal and other sources to determine *the public understanding* of a legal text[.]" *Id*. at 605; *see also McDonald v. Chicago*, 561 U.S. 742, 828 (2010) (Thomas, J., concurring) ("When interpreting constitutional text, the goal is to discern the most likely *public understanding* of a particular provision at the time it was adopted.") (emphasis added).

The Governor presented substantial evidence below that the words "to keep and bear arms"—both at the Founding and in the 19th century—were not publicly understood to guarantee a right by those under 21 to purchase guns. The Governor's expert, Historian Saul Cornell, explained that those under 21 in Founding-era America were considered "minors" or "infants" in the eyes of the law. App. Vol. 1 at 153, 160–64. Until the late 20th century, the American consensus was that the age of majority was 21. *Id.* at 164–65. There is simply no historical evidence suggesting those under 21 had a constitutional right to acquire guns at America's Founding. *Id*. at 168. In fact, they would not even have had the ability to assert a legal claim in a court under the Second Amendment. *Id.* at 161. Instead, until they reached the age of 21, their legal affairs were managed by their

parents or guardians. *Id*. Many of America's early state militia laws also made the parent or guardian responsible for purchasing any gun used for militia participation. *Id*. at 178–79.

This fact is also confirmed by the Governor's post-enactment evidence. *See Heller*, 554 U.S. at 605 (finding post-enactment evidence "a critical tool of constitutional interpretation … to determine *the public understanding* of a legal text[.]"). For example, in the 19th century, the Tennessee Supreme Court rejected that the Second Amendment covered gun purchases by those under 21. App. Vol. 1 at 121 (citing *State v. Callicutt*, 69 Tenn. 714 (1878)). Upholding a state law similar to SB23-169, the Tennessee court held that the "right to 'keep and bear arms,'" did not "necessarily impl[y] the right to buy or otherwise acquire" a gun by a minor. *Id*. at 716.[2] Thomas Cooley—who *Heller* relied on as the "most famous" 19th century legal scholar, 554 U.S. at 616—also concluded that "the State may prohibit the sale of arms to minors" under a State's police powers. App. Vol. 1 at 132 (citing Thomas M. Cooley, *Treatise on Constitutional Limitations*, 740 n.4 (5th ed. 1883)).

[2] Tennessee's age of majority was 21 at the time. *See, e.g., Warwick v. Cooper*, 37 Tenn. 659, 660 (1858) (describing "an infant under the age of twenty-one").

Despite having the burden at *Bruen*'s first step, Plaintiffs offered *no* evidence that the words "to keep and bear Arms" guaranteed a right by those under 21 to purchase guns. Plaintiffs did not rebut the Governor's expert evidence or present a textual argument. Instead, Plaintiffs' entire argument on the issue consisted of one sentence—that "[t]he right to keep arms necessarily implies the right to acquire arms"—without citation to any evidence or authority. *Id.* at 69. Nonetheless, the district court held that Plaintiffs "have sufficiently demonstrated a likelihood of success in showing their proposed conduct is covered by the plain text of the Second Amendment." Order at 28. The district court erred in three ways.

First, the district court improperly relieved Plaintiffs of their burden at *Bruen*'s first step. A preliminary injunction is an "extraordinary remedy" granted only where the movant shows a "clear and unequivocal" right to relief. *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1258 (10th Cir. 2005). Plaintiffs must at least "make a prima facie case showing a reasonable probability that they will ultimately be entitled to the relief sought." *Harmon v. City of Norman, Okla.*, 981 F.3d 1141, 1146 (10th Cir. 2020) (internal quotation omitted); *see also Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006) (the "burdens at the preliminary injunction stage track [who has] the burdens at trial").

The bar cannot be so low that Plaintiffs can show a likelihood of success at *Bruen's* first step—and preliminary enjoin democratically-enacted state laws—without pointing to any evidence or authority that the Second Amendment was publicly understood to cover their conduct. Other courts have properly denied preliminary injunction motions when a plaintiff fails to submit supporting historical evidence at *Bruen*'s first step. *See Nat'l Ass'n for Gun Rts. v. Lamont*, No. CV 3:22-1118 (JBA), 2023 WL 4975979, at *15 (D. Conn. Aug. 3, 2023) (unpublished) (denying preliminary injunction because "[n]othing in *Bruen* … grants [plaintiffs] an automatic presumption that their conduct is constitutionally protected which Defendants are then required to affirmatively rebut. Plaintiffs must bear the burden of producing evidence" at *Bruen*'s first step); *Ocean State Tactical, LLC v. Rhode Island*, 646 F. Supp. 3d 368, 387–88 (D.R.I. 2022) (denying preliminary injunction because "only the State has supported its argument with historical analysis" on "the textual meaning of the Second Amendment").

Second, the district court abused its discretion by failing to consider the relative evidence presented by the parties. *See Denver Homeless Out Loud v. Denver*, 32 F.4th 1259, 1279 (10th Cir. 2022) (reversing where district court "failed to consider record evidence" and preliminary injunction order "lacked a rational basis in the evidence"). *Bruen* did not create new evidentiary standards for

Second Amendment cases. Instead, the Supreme Court instructed courts to continue to "follow the principle of party presentation." 597 U.S. at 25 n.6 (quoting *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020)). Lower courts were instructed "not to resolve historical questions in the abstract" but "to decide a case based on the historical record compiled by the parties." *Id.* Here, the only evidence in the record on the meaning of the Second Amendment's text was the Governor's evidence. The Governor's evidence showed the Second Amendment was never publicly understood to cover gun sales to those under 21. Plaintiffs presented no rebuttal or affirmative evidence on the issue. The district court erred when it reached a decision that was contrary to the only evidence in the record.

Third, the district court erred by shifting the burden at *Bruen*'s first step to the Governor. *See Stevison v. Enid Health Sys.*, 920 F.2d 710, 714 (10th Cir. 1990) (reversing where district court improperly shifted burden of proof). The district court held the Governor's Founding-era evidence was only "evidence supporting an argument that states ***could have*** regulated 18-to-20 year olds [during the Founding era] because they lacked rights as minors." Order at 25 (emphasis added). Yet, that is exactly the evidence *Bruen* requires. At the first step, a court should look to what States "could have" done in the Founding era consistent with

the Second Amendment. The goal is "to determine the *public understanding* of a legal text," *Heller*, 554 U.S. at 605, as the text's meaning is "fixed according to the understandings of those who ratified it." *Bruen*, 597 U.S. at 28. If States "could have" regulated gun sales to 18-to-20-year-olds at the Founding consistent with the Second Amendment, then the district court's analysis should have ended there.

Instead, the district court held that the Governor's evidence was insufficient because "the Governor has not shown a 'historical tradition of firearm regulation' of 18-to-20 year olds during the founding era[.]" Order at 25 (quoting *Bruen*, 597 U.S. at 24). But that is the standard for *Bruen*'s second step. 597 U.S. at 24. The district court improperly required the Governor to satisfy *Bruen*'s second step before Plaintiffs even satisfied *Bruen*'s first step. This makes *Bruen* an impossible test. How does the government identify a historic restriction on a right when there is no evidence that the alleged right ever existed? The district court erred by shifting the burden to the Governor to point to a historical regulation before Plaintiffs demonstrated the Second Amendment covered their conduct.

b) Courts cannot imply rights under the Second Amendment's plain text without considering historical evidence.

Rather than considering the party's evidence on the Second Amendment's public understanding and meaning, the district court accepted Plaintiffs'

conclusory implied-rights argument. The district court held that the Second Amendment's text "includes" a right to purchase guns, relying on pre-*Bruen* cases. Order at 28. The district court erred both by implying rights under the Second Amendment contrary to the historical evidence and relying on pre-*Bruen* cases that do not support that the Second Amendment covers Plaintiffs' conduct.

First, the district court's implied-rights analysis is directly counter to *Bruen* and *Heller*. These cases do not support that a court may imply rights guaranteed by the Second Amendment. The creation of implied rights under the Second Amendment "is quite-clearly not a 'plain text' analysis, required under *Bruen*." *Def. Distributed v. Bonta*, No. CV 22-6200-GW-AGRx, 2022 WL 15524977, at *4 (C.D. Cal. Oct. 21, 2022) (unpublished). The district court erred by determining what rights must be "included" under the Second Amendment in the 21st century without relying on any historical evidence about the public understanding of the text.

Compare the district court's analysis here to *Heller*'s textual analysis. *Heller* did not determine what rights were "included" or "implied" in the abstract. *Heller*'s "textual analysis" on the Second Amendment's scope included review of 18th and 19th century dictionaries; 18th and 19th century state constitutional provisions and statutes; Continental Congress records; 19th century state court

decisions; 18th and 19th century legal commentaries; the Federalist Papers and other Founders' writings; the 1788 ratification debates; 17th and 18th century English statues and complications; 18th century newspapers; and 18th century debates in the British Parliament. 554 U.S. at 580–600. Only after reviewing this bevy of historical sources did *Heller* conclude that the Second Amendment's text covered a right to carry guns for confrontation unconnected with militia service. *Id.* The district court conducted no such textual-historical analysis here, and could not do so because Plaintiffs presented no evidence on the meaning of the Second Amendment's text.

Bruen did not eliminate the need to interpret the Second Amendment's text through historical evidence. While the text must apply to new circumstances not anticipated at the Founding, *Bruen* repeatedly stated that the Second Amendment's meaning is "historically fixed," "fixed according to its historical understanding," and "fixed according to the understandings of those who ratified it." *Bruen*, 597 U.S. at 28. *Bruen* spoke favorably of the first step of the two-part test that courts of appeals had previously used to evaluate Second Amendment challenges after *Heller*, which required lower courts to "ascertain the original scope of the right based on its historical meaning." *Id.* at 18. *Bruen* abrogated only the second step, replacing means-ends scrutiny with the requirement that, when conduct falls within

the text's historical understanding, the government "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 24.

Bruen specifically rejected "any judge-empowering interest balancing inquiry" that could imply what rights exist under the Second Amendment. *Id.* at 22 (quotation to *Heller* omitted). The district court here cited a pre-*Bruen* Ninth Circuit case that stated in dicta that the Second Amendment "wouldn't mean much without the ability to acquire arms." Order at 27 (citing *Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017)). But the Second Amendment is not "subject to future judges' assessments of its usefulness." *Heller*, 554 U.S. at 634. Rather, "it is the very *product* of an interest balancing by the people." *Id*. Courts do not "decide on a case-by-case basis whether the right is *really worth* insisting upon." *Id.* The Second Amendment is "enshrined with the scope [it was] understood to have when the people adopted [it]." *Id.* Thus, a court's analysis at step one must be "rooted in the Second Amendment's text, as informed by history." *Bruen*, 597 U.S. at 19. The district court erred by not considering the Governor's historical evidence, and Plaintiffs' utter lack of historical support, at *Bruen*'s first step.

Before *Bruen*, this Court stated it must follow a "textual-historical" approach, and draw "upon the understanding of the age of 1787 in determining [the Second Amendment's textual] scope." *United States v. Huitron-Guizar*, 678 F.3d 1164, 1169 (10th Cir. 2012); *see also Peterson v. Martinez*, 707 F.3d 1197, 1208 (10th Cir. 2013) (looking to historical evidence on "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment guarantee[.]") (internal quotation omitted).

Post-*Bruen,* at least four other courts of appeals have looked to history when analyzing the Second Amendment's text at *Bruen*'s first step, although reaching different results on its meaning. *See Range v. Att'y Gen. U.S. of Am*., 69 F.4th 96, 102 (3d Cir. 2023) (looking to English common law to determine if non-violent felons are part of "the people"); *NRA v. Bondi*, 61 F.4th 1317, 1321 (11th Cir. 2023), *reh'g en banc granted, vacated*, 72 F.4th 1346 (11th Cir. 2023) (stating *Bruen*'s first step requires "consider[ing] the plain text of the Amendment, as informed by the historical tradition"); *United States v. Rahimi*, 61 F.4th 443, 452 (5th Cir.), *cert. granted*, 143 S. Ct. 2688 (2023) (determining based on "record before us" that individuals subject to domestic violence restraining order "did not fall into any such group" who the Founders historically disarmed); *Atkinson v. Garland*, 70 F.4th 1018, 1022–23, 1025 (7th Cir. 2023) (remanding for historical

facts and analysis to determine if "the plain text of the Second Amendment does not cover felons"). This Court should follow the same approach and evaluate the Second Amendment's text at *Bruen*'s first step, "as informed by history." *Bruen*, 597 U.S. at 19.

Second, the pre-*Bruen* cases the district court cited—*Teixeira* and *Ezell v. City of Chicago*—offer no support for an implied-rights approach to the Second Amendment. Order at 28.[3] At the outset, neither case evaluated whether the Second Amendment covers the acquisition of a gun by those under 21. These cases also do not support that the Second Amendment covers a right to purchase guns more generally. *Rocky Mountain Gun Owners, et al. v. Polis,* --- F. Supp. --- 2023 WL 8446495, at *9 (D. Colo. Nov. 13, 2023) (unpublished) (rejecting that these same cases support "that the purchase of a firearm is covered by the Second Amendment" as they "predate *Bruen*, rely on cases predating *Bruen*, and/or conduct no analysis of the text.") ("*RMGO II*"). *Teixeira* only addressed the issue

[3] The district court also cited two district court opinions for support: *United States v. McNulty*, --- F. Supp. 3d. --- 2023 WL 4826950, at *4 (D. Mass. July 27, 2023) and *Renna v. Bonta*, --- F. Supp. 3d. --- 2023 WL 2846937, at *7 (S.D. Cal. Apr. 3, 2023). However, *McNulty* only cited the *Teixeira* and *Andrews* cases before stating it "does not make a ruling as to whether the Second Amendment covers the sale of firearms." 2023 WL 4826950, at 4. Likewise, *Renna* is unhelpful because it merely cited *Teixeira* while noting that the government in the case did not dispute that the Second Amendment involved a right to purchase guns. 2023 WL 2846937, at *7.

in passing, upholding dismissal of the plaintiff's complaint because "no historical authority suggests that the Second Amendment protects an individual's right to sell a firearm[.]" 873 F.3d at 686–87. *Ezell* involved a ban on firing ranges, not gun sales. *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011).

Both cases also looked to historical sources on the meaning of the Second Amendment. *Ezell* relied on "post-Civil War legal commentaries" including Thomas Cooley's *Treatise* to analyze the scope of the Second Amendment's text. *Id.* The Seventh Circuit later explained that "whether minors have a general right … to purchase or possess firearms" was a separate issue, and 19th century laws prohibiting gun sales to minors "might properly inform [that] question" instead. *Ezell v. City of Chicago*, 846 F.3d 888, 896 (7th Cir. 2017) ("*Ezell II*"). *Teixeira* quoted *Andrews v. State*, 50 Tenn. 165 (Tenn. 1871), a late-19th century decision from the Tennessee Supreme Court. 873 F.3d at 678. *Ezell* and *Teixeira* did not suggest that a court may decide what is "included" under the Second Amendment without reviewing the historical evidence presented by the parties.

These same historical sources cited in *Teixeira* and *Ezell* show that the Second Amendment does not apply to gun sales to those under 21. The Governor relied on Thomas Cooley's *Treatise* and the 1878 *Callicutt* case, a decision issued by the same Tennessee Supreme Court only seven years after *Andrews*. Both

sources demonstrate that the Second Amendment was never understood to cover gun sales to those under 21. *See, supra*, II.A.1.a. The district court erred when it merely cited *Teixeira* and *Ezell*, without conducting its own textual analysis as informed by history. Had the district court considered these historical sources cited in *Ezell* and *Teixeira* and by the Governor below, it would have concluded that the Second Amendment did not cover gun sales to those under 21.

2. The plain text of the Second Amendment does not cover 18-to-20-year-olds.

Even if Plaintiffs had shown that the Second Amendment guarantees a right to purchase guns, Plaintiffs failed to carry their burden showing that the Individual Plaintiffs were part of "the people" covered by the Second Amendment. Moreover, the absence of any express age limit in the Second Amendment demonstrates that the Constitution does not prohibit States from setting a reasonable minimum age for the purchase of a gun.

a) 18-to-20-year-olds were not part of the "political community" at the Founding.

The Governor again presented historical evidence that 18-to-20-year-olds were not part of "the people" under the Second Amendment. Plaintiffs again presented no evidence. *Heller* stated that "the people" "unambiguously refers to all members of the political community, not an unspecified subset." 554 U.S. at

580. Finding that Justices on both sides of *Heller* "drew upon the understanding of the age of 1787 in determining the right's scope," this Court has previously stated it "must follow that approach" when interpreting "the people." *Huitron-Guizar*, 678 F.3d at 1169 (declining to decide whether Second Amendment applies to non-citizens when "this textual-historical inquiry is unaddressed in the parties' briefs … [and] the record.").

There is no dispute that 18-to-20-year-olds were not part of the "political community" when the Second Amendment was ratified. The Governor's expert, Professor Cornell, explained that during the Founding era those under 21 lived under the supervision of their parents or guardians. App. Vol. 1 at 160–64. Early American legal experts wrote that this was necessary based on "the inability of infants to take care of themselves … until the infant has attained the age of twenty-one years." *Id.* at 163 (quoting James Kent, 2 COMMENTARIES ON AMERICAN LAW 259 (3d ed., 1836)). Early American lawmakers also rejected giving the right to vote to those under 21. *Id.*

The district court erred when it failed to consider whether 18-to-20-year-olds were part of the "political community" as informed by history. *See Huitron-Guizar*, 678 F.3d at 1168. Instead, the district court held it would not "read *Heller* or *Bruen* as limiting to whom 'the people' refers." Order at 25. The district court

agreed with the Third Circuit's decision in *Range* that *Heller*'s and *Bruen*'s "references to law-abiding responsible citizens … were dicta." Order at 22 (citing *Range*, 69 F.4th at 101). Even if true, the district court was "bound by Supreme Court dicta almost as firmly as by the Courts' outright holdings." *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1125 (10th Cir. 2015) (considering "dicta" from *Heller*).

Justice Thomas, the author of *Bruen*, also has looked to "the founding generation's understanding of parent-child relations" when describing the scope of the First Amendment. *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 832 (2011) (Thomas, J., dissenting); *see also Morse v. Frederick*, 551 U.S. 393, 410-11 (2007) (Thomas, J., concurring) ("the First Amendment, as originally understood, does not protect student speech in public schools"). In *Brown*, Justice Thomas discussed at length the Founding-era view that those under 21 had "utter incapacity" under law. 564 U.S. at 826-27. Justice Thomas commented that, given views on parent-child relations at the Founding, "the Framers could not possibly have understood" minors to have "unqualified" First Amendment speech rights. *Id.* at 835. The same is true for the Second Amendment. *See McDonald,* 561 U.S. at 780 (Second Amendment is not "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees").

This Court should not interpret certain words of the Second Amendment ("the people") through a modern lens while interpreting other words ("keep and bear Arms") only based on Founding-era history. Instead, the Court should interpret all words of the Amendment "as informed by history." *Bruen*, 597 U.S. at 19. Here, the district court erred because the public understanding of the Second Amendment did not include those under 21 as part of the "political community."

b) The Second Amendment does not displace the States' power to set reasonable minimum age limits for activities that involve a constitutional right.

State legislatures hold expansive power to set different minimum ages for different activities. 42 Am. Jur. 2d Infants § 6 (Oct. 2023 Update) ("statutes setting different ages at which a person may engage in an activity or be treated as an adult are within the province of the legislature"); *see also Jones v. Jones*, 72 F.2d 829, 830 (D.C. Cir. 1934) (observing that at common law infants attained the age of majority at 21, but noting the "Legislature may regulate the age of majority for infants in all cases, or for specified purposes only"). This power is rooted in the Tenth Amendment and the States' police power to enact legislation "for the public good." *Bond v. United States*, 572 U.S. 844, 854 (2014); *see, e.g.*, *Lenahan v. Pittston Coal Mining Co.*, 218 Pa. 311, 313 (Pa. 1907) ("the Legislature, under

its police power, could fix an age limit below which boys should not be employed").

This principle applies equally to fundamental rights enshrined in the federal Constitution, including the right to keep and bear arms. Take, for example, the right to vote. It is protected by multiple constitutional provisions and has been recognized as a fundamental right. *See Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986); *e.g.*, U.S. Const. amend. XIV, XV, XIX, XXIV. But before the Twenty-Sixth Amendment was ratified in 1971, nothing in the Constitution prevented States from setting the minimum voting age at 21 or some other age. *See Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45, 51 (1959) (listing age as an "obvious example[ ]" of a factor a State "may take into consideration in determining the qualifications of voters.").

Or take the fundamental right to marry. The right is protected by the federal Constitution. *See Obergefell v. Hodges*, 576 U.S. 644, 645 (2015). But that does not mean that States are powerless to set the minimum age to marry. To the contrary, "[e]very State in the Union still establishes a minimum age for marriage without parental or judicial consent." *Brown*, 564 U.S. at 836 (Thomas, J., dissenting); *Maynard v. Hill,* 125 U.S. 190, 205 (1888) (State legislatures may prescribe "the age at which parties may contract to marry").

The Second Amendment was adopted against this same background. States hold broad authority to set minimum ages for different activities, including activities that touch upon the exercise of a constitutional right. In Colorado, a "person who has not attained the age of twenty-one years" is a "minor." Colo. Rev. Stat. § 2-4-401(6). By statute in the late-20th century, Colorado has used 18 as the minimum age for "specific purposes," including to contract or to sue and be sued. Colo. Rev. Stat. § 13-22-101(1). But the Second Amendment does not prohibit Colorado from using its age of majority as the minimum age for gun purchases.

The district court disregarded this constitutional background, holding instead that the Second Amendment's absence of an express age restriction prohibits Colorado from setting one. Order at 22-23, 25 (finding persuasive the reasoning in *Firearm Policy Coalition, Inc. v. McCraw*, 623 F. Supp. 3d 740, 748 (N.D. Tex. 2022)). This view would lead to absurd results. A nine-year-old could claim the right to vote. Or a six-year-old could assert the right to carry a gun. And while Congress and the States can amend the Constitution to set a minimum age for a particular activity for the entire Nation—as they have in the Twenty-Sixth Amendment for voting—no constitutional amendment has altered this original understanding for the Second Amendment right. And when the Constitution is

"silent about the exercise of a particular power[,] . . . the power is either delegated to the state government or retained by the people." *Chiafalo v. Washington*, 140 S. Ct. 2316, 2334 (2020) (Thomas, J., concurring) (quotations omitted). Here, unlike the Twenty-Sixth Amendment, the Second Amendment sets no minimum age for purchasing a firearm. Accordingly, the Colorado General Assembly acted well within its authority when it filled this gap and set a minimum age of 21 to purchase a gun.

3. Age-restrictions on commercial sales are "presumptively lawful," and the district court erred by abandoning *Heller*'s "presumptively lawful" categories of gun regulations.

Colorado's SB23-169 is also constitutional because it regulates the conditions and qualifications on the commercial sale of arms. *Heller* made clear that "the right secured by the Second Amendment is not unlimited," 554 U.S. at 626, and the "Constitution leaves the [States] a variety of tools for combating" gun violence. *Id.* at 636. The Supreme Court described a non-exhaustive list of "presumptively lawful" gun regulations such as "laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626–627 n.26.

Colorado's law does not prohibit gun possession or the use of guns in self-defense. Instead, the law primarily prohibits those who sell guns from selling to 18-to-20-year-olds consistent with States' longstanding power to regulate sales

transactions. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.* 447 U.S. 557, 562 (1980) (recognizing different standards apply to commercial speech under the First Amendment because it is "traditionally subject to government regulation").

The district court erred by holding SB23-169's age restriction on guns did not qualify as a condition and qualification on commercial sales, and by not applying Supreme Court and Tenth Circuit precedent on "presumptively lawful" gun relations, effectively eliminating the category altogether.

a) SB23-169's age-restriction is a "presumptively lawful" gun regulation.

SB23-169 is a "presumptively lawful" condition and qualification on the commercial sales of arms. SB23-169 regulates only gun sales. The law primarily operates by prohibiting those who sell guns—both licensed and private sellers—from *selling* to those under the age of 21. App. Vol. 1 at 16–17, §§ 2(2)(e), 3(a)(3). It also prohibits those under 21 from *purchasing* a firearm. *Id.* at § 2(2)(f). But SB23-169 does not prohibit anyone from *possessing* a gun, nor does it prohibit certain non-purchase gun transfers. *See* Colo. Rev. Stat. § 18-12-112(6).

Bruen did not call into question narrow, objective, and definite regulatory standards that ensure gun purchasers "are, in fact, 'law-abiding, responsible citizens.'" 597 U.S. at 38 n.9 (quoting *Heller*, 554 U.S. at 570). Instead, *Bruen*

stated nothing in its "analysis should be interpreted to suggest the unconstitutionality of the 43 States 'shall-issue' licensing regimes" that do not require licensing officials to exercise judgment on the applicant's need for armed self-defense. *Id.* That included restricting permits to those applicants who "undergo a background check or pass a firearms safety course" to show they are law-abiding, responsible citizens. *Id.* Paralleling *Heller*'s presumptively lawful language, *Bruen* indicated these regulations are constitutional absent some evidence that they were being put towards "abusive ends." *Id.*

A commercial restriction on gun sales is a presumptively lawful means of limiting gun purchases to "ordinary, law-abiding *adult* citizens." *Id.* at 15 (emphasis added). Colorado's lawmakers determined that 21 should be the minimum age to purchase guns to ensure guns are sold only to responsible *adults*. There can be no more definite and objective regulatory standard than using a minimum age limit to determine an individual's responsibility with a gun. That decision, in addition to being well within a State's discretion, *see supra* at II.A.2.b, is well-supported by modern science. The Governor presented unrebutted testimony from Dr. Lawrence Steinberg, who explained that adolescent brain development makes individuals aged 18-to-20 more prone to risk-taking and more

prone to gun-violence and suicide than among people who are 21 and older. App. Vol. 2 at 387–97.

The district court erred by limiting the commercial sales category to regulations that "affect[] only those who regularly sell firearms" citing a pre-*Bruen* case. Order at 30 (quoting *United States v. Hosford*, 843 F.3d 161, 166 (4th Cir. 2016)). But as *Bruen* itself indicated, nondiscretionary regulations aimed at ensuring guns are held by "law abiding, responsible citizens" are likely constitutional. 597 U.S. at 38 n.9 (quoting *Heller*, 554 U.S. at 570). The question is not whether the regulation impacts *only* those who regularly sell guns, but whether a State has abused its traditional police power to regulate commercial conduct. Colorado has not abused its powers by adopting a reasonable minimum age limit to ensure gun purchases only by responsible adult citizens.

Other courts have also that held reasonable age-restrictions like SB23-169 are longstanding and presumptively lawful. *See Lara v. Evanchick*, 534 F. Supp. 3d 478, 489-91 (W.D. Pa. 2021); *Mitchell v. Atkins*, 483 F. Supp. 3d 985, 992-93 (W.D. Wash. 2020), *vacated*, 2022 WL 17420766 (9th Cir. 2022). The district court rejected these cases because they applied the presumption "without evaluating whether the Nation's historic tradition of firearm regulations had similar analogues specific to the challenged regulations." Order at 30 n.17. But as

explained directly below, *infra* at II.A.3.b, it was the district court that erred by applying *Bruen*'s second step to "presumptively lawful" gun regulations.

b) The district court wrongly evaluated the Supreme Court's "presumptively lawful" category at *Bruen*'s second step.

This Court has held that it is "bound" to apply *Heller*'s "presumptively lawful" language, which was "an important emphasis upon the narrowness of the holding" in *Heller*. *Bonidy*, 790 F.3d at 1124–25; *see also United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009) (Tymkovich, J. concurring) (agreeing that *Heller*'s "presumptively lawful" categories are binding on the Tenth Circuit).

The district court erred by effectively eliminating the "presumptively lawful" category of gun regulations altogether. The district court held that *Heller* does not "exempt[] certain types of regulations at the first step of the *Bruen* test." Order at 29. Instead, the district court held "the government must justify the constitutionality of any law regulating conduct covered by the plain text of the Second Amendment[]" at *Bruen*'s second step, including those deemed "presumptively lawful." Order at 29-30. But this turns the presumption announced in *Heller* on its head. At *Bruen*'s second step, the "Constitution presumptively protects" plaintiff's conduct. 597 U.S. at 17. But under the district

court's approach, entire categories of laws the Supreme Court held were "presumptively lawful" would now be presumptively unconstitutional if they survive to *Bruen*'s second step. The government would bear the burden of identifying historical analogues for laws that gave the Supreme Court no pause and that six justices in *Bruen* recognized remained valid—such as restrictions on felony possession or possession at schools. *See Bruen*, 597 U.S. at 72 (Alito, J., concurring); *id.* at 80–81 (Kavanaugh, J., concurring, joined by Roberts, C.J.); *id.* at 129–30 (Breyer, J., dissenting, joined by Sotomayor and Kagan, JJ.).

This Court has resolved the issue. After the district court issued its Order, this Court confirmed that *Bruen* does not undermine *Heller*'s "presumptively lawful" categories. *See Vincent v. Garland*, 80 F.4th 1197 (10th Cir. 2023). In *Vincent*, this Court upheld a felony gun possession law without requiring the government to justify the constitutionality of the law at *Bruen*'s second step. *See id.* at 1202. Instead, this Court held *Heller* already "had appeared to recognize the constitutionality of longstanding prohibitions" like those "on possession of firearms by convicted felons." *Id.* at 1201. *Bruen* did not "indisputably and pellucidly abrogate" the Tenth Circuit's prior precedent upholding the validity of the felon-in-possession ban. Nor did *Bruen* undermine these "presumptively lawful" categories. Instead, *Bruen* contains "signs of support for these

prohibitions." *Id.* (noting that six justices in *Bruen* affirmed the "presumptively lawful" category). Other courts have also correctly rejected the call to invalidate *Heller*'s presumptively lawful category after *Bruen*. *See, e.g.*, *United States v. Minter*, 635 F. Supp. 3d 352, 361 (M.D. Pa. 2022) (upholding prohibition of possession of guns by felons); *United States v. Price*, 635 F. Supp 455, 466 (S.D. W. Va. 2022) (same); *see also McNulty*, 2023 WL 4826950, at *5 ("no significant case, precedential or persuasive, has cast doubt on the constitutionality of imposing conditions and qualifications on the commercial sale of arms").

This Court is bound by the *Vincent* panel's determination that the "presumptively lawful" category continues to apply after *Bruen*. *See, e.g.*, *United States v. Manzanares*, 956 F.3d 1220, 1225 (10th Cir. 2020) ("We are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court") (quotations omitted). Because SB23-169 is a presumptively lawful commercial regulation, the district court erred by proceeding to *Bruen*'s second step and enjoining it.

B. Even if Plaintiffs were likely to succeed on *Bruen*'s first step, this Court should reverse because SB23-169 is relevantly similar to historic regulations on firearms at *Bruen*'s second step.

Although the district court's analysis should have ended at *Bruen*'s first step, the district court also erred by holding that the Governor failed to "demonstrate

that SB23-169 is consistent with the Nation's historical tradition of firearm regulation." Order at 40. These issues were raised and ruled on below. *Id.* at 31–40.

First, the Governor presented robust and unrebutted evidence that SB23-169 is consistent with Founding-era and Reconstruction-era restrictions. Our Nation's history of prohibiting gun sales to those under 21 is one of the most extensive traditions of gun regulations—with nearly half of the States existing prior to the 20th century enacting such restrictions.

Second, the district court only reached its conclusion by misapplying *Bruen*. The district court concluded that the Governor failed to identify "during the founding era" "a total prohibition on the sale of firearms to minors." Order at 39. But *Bruen* does not require a "dead ringer" in the historical record. 597 U.S. at 30. Instead, when faced with "unprecedented societal concerns or dramatic technological changes" the Supreme Court instructed lower courts to "reason[] by analogy" whether the modern regulation is "relevantly similar" to the "historical analogues" identified by the government. *Id.* at 28–30. The district court also erred by excluding any non-Founding-era historical evidence from its analysis. The district court required the Governor to first point to a "total prohibition" from the Founding era *before* the district court would even consider pre-Civil War or

Reconstruction era evidence. Order at 39–40. *Heller* and *Bruen* do not require this and otherwise found post-enactment evidence "critical" on the Second Amendment's meaning when it was not inconsistent with earlier evidence. *Bruen*, 597 U.S. at 34–36 (quoting *Heller*, 554 U.S. at 605).

1. The Governor's evidence demonstrated a "relevantly similar" tradition of firearm regulation from the Founding through the 19th century.

The Governor presented unrebutted evidence that age-restrictions on gun sales were consistent with our Nation's historical traditions. As discussed *supra* II.A.1.a and II.A.2.a, the Governor's expert showed that those under 21 were not adults under the common law at America's Founding. Their legal affairs were managed by their parents or guardians. *Id.* Minors were viewed as "lack[ing] reason and decisionmaking ability" and "the law imposed age limits on all manner of activities that required judgment and reason." *Brown*, 564 U.S. at 826, 834 (Thomas, J. dissenting). Based on this history, Justice Thomas concluded in *Brown* that laws limiting a minor's speech "by requiring parental consent to speak to a minor … [were] within the original meaning of the First Amendment." *Id.* at 835. The same historical analysis should apply to the Second Amendment.

Furthermore, Professor Cornell explained that early States regulated the commercial conduct of those under 21. Early American courts regularly voided

contracts entered by those under 21 when the court determined the transaction was not in the minor's interest. App. Vol. 1 at 162–63. States protected those under 21 who entered contracts independently from their parents and upheld contracts only for "necessaries" like food and shelter. *Id.* This made minors "subject to far greater state supervision than any other legal entity involved in the marketplace during the early years of the republic." *Id.* at 163. If 18-to-20-year-olds did not have full contractual rights under early American common law, then it is hard to imagine they had an unfettered right to contract for the purchase of guns.

Next, the Governor presented unrebutted testimony from Historian Robert Spitzer that early American colleges enacted policies prohibiting students from possessing guns. App. Vol. 2 at 240–43, 287–92. Among early public colleges, Professor Spitzer identified such restrictions at the University of North Carolina (1799, 1838), Georgia (1810), Virginia (1824), College of Wiliam and Mary (1830), the College of New Jersey/Rutgers College/Drew University (1871), the University of Mississippi (1878, 1892), and the University of Kentucky. *Id.* at 242–43. Professor Spitzer also explained that has not yet found a college policy from this era permitting gun possession on college campuses. *Id.* at 243.

Founding-era laws also often regulated who could possess guns for safety reasons. At least one court of appeals held pre-*Bruen* that these colonial

restrictions were part of the "considerable evidence" that laws prohibiting gun sales to those under 21 were "consistent with a longstanding, historical tradition[.]" *NRA v. BATFE*, 700 F.3d 185, 203 (5th Cir. 2012); *see also Reese v. BATFE*, 647 F. Supp. 3d 508, 524 (W.D. La. 2022) (dismissing Second Amendment challenge by 18-to-20-year-olds because *BATFE*'s discussion of colonial era-regulations "satisfies the *Bruen* test" for a historical analogue).

At the start of the 19th century, States began to codify these common law restrictions in statute. In the early 19th century, laws in New York, Delaware, South Carolina, and Connecticut made parents liable for minors unlawfully firing guns. App. Vol. 2 at 233–34. And by the early 1900s, some 46 States had enacted over 100 state laws that restricted access to guns and other dangerous weapons by young people. *Id.* at 232–33, 246–286.

By the end of the 19th century, eighteen States and the District of Columbia had enacted laws remarkably similar to SB23-169, restricting those under 21 from using or purchasing guns.[4] *Id.* at 234–37, 462–70. Before the Civil War, Alabama, Tennessee, and Kentucky passed laws prohibiting the sale of pistols and other dangerous weapons to minors. 1856 Ala. Acts 17; Tenn. Code § 4864; 1859

[4] A nineteenth state, Kentucky, enacted laws prohibiting the sale of pistols to minors in two major cities. App. Vol. 2 at 235 n.21.

Ky. Acts 245. In all three, the age of majority was 21. *See Saltonstall v. Riley*, 28 Ala. 164, 172 (Ala. 1856); *Warwick*, 37 Tenn. at 660–61; *Newland v. Gentry*, 57 Ky. 666, 671 (Ky. 1857). Over the next forty years, sixteen more States (Indiana, Georgia, Mississippi, Delaware, Illinois, Nevada, Maryland, West Virginia, Wisconsin, Kansas, Missouri, Iowa, Louisiana, Wyoming Territory, North Carolina, Texas) and the District of Columbia enacted nearly identical laws. App. Vol. 2 at 234–37, 462–70. For example, in 1875 Indiana law made it "unlawful for any person to sell … to any other person, under the age of twenty-one years, any pistol" or other dangerous weapons. 1875 Ind. Acts 59. Many of these States restricted gun sales to "minors." App. Vol. 2 at 234–37, 462–70. The law of each jurisdiction stated that minors were those under 21. *See Bondi*, 61 F.4th at 1333; App. Vol. 2 at 462–70.

These 19th century laws were "well-established," not "localized restrictions" or "outliers." *Bruen*, 597 U.S. at 30, 65, 67. They were enacted over a forty-year period. App. Vol. 2 at 462–70. These twenty jurisdictions represent nearly half of the States at the time. The States adopting these laws were also geographically diverse, with States from the East (e.g., Delaware, Maryland), the South (e.g., Alabama, Georgia), the Midwest (e.g., Illinois, Wisconsin), and the then-West (e.g., Texas, Wyoming Territory).

While each law varied, these 19th century laws generally operated like SB23-169 by regulating what gun dealers could sell to those under 21. *Id.* at 236. Several went further than SB23-169 by making it unlawful to even give those under 21 a gun. *See, e.g.*, Mo. Rev. Stat. § 1247 (1883) (making it unlawful to "directly or indirectly sell or deliver, loan, or barter to any minor any" any dangerous weapon including "any kind of fire arms, bowie knife, dirk, dagger, [or] slung-shot.").

The Governor also pointed to the lack of legal challenges to these laws at the time. As discussed above, *supra* II.A.1.a, legal commentors like Thomas Cooley agreed that "the State may prohibit the sale of arms to minors' pursuant to the State's police power." In *Callicutt*, the Tennessee Supreme Court rejected the only known Second Amendment challenge to these 19th century laws. *Callicutt*, 69 Tenn. at 716. In other cases, courts reviewed convictions under these age-restriction laws without even addressing the Second Amendment. *See Coleman v. State*, 32 Ala. 581, 582–83 (Ala. 1858); *State v. Allen*, 94 Ind. 441 (Ind. 1884); *Tankesly v. Comm.*, 9 S.W. 702, 703 (Ky. 1888). These defendants did not bother to assert the Second Amendment as a defense to their charges under these 19th century laws, underscoring the public's understanding that age-restrictions were constitutional.

In sum, the Governor presented evidence of an unbroken historical tradition—from common law attitudes to widespread state statutes—regulating access to guns by those under 21. If this Court reaches *Bruen*'s second step, the Governor has carried his burden of demonstrating relevantly similar historical analogues for SB23-169.

2. The district court applied the wrong standard at *Bruen*'s second step.

The district court's conclusion that the Governor failed to carry his burden at *Bruen*'s second step was the result of two legal errors. *First*, the district court wrongly required the Governor identify a "dead ringer" from the Founding-era rather than a "historical analogue." *Bruen*, 597 U.S. at 30. *Second*, the district court completely discounted Reconstruction-era evidence despite the fact that such evidence is relied on by the Supreme Court when, as here, the evidence is consistent with prior historical evidence.

a) The district court wrongly required identification of a "total prohibition" from the Founding era, *i.e.* a "dead ringer."

At *Bruen*'s second step, the government's burden is to "identify a well-established and representative historical *analogue*[.]" *Id*. *Bruen* made clear that the government need not identify a "historical twin" or a "dead ringer" in the historical record to pass constitutional muster. *Id*. Lower courts were not

instructed to simply flyspeck whether the modern regulation existed in the same form in 1791. Due to "unprecedented societal concerns or dramatic technological changes" "[t]he regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868." *Id.* at 27. The Supreme Court instructed lower courts to "reason[] by analogy" whether the modern regulation is "relevantly similar" to the historical analogues identified by the government. *Id.* at 29. A court conducts this analysis across at least two metrics: "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id.*

The district court applied the wrong standard to the Governor's evidence. The district court stated the Governor "fail[ed] to point to any evidence during the founding era that a ***total prohibition*** on the sale of firearms to minors was consistent with the right to bear arms[.]" Order at 39–40 (emphasis added). But by requiring the Governor to show a "total prohibition" "during the founding era" for SB23-169, the district court improperly required evidence of a "dead ringer."

The Governor presented uncontested evidence that the modern challenges of youth gun violence were not prevalent at the Founding. Gun violence was not a pressing issue at the Founding. App. Vol. 1 at 184. Founding-era America was a rural society where minors lived mostly at home. App. Vol. 2 at 238–39.

However, by the late 1800s, the United States had become an urban-industrialized society necessitating the creation of various laws protecting minors. *Id.* The Governor's expert, Historian Brennan Rivas, explained that dramatic technological advancements in gun production in the 19th century and increased levels of violence led to new gun regulations, like age-based sales restrictions. *Id.* at 348–72. These laws were a response to America's first gun crisis in the late 19th century, and the sudden easy commercial availability of more dangerous guns. *Id.* at 373–74. Thus, it is not surprising that statutes directed specifically at restricting sales of guns to minors did not emerge until this period.

However, throughout its analysis, the district court required a "dead ringer" instead of a "historical analogue." For example, as to Founding-era common law, the district court found this evidence was not "directed specifically at the acquisition of firearms" or that the evidence did not show gun purchases "typically involved a contract[.]" Order at 33. While possibly not a dead ringer, Founding era attitudes were nonetheless relevantly similar. "The history clearly shows a founding generation that believed parents to have complete authority over their minor children." *Brown*, 564 U.S. at 834 (Thomas, J. dissenting). Importantly, the "how and the why" was the same. *Bruen*, 142 S. Ct. at 2133. American common law imposed age limits and regulated 18-to-20-year-olds' commercial conduct to

protect minors and because those under 21 were viewed as lacking responsible decision making ability. *Brown* at 826–27.

Likewise, the district court dismissed the fact that early American public colleges prohibited this age group from possessing guns on campus. Order at 35. The district court stated that early college bans "could just easily have been based on their status as students living together in dormitories." Order at 35. But this was directly counter to the historians' unrebutted expert declarations, who explained that early colleges acted in place of a parent precisely because a college student's age meant they were not yet adults. App. Vol. 1 at 168–70 ("[M]inors attending college traded strict parental authority for an equally restrictive rule of in *loco parentis*."); Appl Vol. 2 at 240 (same). College was one of the few areas where those under 21 lived outside their parent's authority, making government restrictions during the Founding era necessary. *Id*. Early public college restrictions thus demonstrate a Founding-era tradition that gun restrictions on this age group did not contravene the public's understanding of the Second Amendment.

b) The district court wrongly rejected the Governor's Reconstruction-era evidence, despite its consistency with earlier traditions.

While the Governor needs only to identify a "historical analogue," the 19th century laws identified from twenty American jurisdictions were effectively "dead ringer[s]" or "historical twin[s]" for SB23-169. *Bruen*, 597 U.S. at 30. The district court erred legally by excluding this evidence from its analysis entirely.

While recognizing it was an "open question as to how a court should weigh historical understandings … at the time the Fourteenth Amendment was adopted" the district court ultimately refused to consider any Reconstruction-era evidence "*because* the Governor fails to point to any evidence during the founding era that a total prohibition on the sale of firearms to minors was consistent with the right to bear arms[.]" Order at 39–40 (emphasis added). In other words, the district court required the Governor to first point to a "total prohibition" from the Founding era *before* the district court would even consider Reconstruction-era evidence. *Id*. The district court's analysis would effectively reduce *Bruen*'s second step to a question of whether there is an exact match for the modern regulation from the Founding era.

This Court should reject the district court's refusal to consider 19th century evidence. *First*, the Supreme Court has never instructed lower courts to ignore

19th century history. *Heller*, *McDonald*, and *Bruen* all looked to 19th century history as part of its Second Amendment analysis. *Heller* looked to how the text was "interpreted from immediately after its ratification through the end of the 19th century," 554 U.S. at 605, and described post-ratification history as "a critical tool of constitutional interpretation." *Id.* *Heller* spent nearly fifteen pages analyzing the scope of the Second Amendment based on 19th century evidence. *Id.* at 605-14. Likewise, *McDonald* looked extensively to 19th century evidence when considering whether the Second Amendment right was fundamental. 561 U.S. at 770–78 ("Evidence from the period immediately following the ratification of the Fourteenth Amendment only confirms that the right to keep and bear arms was considered fundamental.").

While recognizing the "ongoing scholarly debate" on the question, *Bruen* ultimately declined to decide whether courts should "primarily" look to Reconstruction-era or Founding-era history when evaluating Second Amendment challenges to state laws. 597 U.S. at 37–38. Nonetheless, *Bruen* itself looked to late 19th century history on the scope of public carry, criticizing the parties for "ignor[ing] the outpouring of the discussion of the [right to keep and bear arms] … after the Civil War." *Id.* at 60 (citation to *Heller* omitted). Far from rejecting Reconstruction-era history, *Bruen* explained "the public discourse surrounding

Reconstruction is useful in demonstrating" the scope of public carry under the Second and Fourteenth Amendment. *Id.* at 60. This Court should follow the same approach as the Supreme Court and look to 19th century history when evaluating challenges under the Second Amendment.

Second, what *Bruen* truly cautioned against when using post-enactment history was using "late-19th-century evidence … when it *contradicts* earlier evidence." *Id.* at 66 (emphasis added). For example, *Bruen* found an 1871 statute from a single state unpersuasive on the scope of public carry under the Second Amendment. *Id.* at 64–66. *Bruen* rejected the relevance of the law, not because it was too late in time, but because the single law "contradicts the overwhelming weight of other evidence" from history closer in time to the Founding. *Id.* at 66 (quoting *Heller*, 554 U.S. at 632).

Here, the Reconstruction-era age-restriction statutes identified by the Governor were broadly consistent with Founding era views on people under the age of 21. For example, many of the Reconstruction-era statutes prohibiting gun sales to minors made exceptions for purchases made under parental consent or supervision. *See, e.g.*, 1897 Tex. Gen. Laws 221-22, App. Vol. 2 at 236. It is hardly surprising that this tradition was codified in a wave of state statutes in the

1800s, when parent-minor relationships were traditionally governed by common law during the Founding-era.

Bruen did not suggest that 19th century history is unhelpful when it is *consistent* with earlier evidence or our best historical evidence on the Founding era's view on the right's scope. But the district court adopted that approach here. There is a substantial difference between what *Bruen* said—rejecting later evidence when it contradicts the overwhelming weight of earlier historical evidence—and the district court's refusal to consider historical evidence when it purportedly is not supported by "confirmation in the form of founding era regulations." Order at 38. As other courts have held, "[i]t would be a mistake to treat this absence of evidence as evidence of [a modern regulation's] unconstitutionality," *Or. Firearms Fed'n v. Kotek*, --- F. Supp. 3d ---, 2023 WL 4541027, at *36 n.28 (D. Or. July 17, 2023) (unpublished), because it "make[s] no sense to divine constitutional significance from non-existent legislation concerning non-existent problems" at the Founding. *Hanson v. D.C.,* --- F. Supp. 3d ---, 2023 WL 3019777, at *16 (D.D.C. Apr. 20, 2023) (unpublished).

Because the Governor's Reconstruction-era evidence was not contradicted by earlier Founding-era history, the district court erred by excluding it. Even if Reconstruction-era evidence does "not provide as much insight into its original

meaning as earlier sources," *Heller* 554 U.S. at 614, it should not be disregarded entirely. The Reconstruction-era generation was closer in time to the Founding and likely had a better understanding of Second Amendment's original meaning. Our Nation's history did not end in 1791. How subsequent generations "adapted [the Constitution] to the various crises of human affairs" not anticipated at the Founding provides insight on its meaning. *Bruen*, 597 U.S. at 28 (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 415 (1819)). The alternative is replacing history with our 21st century understandings of the right's scope. *Bruen* directly rejected that approach, finding that "reliance on history to inform the meaning of constitutional text … is, in our view, more legitimate[.]" 597 U.S. at 25.

Third, Reconstruction-era history should be considered when a plaintiff challenges State laws under the Second Amendment. States like Colorado are "bound to respect the right to keep and bear arms because of the Fourteenth Amendment, not the Second." *Bruen*, 597 U.S. at 37; *see also Bondi*, 61 F.4th at 1323 ("the more appropriate barometer is the public understanding of the right when the States ratified the Fourteenth Amendment[.]"); *Ezell*, 651 F.3d at 702 ("*McDonald* confirms that when state- or local-government action is challenged, the focus of the original-meaning inquiry is carried forward in time; the Second Amendment's scope as a limitation on the states depends on how the right was

understood when the Fourteenth Amendment was ratified.”). Therefore, how the Second Amendment was publicly understood when the Fourteenth Amendment was ratified in 1868 is the most appropriate inquiry. The district court’s exclusion of Reconstruction-era history in a challenge to Colorado law is particularly ahistorical. Colorado joined the Union eight years *after* the Fourteenth Amendment was adopted, and during a time when States across the country were adopting laws restricting sales of guns to minors.

III. The remaining factors do not support the preliminary injunction.

The preliminary injunction should also be reversed because Plaintiffs failed to demonstrate that they will experience any irreparable harm or that that the alleged injury outweighs the public interest. *See Free the Nipple-Fort Collins*, 916 F.3d at 797. This issue was raised and ruled on below. Order at 40–41.

First, Plaintiffs failed to demonstrate they would suffer any non-theoretical injury absent the injunction. “To constitute irreparable harm, an injury must be certain, great, actual and not theoretical.” *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (quotation omitted). Moreover, Plaintiffs must show that “the injury complained of is of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm.” *Id.* (quotations omitted).

Plaintiffs' boilerplate declarations were insufficient to establish imminent and non-theoretical irreparable harm. *See N.M. Dep't of Game & Fish*, 854 F.3d at 1253 (declaration insufficient to show irreparable harm because "general rule that a preliminary injunction should not issue on the basis of affidavits alone."). Plaintiffs' declarations failed to disclose whether Plaintiffs already owned guns they could use in self-defense or whether they could acquire guns through family members consistent with the law. SB23-169 does nothing to prevent possession of guns Plaintiffs already owned.

The district court erred by finding that the allegation of a Second Amendment injury alone was sufficient to demonstrate irreparable harm. Order at 41. However, as explained above, the Plaintiffs failed to establish the Second Amendment covers purchasing guns before the age of 21. Instead, "individual self-defense is 'the *central component*' of the Second Amendment right." *Bruen*, 597 U.S. at 29 (quoting *McDonald* and *Heller*). Plaintiffs' declarations were devoid of any non-conclusory facts supporting that SB23-169 threatened their ability to use guns in self-defense. *See RMGO II*, 2023 WL 8446495 at *20 (finding no irreparable harm where plaintiffs possessed "numerous other firearms" did not testify they "would be unable to defend themselves" and "alleged no harm associated with the right of self-defense."). Moreover, Plaintiffs needed to show

that their rights were threatened or actually impaired "at the time relief was sought." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Plaintiffs' declarations were signed two months before SB23-169 went into effect. Plaintiffs had ample opportunity to purchase guns prior to SB23-169's effective date. Even if a constitutional right was involved, the district court was obligated to "nonetheless engage in [the] traditional equitable inquiry as to the presence of irreparable harm in such a context." *Fish v. Kobach*, 840 F.3d 710, 752 (10th Cir. 2016). Here, the Plaintiffs did not need a preliminary injunction to avoid the claimed harm, but could have purchased guns on the day they signed their declarations.

Second, the public interest strongly favors Colorado's enforcement of SB23-169. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). "Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012). SB23-169 was enacted as guns became the leading cause of death in Colorado among this age group. App. Vol. 1 at 115 n.1. The Governor's expert Dr. Steinberg explained that Colorado's law would "likely reduce the number of firearm homicides, nonhomicide violent crimes, suicides, and accidental firearms injuries in Colorado." App. Vol. at 2 at 399. Plaintiffs simply cannot show their

desire to purchase guns before the age of 21 outweighs Colorado's concrete public interest in protecting people's lives.

CONCLUSION

This Court should reverse the district court entry of a preliminary injunction against SB23-169.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested because this appeal involves a constitutional challenge to a state statute.

Dated: December 7, 2023

PHILIP J. WEISER
Attorney General

s/ Matthew J. Worthington
Grant T. Sullivan, Assistant Solicitor General*
Michael T. Kotlarczyk, Senior Assistant Attorney General*
Matthew J. Worthington, Assistant Attorney General*
1300 Broadway, 10th Floor
Denver, CO 80203
Telephone: (720) 508-6349
Email: grant.sullivan@coag.gov;
mike.kotlarczyk@coag.gov;
matt.worthington@coag.gov
Attorneys for Governor Jared Polis
*Counsel of Record

CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2023, I served a true and complete copy of the foregoing **Appellant's Brief** upon all parties herein by e-filing with the CM/ECF system maintained by the court and/or email, addressed as follows:

Barry K. Arrington
Arrington Law Firm
4195 Wadsworth Boulevard
Wheat Ridge, Colorado 80033
Voice: (303) 205-7870
Email: barry@arringtonpc.com

Attorney for Plaintiffs

s/ Carmen Van Pelt
Carmen Van Pelt

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Date: December 7, 2023.

s/ Matthew J. Worthington
MATTHEW J. WORTHINGTON
Assistant Attorney General

Exhibit A to
Appellant Jared Polis's Opening Brief

District Court's Order Granting Preliminary Injunction

Polis v. Rocky Mountain Gun Owners, et al., No. 23-1251 (Tenth Circuit)

December 7, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Philip A. Brimmer

Civil Action No. 23-cv-01077-PAB

ROCKY MOUNTAIN GUN OWNERS,
TATE MOSGROVE, and
ADRIAN S. PINEDA,

Plaintiffs,

v.

JARED S. POLIS, in his official capacity as Governor of the State of Colorado,

Defendant.

ORDER

This matter comes before the Court on the Motion for Preliminary Injunction [Docket No. 12] of plaintiffs Rocky Mountain Gun Owners ("RMGO"), Tate Mosgrove, and Adrian S. Pineda. Defendant Jared S. Polis, in his capacity as the Governor of the State of Colorado (the "Governor"), filed a response opposing plaintiffs' motion. Docket No. 28. Plaintiffs filed a reply. Docket No. 30.

I. BACKGROUND

A. Findings of Fact

Plaintiffs challenge the constitutionality of Senate Bill 23-169 ("SB23-169"), which was passed by the Colorado General Assembly and which amends Sections 18-12-112 and 18-12-112.5 of the Colorado Revised Statutes, a provision in the Colorado Criminal Code regulating private firearm transfers. Docket No. 9 at 1, ¶ 1; Colo. Rev. Stat. § 18-12-112. The Governor signed the bill on April 27, 2023. Docket No. 9 at 1, ¶ 1. SB23-

169 becomes effective[1] "at 12:01 a.m. on the day following the expiration of the ninety-day period after final adjournment of the general assembly." SB23-169, 74th Gen. Assemb., 1st Reg. Sess. (Colo. 2023). Colorado's General Assembly adjourned on May 8, 2023.[2]

Section 18-12-112, as amended by SB23-169, provides:

> (2)(e) A person who is not a licensed gun dealer shall not make or facilitate the sale of a firearm to a person who is less than twenty-one years of age.
>
> (f) It is unlawful for a person who is less than twenty-one years of age to purchase a firearm.

Colo. Rev. Stat. § 18-12-112. "A person who violates a provision of [Section 18-12-112] commits a class 2 misdemeanor." *Id.* at § 18-12-112(9)(a). Relevant provisions of Section 18-12-112.5 as amended provide:

> (a.3) A person who is a licensed gun dealer shall not make or facilitate the sale of a firearm to a person who is less than twenty-one years of age.
>
> (a.5) It is unlawful for a person who is less than twenty-one years of age to purchase a firearm
>
> . . . .
>
> (b) Transferring or selling a firearm in violation of this subsection (1) is a class 1 misdemeanor.
>
> (c) Purchasing a firearm in violation of this subsection (1) is a class 2 misdemeanor.

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[1] The parties are not consistent as to when they claim SB23-169 goes into effect, indicating August 4, August 7, and August 8, 2023. *See* Docket No. 9 at 1, ¶ 1; Docket No. 12 at 1; Docket No. 28 at 1; Docket No. 30 at 14; Docket No. 36 at 2 n.1.

[2] The Court takes judicial notice of the date that the Colorado General Assembly adjourned. S. J., 74th Gen. Assemb., 1st Reg. Sess. at 1489 (Colo. 2023), https://leg.colorado.gov/sites/default/files/2023_senate_cumulative_journal.pdf.

Id. at § 18-12-112.5. Sections 18-12-112 and 18-12-112.5 make exceptions for sales to persons under twenty-one years old if the purchaser is an active-duty member of the United States Armed Forces, a peace officer who is "on duty," or a person "certified by the P.O.S.T. Board."[3] *Id.* at §§ 18-12-112, 18-12-112.5. As noted by the Governor, 18-to-20 year olds may still possess and use firearms. Docket No. 28 at 3. And they may acquire, inherit, or receive as gifts firearms from family members. *Id.*

RMGO is a nonprofit organization that "seeks to defend the right of all law-abiding individuals to keep and bear arms." Docket No. 12-1 at 1, ¶ 3. RMGO has members between 18 and 20 years old who desire and intend to purchase firearms for lawful purposes, including self-defense in their homes. *Id*. at 1-2, ¶¶ 3-4.

Mr. Mosgrove is a citizen of Colorado and is older than 18, but younger than 21. Docket No. 12-2 at 1, ¶ 2. It is his "present intention and desire to lawfully purchase a firearm for lawful purposes, including self-defense in [his] home." *Id.*

Mr. Pineda is a citizen of Colorado and is older than 18, but younger than 21. Docket No. 12-3 at 1, ¶ 2. It is his "present intention and desire to lawfully purchase a firearm

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[3] "The following peace officers shall meet all the standards imposed by law on a peace officer and shall be certified by the peace officers standards and training board, referred to in this article as the 'P.O.S.T. board': A chief of police; a police officer; a sheriff; an undersheriff; a deputy sheriff; a Colorado state patrol officer; a town marshal; a deputy town marshal; a reserve police officer; a reserve deputy sheriff; a reserve deputy town marshal; a police officer or reserve police officer employed by a state institution of higher education; a Colorado wildlife officer; a Colorado parks and recreation officer; a Colorado police administrator or police officer employed by the Colorado mental health institute at Pueblo; an attorney general criminal investigator; a community parole officer; a public transit officer; a municipal court marshal; and the department of corrections inspector general." Colo. Rev. Stat. § 16-2.5-102.

for lawful purposes, including self-defense in [his] home." *Id.*

B. Procedural History

Plaintiffs filed this action on April 28, 2023. Docket No. 1. Plaintiffs amended their complaint on May 26, 2023. Docket No. 9. The amended complaint adds Mr. Pineda as a plaintiff and brings one claim on behalf of all plaintiffs alleging that the restrictions in SB23-169 "infringe on the right of the people of the State, including Plaintiffs, to keep and bear arms as guaranteed by the Second Amendment and made applicable to Colorado and its political subdivisions by the Fourteenth Amendment." *Id.* at 6, ¶ 20. Plaintiffs seek a declaratory judgment, injunctive relief, and damages for the individual plaintiffs. *Id.* at 6-7, ¶¶ 23-26. On June 7, 2023, plaintiffs filed a motion for preliminary injunction requesting that the Court preliminarily enjoin the enforcement of SB23-169 arguing that the bill is unconstitutional under the Second Amendment.[4] Docket No. 12 at 1, 17. On August 3, 2023, plaintiffs filed a motion for a temporary restraining order seeking the same relief. Docket No. 34.

II. LEGAL STANDARD

A preliminary injunction is not meant to "remedy past harm but to protect plaintiffs

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[4] The parties did not request a hearing. *But see* Docket No. 12 at 1-2 ("Plaintiffs submit this motion hoping that it will be briefed and argued prior to the effective date of the law."). The decision whether to hold a hearing on a preliminary injunction is within the discretion of the Court. *Buentello v. Boebert*, 545 F. Supp. 3d 912, 914 n.1 (D. Colo. 2021) (citing *Carbajal v. Warner*, 561 F. App'x 759, 764 (10th Cir. 2014) (unpublished), and *Reynolds & Reynolds Co. v. Eaves*, 149 F.3d 1191, 1998 WL 339465, at *3 (10th Cir. 1998) (unpublished table decision)). As the material facts are not in dispute, other than the historical section for which declarations have been attached, the Court exercises its discretion not to hold a hearing on plaintiffs' motions.

from irreparable injury that will surely result without [its] issuance" and "preserve the relative positions of the parties until a trial on the merits can be held." *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1258, 1267 (10th Cir. 2005); *see also Hale v. Ashcroft*, 683 F. Supp. 2d 1189, 1197 (D. Colo. 2009) ("injunctive relief can only be obtained for current or prospective injury and cannot be conditioned on a past injury that has already been remedied"). "[C]ourts generally will refuse to grant injunctive relief unless plaintiff demonstrates that there is no adequate legal remedy." 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2944 (3d ed. 2023).

To obtain a preliminary injunction, "the moving party must demonstrate four factors: (1) a likelihood of success on the merits; (2) a likelihood that the movant will suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in the movant's favor; and (4) that the injunction is in the public interest." *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208 (10th Cir. 2009). "[B]ecause a preliminary injunction is an extraordinary remedy, the right to relief must be clear and unequivocal." *Beltronics USA, Inc. v. Midwest Inventory Distrib., LLC*, 562 F.3d 1067, 1070 (10th Cir. 2009).

III. ANALYSIS

A. Standing

"[A] court must raise the standing issue sua sponte, if necessary, in order to determine if it has jurisdiction." *Russell v. Fin. Cap. Equities*, 158 F. App'x 953, 955 (10th Cir. 2005) (unpublished) (quoting *United States v. Colorado Supreme Court*, 87 F.3d 1161, 1166 (10th Cir. 1996)). Moreover, if a court believes there is a standing issue, it "is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing." *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1154 (10th Cir.

2005) (citation omitted); *see also Colo. Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537, 543 (10th Cir. 2016) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998)) ("a federal court can't 'assume' a plaintiff has demonstrated Article III standing in order to proceed to the merits of the underlying claim, regardless of the claim's significance"). Each plaintiff must have standing to seek each form of relief in each claim. *Bronson v. Swensen*, 500 F.3d 1099, 1106 (10th Cir. 2007). Therefore, the Court will begin by examining each plaintiffs' standing to seek injunctive relief.

1. Pre-Enforcement Challenge

Plaintiffs seek to enjoin enforcement of SB23-169 as unconstitutional. Docket No. 12 at 17. Because SB23-169 had not taken effect at the time of filing, plaintiffs are bringing a pre-enforcement challenge. The Governor argues that plaintiffs' declarations "simply repeat a legal conclusion that they 'desire to purchase a firearm . . . and [they are] or soon will be precluded from purchasing a firearm by SB23-169.' This is not enough to preliminarily enjoin the law or even establish standing." Docket No. 28 at 8 (citations omitted). Plaintiffs do not respond directly to the Governor's standing argument. *See* Docket No. 30 at 14. Instead, plaintiffs state:

> The State argues that because the law is not effective until August 8, 2023, the Plaintiffs are not at this moment entitled to a preliminary injunction. Plaintiffs do not disagree, as they explained in their motion []. Plaintiffs filed their motion prior to the effective date of the statute so that the issues would be fully briefed prior to that date so that the Court would be able to proceed in a more deliberate fashion rather than all at once on August 8. Obviously, Plaintiffs will require an injunction to vindicate their constitutional rights when the statute does become effective. The point of the State's argument is thus unclear.

Id. (citation omitted). The Court understands plaintiffs' argument to be that, although plaintiffs filed their preliminary injunction motion well in advance of the statute's effective

date, plaintiffs are not seeking to enjoin the statute before that date, but rather plaintiffs challenge the statute as of the date it goes into effect. *See id.* at 13-14.

The Supreme Court has stated that, "standing is to be determined as of the commencement of the suit." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570 n.5 (1992); *see also Nova Health Sys.*, 416 F.3d at 1154-55. "Where, as here, the original complaint has been super[s]eded by an amended complaint, we examine 'the amended complaint in assessing a plaintiff's claims, including the allegations in support of standing.' Nevertheless, 'standing is determined at the time the action is brought . . . and we generally look to when the complaint was first filed, not to subsequent events' to determine if a plaintiff has standing." *S. Utah Wilderness Alliance v. Palma*, 707 F.3d 1143, 1152-53 (10th Cir. 2013) (quoting *Mink v. Suthers*, 482 F.3d 1244, 1253-54 (10th Cir. 2007)). The Court will evaluate the allegations in the amended complaint to determine plaintiffs' standing to seek injunctive relief as of April 28, 2023, the time of filing.

2. Legal Standard for Standing

To establish Article III standing, a plaintiff must allege "that (1) he or she has suffered an injury in fact; (2) there is a causal connection between the injury and the conduct complained of; and (3) it is likely that the injury will be redressed by a favorable decision." *Ward v. Utah*, 321 F.3d 1263, 1266 (10th Cir. 2003) (quoting *Phelps v. Hamilton*, 122 F.3d 1309, 1326 (10th Cir. 1997)). In order to show the first element of standing, a plaintiff must show he has "suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560-61 (internal

quotations and citations omitted); *see also Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) ("Injury in fact is a constitutional requirement."). An injury is particularized if it affects the plaintiff in "a personal and individual way." *Spokeo*, 578 U.S. at 339 (citation omitted). "A 'concrete' injury must be '*de facto*'; that is, it must actually exist;" it must be "real," not "abstract." *Id*. at 340. Furthermore, "[a] federal court's jurisdiction . . . can be invoked only when the plaintiff himself has suffered 'some threatened or actual injury.'" *Warth v. Seldin,* 422 U.S. 490, 499 (1975) (quoting *Linda R.S. v. Richard D.,* 410 U.S. 614, 617 (1973)).

"[T]he proof required to establish standing increases as the suit proceeds. At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, while on summary judgment, the plaintiff must set forth by affidavit or other evidence specific facts, . . . which for purposes of the summary judgment motion will be taken to be true." *Rio Grande Found. v. Oliver*, 57 F.4th 1147, 1162 (10th Cir. 2023) (internal citations and quotations omitted). At the preliminary injunction stage, plaintiffs must make a "'clear showing' that they have standing." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1185 (10th Cir. 2013) (Matheson, J., concurring) (quoting *Lopez v. Candaele*, 630 F.3d 775, 785 (9th Cir. 2010) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008))), *aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

Where, as here, a plaintiff seeks prospective relief such as an injunction, "the plaintiff must be suffering a continuing injury or be under a real and immediate threat of being injured in the future." *Tandy v. City of Wichita*, 380 F.3d 1277, 1283 (10th Cir. 2004).

"The threatened injury must be certainly impending and not merely speculative." *Id.* (quotations and citation omitted).

In some narrow circumstances, a plaintiff may seek prospective relief for a law he fears may be enforced against him in the future. *See, e.g.*, *Bronson*, 500 F.3d at 1108-09. A pre-enforcement challenge can be brought against an existing law under which plaintiff has previously been prosecuted, against an existing law under which plaintiff has not been prosecuted, or in some rare cases before an enacted law is enforced. *See, e.g.*, *Faustin v. City & Cnty. of Denver*, 268 F.3d 942, 947-48 (10th Cir. 2001) (evaluating a pre-enforcement challenge to a statute before it took effect); *Winsness v. Yocom*, 433 F.3d 727, 733 (10th Cir. 2006) (evaluating a pre-enforcement challenge to a statute that plaintiff had not been cited or prosecuted under); *Virginia v. American Booksellers Ass'n, Inc.*,[5] 484 U.S. 383, 387-88, 392 (1988) (evaluating a pre-enforcement challenge to a statute that had been enacted but before the statute was made effective). Consistent with the usual standing requirements described above,

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[5] In *American Booksellers*, 484 U.S. at 387-88, the Court examined a First Amendment claim where plaintiffs alleged harm was chilled speech. A "chilled speech" claim differs from a "pre-enforcement challenge," but both can be used in a First Amendment context to establish an injury-in-fact that is sufficient to obtain prospective relief. *See Rio Grande Found.*, 57 F.4th at 1160 (observing a "lessening of prudential limitations on standing" for "chilled speech or pre-enforcement challenges" (citations omitted)). A chilled speech claim also requires showing a credible threat of enforcement. *Id.* The Court, however, finds no Tenth Circuit precedent applying the "chilled speech" test outside of a First Amendment context. The Court's order should not be interpreted as extending the "chilled speech" test to a Second Amendment claim; instead, the Court relies on "chilled speech" cases for their value in demonstrating a credible threat of prosecution for a pre-enforcement challenge.

courts have held that, for a threat of enforcement to be sufficient for Article III injury, a plaintiff must allege "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)).

3. RMGO Standing

An organization has standing to sue on its own to challenge action that causes it direct injury, and the inquiry is "the same inquiry as in the case of an individual." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982). Organizations may assert standing in their own right when, for instance, a defendant's conduct makes it difficult or impossible for the organization to fulfill one of its essential purposes or goals, such as when the organization faces a drain on its resources or when the defendant's actions "have perceptibly impaired" the organization's ability to carry out its mission. *Id.* at 379. An association also has "standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000).

RMGO does not provide grounds for its own standing. Plaintiffs state that RMGO "seeks to defend the right of all law-abiding individuals to keep and bear arms" and that it specifically "represents the interests of those members who are affected by SB23-169's unconstitutional prohibition on law-abiding adults from purchasing firearms."

Docket No. 12-1 at 1, ¶ 3. Plaintiffs provide no evidence or argument that SB23-169 has made it difficult for RMGO to fulfill any of its essential goals or that SB23-169 has caused a drain on RMGO's resources. Accordingly, RMGO fails to show standing in its own right to seek an injunction.

RMGO may also establish standing on behalf of its members. RMGO, however, fails to show the first requirement for establishing standing in this way, namely, that its members would have standing to sue in their own right. In *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009), the Court observed that organizational plaintiffs must "identify members who have suffered the requisite harm." This is accomplished when, through allegations or competent evidence, a plaintiff "name[s] the individuals who were harmed" or shows "*all* the members of the organization are affected by the challenged activity." *Id.* at 498-99 (citations omitted). Plaintiffs do not identify any individual members of RMGO, much less any individual member who is affected by SB23-169. *See* Docket No. 12-1. RMGO claims it "has members who reside in Colorado who are between the ages of 18 and 20" who intend and "desire to lawfully purchase a firearm for lawful purposes including, self-defense in their home," *id.* at 1, ¶¶ 3-4, but does not claim that this is true regarding every member of RMGO or even regarding every Colorado member of RMGO. *See id.* Although RMGO could presumably identify individual members it references, a "federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing." *Nova Health Sys.*, 416 F.3d at 1154 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155–56 (1990)). Plaintiffs have not met their burden, *see Colo. Outfitters Ass'n*, 823 F.3d at 543, to show that RMGO has standing in its own right or that it has standing based on its members'

standing. The Court may go no further, *id.* at 543-44, and will deny plaintiffs' motion to the extent it is brought on behalf of RMGO.

4. Individual Plaintiffs

Mr. Mosgrove and Mr. Pineda (the "Individual Plaintiffs") seek prospective relief and, therefore, to meet the injury-in-fact requirement of Article III standing, they must show a continuing or imminent injury. *Tandy*, 380 F.3d at 1283. Because the Individual Plaintiffs seek to enjoin a law pre-enforcement, the Individual Plaintiffs can establish an injury sufficient to establish standing by showing "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by statute, and there exists a credible threat of prosecution thereunder." *Peck v. McCann*, 43 F.4th 1116, 1129 (10th Cir. 2022) (quoting *Ward*, 321 F.3d at 1267).

a. Injury in Fact

First, Mr. Pineda and Mr. Mosgrove must show an intention to engage in a course of conduct arguably affected with a constitutional interest. Their declarations indicate that both intend to purchase a firearm for the purpose of self-defense in their homes.[6] Docket No. 12-2 at 1, ¶ 2; Docket No. 12-3 at 1, ¶ 2. The Supreme Court has ruled that

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[6] In *Colo. Outfitters Ass'n*, 823 F.3d at 551, the Tenth Circuit found that plaintiffs in a Second Amendment case lacked standing based on not having "concrete plans to engage in conduct" that violates the challenged statute. Here, the Individual Plaintiffs state they intend to purchase firearms, but do not state that they will purchase firearms after the law goes into effect, that they have previously purchased firearms, or that they have taken any steps to prepare to purchase firearms. *See* Docket No. 12-2; Docket No. 12-3. At this phase of the proceedings, the Individual Plaintiffs have done enough to make a "clear showing," *Hobby Lobby Stores, Inc.*, 723 F.3d at 1185, that they intend to purchase firearms, but the Court does not pass on the Individual Plaintiffs' showing for purposes of other stages of the case.

"the Second and Fourteenth Amendments protect the right of an ordinary, law-abiding citizen to possess a handgun in the home for self-defense." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2122 (2022). The Governor argues that the Second Amendment does not extend to the right to purchase a firearm as opposed to the right to "keep" and "bear" firearms.[7] Docket No. 28 at 7. Based on Mr. Mosgrove's and Mr. Pineda's representations that the purchase is at least partly for self-defense, the Court finds the Individual Plaintiffs' proposed course of conduct is "arguably affected with a constitutional interest," *Babbitt*, 442 U.S. at 298, under the Second Amendment.

Next, the Individual Plaintiffs must show that their conduct is proscribed by statute. *Id.* Mr. Mosgrove and Mr. Pineda do not state whether they seek to purchase a firearm through a licensed gun dealer or through a private sale, *see* Docket No. 12-2 at 1; Docket No. 12-3 at 1, but SB23-169 criminalizes both for 18-to-20 year olds. *See* Colo. Rev. Stat. §§ 18-12-112, 18-12-112.5. Purchasing a firearm from either a licensed gun dealer or a private party would constitute a class two misdemeanor under SB23-169

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[7] The Governor raises his argument about the right to purchase firearms in the merits portion of his brief. The test for determining whether a plaintiff has suffered an injury arguably affected by a constitutional interest for Article III standing purposes is different from the test for the likelihood of success on the merits prong of a preliminary injunction. *See Turtle Island Foods, SPC v. Thompson*, 992 F.3d 694, 700 (8th Cir. 2021) ("The standard reaffirmed in *Susan B. Anthony List* does no work for Plaintiffs beyond the standing context. Although related, our analysis of whether Plaintiffs have standing on their First Amendment claim at this stage in the litigation is separate from our analysis of whether the claim is likely to prevail on the merits."). The Court nevertheless addresses the Governor's argument to the extent it can be construed to challenge the Individual Plaintiffs' standing.

because both the Individual Plaintiffs were under the age of 21 at the time of filing.[8] Therefore, the Court finds that the Individual Plaintiffs have demonstrated their proposed course of conduct is proscribed by statute.

Finally, the Individual Plaintiffs must establish a credible threat of prosecution. The Tenth Circuit has recognized "at least three factors to be used in determining a credible fear of prosecution: (1) whether the plaintiff showed past enforcement against the same conduct; (2) whether authority to initiate charges was not limited to a prosecutor or an agency and, instead, any person could file a complaint against the plaintiffs; and (3) whether the state disavowed future enforcement." *Peck*, 43 F.4th at 1132 (quotations and citation omitted). "[A] plaintiff need not risk actual prosecution before challenging an allegedly unconstitutional criminal statute." *Bronson*, 500 F.3d at 1107. The most credible threats of prosecution exist in "pre-enforcement claims brought after the entity responsible for enforcing the challenged statute actually threatens a particular plaintiff with arrest or even prosecution." *Id.* at 1108. "These claims can be juxtaposed with" those cases where "affirmative assurances of non-prosecution from a governmental actor responsible for enforcing the challenged statute prevents a 'threat' of prosecution from maturing into a 'credible' one, even when the plaintiff previously has been arrested under the statute." *Id.*

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[8] Mr. Mosgrove and Mr. Pineda state they were under 21 as of June 2, 2023, Docket No. 12-2 at 2; Docket No. 12-3 at 2. The Court has no indication that the Individual Plaintiffs have turned 21 since June 2, 2023, but, moving forward, this question will be relevant to determining whether any requests for continuing injunctive relief are moot. *See Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco & Explosives*, 14 F.4th 322, 326 (4th Cir. 2021).

Here, the statute is new, there is no evidence of an assurance that the statute will not be enforced, and there is no indication that the statute is moribund based on a change in controlling law. *Cf. Brown v. Herbert*, 850 F. Supp. 2d 1240, 1248 (D. Utah 2012) ("Where a statute is recently enacted and is not moribund, its existence alone may create a threat that is credible enough to create standing." (citing *Babbit*, 442 U.S. at 301-02)). For the purpose of a preliminary injunction, the Individual Plaintiffs have made a clear showing of a credible threat of prosecution.[9] Accordingly, the Individual Plaintiffs have shown an injury-in-fact sufficient to establish Article III standing.

b. Causation and Redressability

To establish the second and third elements of Article III standing, the Individual Plaintiffs must show "there is a causal connection between the injury and the conduct complained of; and [] it is likely that the injury will be redressed by a favorable decision." *Ward*, 321 F.3d at 1266 (citation omitted). Neither party addresses causation or

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[9] Some courts require individualized threats of enforcement for cases asserting rights other than those guaranteed by the First Amendment. *See, e.g.*, *Angelo v. District of Columbia*, --- F. Supp. 3d ----, 2022 WL 17974434, at *4 (D.D.C. Dec. 28, 2022) ("binding D.C. Circuit case law demands more [evidence of a credible threat] than does [*Babbit*] — at least where the plaintiff presents a non-First Amendment preenforcement challenge to a criminal statute that has not reached the court through agency proceedings. In those contexts, plaintiffs must establish that the threat of prosecution is not only credible, but also imminent. In other words, plaintiffs bringing a preenforcement challenge must demonstrate that their prosecution results from a special law enforcement priority, namely that they have been singled out or uniquely targeted by the government for prosecution." (internal citations, alterations, and quotations omitted)). Neither party addresses the relevant standard in this circuit. Finding no evidence this is the standard in the Tenth Circuit, the Court will decline to apply this requirement.

redressability. *See generally* Docket No. 12; Docket No. 28. The Court finds the Individual Plaintiffs have established both.

Relevant to establishing causation, the Individual Plaintiffs allege the Governor "will enforce the unconstitutional provisions of the law against Plaintiffs." Docket No. 12 at 3, ¶ 4. The Governor argues that, for purposes of Eleventh Amendment immunity as described in *Peterson v. Martinez*, 707 F.3d 1197, 1205 (10th Cir. 2013), "he does not 'have a particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty,'" but states that he waives his Eleventh Amendment immunity. Docket No. 28 at 3 n.2. The Court notes that, in determining causation in an analysis of whether a party has standing, "there is a common thread between Article III standing analysis and *Ex parte Young*[, 209 U.S. 123 (1908)] analysis." *Cressman v. Thompson*, 719 F.3d 1139, 1146 n.8 (10th Cir. 2013). The Governor's comment on his lack of a particular duty to enforce SB23-169 could be interpreted as an attack on the causation element of the Individual Plaintiffs' standing because the two inquiries are related. The Court, however, finds that the Governor "possesses sufficient authority to enforce (and control the enforcement of) the complained-of statute" because "[t]he Colorado Constitution states that the 'supreme executive power of the state shall be vested in the governor, who shall take care that the laws be faithfully executed.'" *Cooke v. Hickenlooper*, No. 13-cv-01300-MSK-MJW, 2013 WL 6384218, at *8 (D. Colo. Nov. 27, 2013) (quoting Colo. Const. Art. IV, § 2), *aff'd in part sub nom. Colo. Outfitters Ass'n*, 823 F.3d at 554-55. Enjoining the enforcement of SB23-169 would redress the Individual Plaintiffs' injuries by removing the alleged violation of their Second Amendment rights. *See Aptive Env't, LLC v. Town of Castle Rock*, 959 F.3d 961, 978

(10th Cir. 2020).

B. Likelihood of Success on the Merits

In order for the Court to grant a plaintiff's motion for a preliminary injunction, the plaintiff must demonstrate "a likelihood of success on the merits." *RoDa Drilling Co.*, 552 F.3d at 1208.

> The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary-injunction hearing.

Univ. of Texas v. Camenisch, 451 U.S. 390, 395 (1981) (citing *Progress Development Corp. v. Mitchell*, 286 F.2d 222 (7th Cir. 1961)). The Individual Plaintiffs raise a facial challenge to the validity of SB23-169.[10] As stated above, the amended complaint brings one claim on behalf of all plaintiffs alleging that the restrictions in SB23-169 "infringe on

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[10] The Individual Plaintiffs do not explicitly state that they bring a facial challenge as opposed to an as-applied challenge in their motion for preliminary injunction. *See* Docket No. 12. The Individual Plaintiffs indicate they are challenging the statute in both ways in their amended complaint. *See* Docket No. 9 at 6, ¶ 23 ("SB23-169 is unconstitutional on its face or as applied"). It is unclear what the Individual Plaintiffs' as-applied challenge is and, for purposes of this motion, the Court presumes the Individual Plaintiffs' challenge is facial because SB23-169 has not been enforced against any of the Individual Plaintiffs. *See Colo. Outfitters Ass'n*, 24 F. Supp. 3d 1050, 1058 n.8 (D. Colo. 2014) ("Challenges to the constitutionality of statutes can take two forms. There can be a challenge as to how the law has actually been applied to a plaintiff (an 'as-applied' challenge) or, there can be a challenge based solely on its language and anticipated applications (a 'facial' challenge). Here, because the statutes have not been enforced against any Plaintiff, only facial challenges have been asserted."), *vacated and rev'd on other grounds, Colo. Outfitters Ass'n*, 823 F.3d at 554-55.

the right of the people of the State, including Plaintiffs, to keep and bear arms as guaranteed by the Second Amendment and made applicable to Colorado and its political subdivisions by the Fourteenth Amendment." Docket No. 9 at 6, ¶ 20.

1. Legal Framework for Second Amendment Claims

On June 23, 2022, the Supreme Court announced its decision in *Bruen*, 142 S. Ct. 2111. The Court held that "the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home." *Id.* at 2122. In evaluating a Second Amendment claim, the Court declined to adopt the two-step approach the courts of appeal had developed, in which, "at the second step, courts often analyze how close the law comes to the core of the Second Amendment right and the severity of the law's burden on that right." *Id.* at 2122, 2126 (quotations and citations omitted). *Bruen* held that the "two step test" has one step too many and that means-end scrutiny of laws that infringe upon Second Amendment rights is not supported by the Court's opinions in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and *District of Columbia v. Heller*, 554 U.S. 570 (2008). *Bruen*, 142 S. Ct. at 2117-18.

Bruen states that the appropriate test for applying the Second Amendment is:

> 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. at 2129-30 (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50 n.10 (1961)). In order to determine whether the plain text of the Second Amendment covers a plaintiff's conduct, a court must determine whether plaintiff is "part of 'the people' whom the Second Amendment protects" and if the firearms at issue are "weapons 'in common

use' today for self-defense."[11] *Id.* at 2134 (quoting *Heller*, 554 U.S. at 580, 627). Next, a court determines whether the plaintiff's "proposed course of conduct" is protected by the plain text of the Second Amendment. *Id.* After determining that a plaintiff's conduct is covered, the burden shifts to the government to demonstrate that the challenged regulation is consistent with the Nation's historical tradition of firearm regulation. *Id.* at 2135.

To perform the inquiry into the Nation's historic tradition, *Bruen* states the text of the Second Amendment must control over later history that contradicts the text. *Id.* at 2137. *Bruen* also states that "there is an ongoing scholarly debate on 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 (as well as the scope of the right against the Federal Government)." *Id.* at 2138. *Bruen* did not resolve this debate because it was not necessary for purposes of examining the challenged statute, observing only that it "generally assumed that the scope of the protection applicable to the Federal Government and States is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791." *Id.* at 2137-38.

Since the Supreme Court's ruling in *Bruen*, few courts have addressed the evidentiary burdens necessary to preliminarily enjoin a law on Second Amendment

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[11] The Governor observes that federal law already prohibits licensed gun dealers from selling shotguns and rifles to anyone under 18 years old and selling all other firearms to anyone under 21 years old. Docket No. 28 at 3 (citing 18 U.S.C. § 922(b)(1)). The effect of SB23-169 would be to limit 18-to-20 year olds' ability to purchase shotguns and rifles from licensed gun dealers and to prohibit 18-to-20 year olds from purchasing any firearm in private sales.

grounds. On the likelihood of success on the merits prong, the Governor argues that, because *Bruen* is silent on who carries the burden of establishing that the proposed conduct falls within the plain text of the statute, the Individual Plaintiffs should bear the burden. Docket No. 28 at 6 n.3. Courts that have considered this issue have ruled that, in order for plaintiffs to carry their burden on the likelihood of success on the merits prong, plaintiffs must show their conduct is covered by the Second Amendment and that plaintiffs' burden remains unchanged for the remaining three prongs of the preliminary injunction requirements. *See, e.g.*, *Oregon Firearms Fed'n, Inc. v. Brown*, --- F. Supp. 3d. ----, 2022 WL 17454829, at *12 (D. Or. Dec. 6, 2022), *appeal dismissed*, 2022 WL 18956023 (9th Cir. Dec. 12, 2022); *Baird v. Bonta*, --- F. Supp. 3d. ----, 2022 WL 17542432, at *5–6 (E.D. Cal. Dec. 8, 2022). The Court agrees with the analysis in *Oregon Firearms* and *Baird* and will analyze the Individual Plaintiffs' motion by allocating burdens in the same way.

2. Scope

First, the Individual Plaintiffs must establish that their proposed conduct falls within the scope of the Second Amendment. *Bruen*, 142 S. Ct. at 2129-30. The Second Amendment 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. The Individual Plaintiffs state that their proposed course of conduct is to "purchase firearms for lawful purposes (including defense of their homes)." Docket No. 12 at 5.

a. Right of the People

In determining whether their proposed conduct is within the scope of the Second

Amendment, a threshold question is whether the Individual Plaintiffs are part of "the people" the Second Amendment protects. *Range v. Att'y Gen.*, 69 F.4th 96, 101 (3rd Cir. 2023) (en banc). Neither *Heller* nor *Bruen* defines the scope of the phrase "the people" because it was undisputed that the plaintiffs in each case were a part of "the people." *Id.* The Second Amendment "codifies a 'right of the people.'" *Heller*, 554 U.S. at 579. *Heller* states that in every other instance where the unamended Constitution and Bill of Rights references a right of "the people" that the right is exercised individually and belongs to "all members of the political community, not an unspecified subset." *Id.* at 579-81 (citing U.S. Const. Amends. I, IV). Thus, *Heller* began "with a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans." *Id.* at 581. *Bruen* states that it is undisputed that "ordinary, law-abiding, adult citizens—are part of 'the people' whom the Second Amendment protects." *See* 142 S. Ct. at 2134.

The Governor argues that "the people" does not include 18-to-20 year olds based on a "textual-historical" inquiry of how the term "the people" was used in 1787. Docket No. 28 at 10-11. First, the Governor argues that 18-to-20 year olds were considered minors without full legal protections when the Second Amendment was adopted (which the Court will refer to as the "founding era") and that 18-to-20 year olds were only recognized as part of the political community in the late 20th century. *Id.* at 11. Second, the Governor argues that the age of majority at the time the Second Amendment was adopted by Colorado was 21 and nothing prevents Colorado from using its long-held age of majority at 21 to regulate firearm purchases. *Id.* Finally, the Governor argues that declining to engage in a textual-historical inquiry into the meaning

of the words "the people" defies *Heller's* holding; therefore, this Court should not rely on cases that do not perform such inquiry. *Id.* at 12.

The Individual Plaintiffs argue that, under *Heller*, "the people" applies to all Americans, that comparison to other provisions of the Constitution reveals that the Second Amendment does not include an age limit, and that, because 18-to-20 year olds were required to serve in militias at the time of the Bill of Rights' adoption, it would be inconceivable to conclude they had anything but full rights regarding firearms. Docket No. 30 at 6-8.

Recently, in *Range*, 69 F.4th 96, the Third Circuit evaluated an as-applied challenge under *Bruen* to the prohibition on felons possessing guns in 18 U.S.C. § 922(g)(1). *Range* ruled that "the people" included felons. *Id.* at 103. The court provided four reasons why it believed felons were included in "the people": (1) references to law-abiding responsible citizens in *Heller*, *McDonald*, and *Bruen* were dicta because criminal history was not at issue in those cases, (2) other provisions of the Constitution that reference "the people" include felons and there is no reason to read the Second Amendment differently, (3) acknowledging permissible restrictions on the right to keep and bear arms for a group of people does not mean they are not a part of "the people," and (4) the phrase "law-abiding" is too broad to be understood as a part of the Second Amendment because it "devolves authority to legislators to decide whom to exclude from 'the people.'" *Id.* at 101-03.

In *Firearms Policy Coalition, Inc. v. McCraw*, 623 F. Supp. 3d 740, 748 (N.D. Tex. Aug. 25, 2022), the court ruled that 18-to-20 year olds are part of "the people" under the Second Amendment. The court observed that the Second Amendment does not

include an age restriction, unlike other parts of the Constitution that list an explicit age restriction such as the requirement in Section 2 of Article I that members of the House of Representatives be at least 25 years old, the requirement in Section 3 of Article I that senators be at least 30 years old, and the requirement in Section 1 of Article II that the president be at least 35 years old. *Id.* As in *Heller*, the court compared definitions of "the people" in other constitutional amendments, which have been held to include 18-to-20 year olds, to bolster its conclusion that "the people" in the Second Amendment includes 18-to-20 year olds. *Id.* at 748-49. Specifically, the court observed that the First and Fourth Amendments extend their protections to 18-to-20 year olds. *Id.* The court also looked at individual rights guaranteed by the Constitution that are not specifically a "right of the people," observing that the Fifth and Fourteenth Amendments include 18-to-20 year olds and that, in the context of the Eighth Amendment, "the Supreme Court has said that where 'a line must be drawn,' '[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood.'" *Id.* at 749 (quoting *Roper v. Simmons*, 543 U.S. 551, 574 (2005)). Finally, the court reasoned that, because *Heller* interpreted the prefatory clause of the Second Amendment to announce that the purpose of the Amendment is to "prevent elimination of the militia" and because 18-to-20 year olds could be required to join a militia, "[i]t would be illogical to enumerate a constitutional right to keep and bear arms to maintain an armed militia if that right did not protect those individuals from whom a militia would be drawn." *Id.* at 749-50 (quoting *Heller*, 554 U.S. at 599).

In *United States v. Huitron-Guizar*, 678 F.3d 1164, 1167 (10th Cir. 2012), the Tenth Circuit considered whether the Second Amendment extends to non-citizens. The court

cautioned against reading "an unwritten holding into *Heller*" by interpreting *Heller's* reference to "citizens" as conclusive as to whom "the people" refers because the issue was not before the Court in *Heller* and because "the question seems large and complicated." *Id.* at 1169. The court declined to pass on the question without the benefit of a full record and adversarial argument. *Id.*

The Governor states minors under 21 did not have "full legal rights" and that 18-to-20 year olds "did not enjoy significant legal rights at the founding." Docket No. 28 at 11-12. The Governor argues that "[o]nly in the late 20th century did our Nation recognize 18-to-20-year-olds' role in the political community with First Amendment protection and the right to vote under the Twenty-Sixth Amendment."[12] *Id.* at 11. The Governor cites a declaration prepared by historian Saul Cornell[13] (the "Cornell report") to support the claim that 18-to-20 year olds were not recognized as being part of the "political community" until the late 20th century. *See id.* (citing Docket No. 28-1 at 23-24). The Cornell report states that, because 18-to-20 year olds were considered minors, it is

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[12] The Governor cites Justice Thomas' concurrence in *Morse v. Frederick*, 551 U.S. 393, 410 (2007). Docket No. 28 at 11. In *Morse*, Justice Thomas opined that in his view "the history of public education suggests that the First Amendment, as originally understood, does not protect student speech in public schools." 551 U.S. at 410-11. Justice Thomas' concurrence does not argue that children or students outside of schools were not part of "the people" referenced in the First Amendment and instead describes speech in public schools as exempted from First Amendment restrictions. *See id.* Justice Thomas' concurrence supports historical readings that limit the rights of minors, but does not support excluding minors from the Constitution's provision of individual rights granted to "the people."

[13] Dr. Saul Cornell is "the Paul and Diane Guenther Chair in American History at Fordham University in New York City." Docket No. 28-1 at 2.

anachronistic to assume that, at the time of the founding, they had a legal right to keep and bear arms. Docket No. 28-1 at 14.

The Court is persuaded by the reasoning in *Range* and *McCraw* that an interpretation of "the people" in the Second Amendment should begin with the assumption that every American is included. In reaching this conclusion, the Court is careful not to read *Heller* or *Bruen* as limiting to whom "the people" refers. Moreover, the Court finds that the Governor has not shown a "historical tradition of firearm regulation," *Bruen*, 142 S. Ct. at 2130, of 18-to-20 year olds during the founding era, as opposed to him citing evidence supporting an argument that states could have regulated 18-to-20 year olds because they lacked rights as minors. Thus, the Court finds that the Individual Plaintiffs have shown a likelihood of success on the merits on the question of whether the Second Amendment applies to 18-to-20 year olds.

b. Proposed Conduct

Next, the Individual Plaintiffs must show that the plain text of the Second Amendment covers their conduct. *Bruen* ruled that the Second Amendment covers "carrying handguns publicly for self-defense," and *Heller* and *McDonald* ruled that the Second Amendment covers "possess[ing] a handgun in the home for self-defense." *Bruen*, 142 S. Ct. at 2122. The Governor argues the Individual Plaintiffs' course of conduct is not protected by the Second Amendment because there is no Second Amendment right to purchase firearms. Docket No. 28 at 7-8. The Individual Plaintiffs, on the other hand, argue that the right to keep and bear arms impliedly includes a right to acquire arms. Docket No. 30 at 1.

The Court must first decide what the Individual Plaintiffs intend to do to exercise their

alleged Second Amendment rights. The Individual Plaintiffs categorize their proposed course of conduct as "purchas[ing] firearms for lawful purposes (including defense of their homes)." Docket No. 12 at 5. Mr. Mosgrove has "never been charged with nor [sic] convicted of any misdemeanor or felony offense" and he intends to "lawfully purchase a firearm for lawful purposes, including self-defense in [his] home."[14] Docket No. 12-2 at 1, ¶ 2. Mr. Pineda has "never been charged with nor [sic] convicted of any misdemeanor or felony offense" and he intends to "lawfully purchase a firearm for lawful purposes, including self-defense in [his] home."[15] Docket No. 12-3 at 1, ¶ 2. Thus, based on the declarations, the Court finds that the Individual Plaintiffs have a stated intention to purchase firearms, in an otherwise lawful manner, not having any felony or misdemeanor convictions, for lawful reasons including self-defense in their homes.

The second question is whether the Second Amendment's right to "keep" and "bear" arms extends to the Individual Plaintiffs' intended conduct. The Individual Plaintiffs claim the right to keep firearms necessarily implies the right to acquire arms. Docket No. 12 at 5. The Individual Plaintiffs claim that it is settled law that Constitutional rights protect closely related acts necessary to their exercise and that purchasing firearms is necessary for keeping and bearing arms. Docket No. 30 at 1. Additionally, the Individual Plaintiffs argue that a total prohibition on a right is not necessary to show a

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[14] Mr. Mosgrove does not state what firearms he intends to purchase, when he intends to purchase them, or whether he wants to purchase firearms from a licensed commercial dealer or from a private seller. *See* Docket No. 12-2 at 1, ¶ 2.

[15] Mr. Pineda does not state what firearms he intends to purchase, when he intends to purchase them, or whether he wants to purchase firearms from a licensed commercial dealer or from a private seller. *See* Docket No. 12-3 at 1, ¶ 2.

right is infringed. *Id.* at 2. The Governor argues that the Individual Plaintiffs have made an insufficient showing that the right to keep arms includes a right to buy firearms. Docket No. 28 at 7-8. Additionally, the Governor argues the Individual Plaintiffs have not shown that their right to self-defense is burdened because SB23-169 has not gone into effect and therefore the Individual Plaintiffs still have the ability to purchase firearms.[16] *Id.* at 8.

Several courts have ruled that the right to keep arms necessarily includes a right to acquire arms. *See, e.g., Teixeira v. County of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017) ("the core Second Amendment right to keep and bear arms for self-defense wouldn't mean much without the ability to acquire arms" (quotations and citation omitted)); *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011) ("The right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use."); *United States v. McNulty*, --- F. Supp. 3d. ----, 2023 WL 4826950, at *4 (D. Mass. July 27, 2023) ("The text of the Second Amendment itself also suggests that the right to 'keep' firearms necessarily includes an ability to purchase, sell, or otherwise transfer firearms in order to keep oneself properly armed."); *Renna v. Bonta*, 2023 WL 2846937, at *7 (S.D. Cal. Apr. 3, 2023) ("the right to keep arms, necessarily involves the right to purchase them."), *appeal filed*, No. 23-55367 (9th Cir.

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[16] This argument is more appropriately considered in evaluating whether the Individual Plaintiffs have shown that they face irreparable harm absent a preliminary injunction, and the Court will address the Governor's argument in its discussion of the irreparable harm prong.

Apr. 20, 2023).

The Court agrees with the Individual Plaintiffs that the Second Amendment includes the right to acquire firearms and, therefore, protects the Individual Plaintiffs' proposed conduct. *See Teixeira*, 873 F.3d at 677; *Ezell*, 651 F.3d at 704. For purposes of a preliminary injunction, the Individual Plaintiffs have sufficiently demonstrated a likelihood of success in showing their proposed conduct is covered by the plain text of the Second Amendment.

3. Historical Tradition

The Court has found that the Individual Plaintiffs' proposed course of conduct, purchasing firearms for self-defense in the home, is covered by the plain text of the Second Amendment. Under *Bruen*, the government must then "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." 142 S. Ct. at 2130. Thus, for purposes of this case, the Governor has the burden of establishing that SB23-169 is "consistent with the Nation's historical tradition of firearm regulation" such that the Individual Plaintiffs' conduct "falls outside the Second Amendment's 'unqualified command.'" *Id.* at 2130 (quoting *Konigsberg*, 366 U.S. at 50 n.10).

a. Presumptively Lawful Regulations

First, the Governor argues that SB23-169 falls within one of the categories of firearm regulations that the Supreme Court has found to be presumptively lawful, namely, "conditions and qualifications on the commercial sale of arms." Docket No. 28 at 8-10. The Governor relies on *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1124-25 (10th Cir. 2015) (citation and quotations omitted), where the court opined that the presumptively

lawful categories of regulations identified by *Heller* cannot be ignored since the Tenth Circuit is "bound by Supreme Court dicta almost as firmly as by the Courts' outright holdings, particularly when the dicta is recent and not enfeebled by later statements." As a result, the Governor argues that *Bonidy* "demonstrates that courts cannot disregard *Heller's* carve outs." Docket No. 28 at 10. The Individual Plaintiffs respond that, in light of *Bruen*, it is inappropriate to presume a regulation is lawful as that would improperly shift the burden to the Individual Plaintiffs to point out why a law is unconstitutional. Docket No. 30 at 3.

In *Heller*, the Court states:

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our 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.
>
> We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.

554 U.S. at 626-27 & n.26. In *Bruen*, Justice Kavanaugh filed a concurring opinion, joined by the Chief Justice, that repeated *Heller's* description of presumptively lawful regulations and noted that Justice Alito's concurring opinion in *McDonald* used the same description. *Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J., concurring).

The Court rejects the Governor's argument that SB23-169 is presumptively lawful for two reasons. First, the Court disagrees with the Governor's reading of *Heller* as exempting certain types of regulations at the first step of the *Bruen* test. *Bruen* does not suggest that a different test applies to certain categories of laws or regulations. *Id*. at 2132-33. Rather, *Bruen* is clear that the government must justify the constitutionality of

any law regulating conduct covered by the plain text of the Second Amendment. Justice Kavanaugh's concurrence also does not state that regulations falling into the "presumptively lawful" categories should be subject to a different test. *See id.* at 2162. Additionally, the Court disagrees with the Governor's reading of *Bonidy* to the extent it suggests a different test for "presumptively lawful" regulations. Acknowledging *Bonidy's* admonition not to ignore the language of *Heller* as dicta, the Court reads *Heller* to provide examples of laws or regulations that lawfully limit or qualify rights under the Second Amendment in a way that aligns with the Nation's historical tradition of firearm regulation.

Second, the Governor fails to show that SB23-169 falls into the category of commercial regulations described by *Heller*. Regulations of the commercial sale of arms have been described as "condition[s] or qualification[s]" that "affect[] only those who regularly sell firearms." *United States v. Hosford*, 843 F.3d 161, 166 (4th Cir. 2016). SB23-169 does not base its prohibitions on 18-to-20 year olds because 18-to-20 year olds, as a group, regularly sell firearms. Rather, SB23-169 categorically bans an entire group of law-abiding citizens from purchasing firearms based on age. Additionally, the Court is not persuaded that the pre-*Bruen* cases the Governor cites, *see* Docket No. 28 at 9, suggest a different outcome for age-based firearm restrictions[17]

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[17] In *Lara v. Evanchick*, 534 F. Supp. 3d 478, 489-91 (W.D. Pa. 2021), the court decided age-based restrictions are longstanding and presumptively lawful without evaluating whether the Nation's historic tradition of firearm regulations had similar analogues specific to the challenged regulations. In *Mitchell v. Atkins*, 483 F. Supp. 3d 985, 992-93 (W.D. Wash. 2020), *vacated*, 2022 WL 17420766 (9th Cir. Dec. 2, 2022), the court concluded that the regulation on gun purchases by 18-to-20 year olds fell outside the ambit of the Second Amendment in part because of the presumed

because these cases presume the lawfulness of the category of restriction and, as a result, do not follow the test for Second Amendment cases discussed in *Bruen*.

b. Tradition of Age Based Regulations

Bruen declined to "provide an exhaustive survey of the features that render regulations relevantly similar under the Second Amendment," but provided "two metrics" to determine whether a regulation is within the Nation's historical tradition, namely, "how and why" the regulations burden a law-abiding citizen's right to armed self-defense. *Bruen*, 142 S. Ct. at 2132-33. *Bruen* acknowledged that:

> Analogical reasoning under the Second Amendment is neither a regulatory straightjacket nor a regulatory blank check. On the one hand, courts should not "uphold every modern law that remotely resembles a historical analogue," because doing so "risk[s] endorsing outliers that our ancestors would never have accepted." *Drummond v. Robinson*, 9 F.4th 217, 226 (3rd Cir. 2021). On the other hand, analogical reasoning requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*. 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. at 2133.

The Governor argues that SB23-169 is consistent with the Nation's past history of firearm regulation because: (1) "[t]his Nation has a longstanding history of placing age-restrictions on firearm purchases," and (2) "[m]id-to late-19th Century history 'is relevant'

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lawfulness of age-based regulations. In *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 203 (5th Cir. 2012), *abrogated by Bruen*, 142 S. Ct. at 2127 n.4, the court upheld age-based firearm restrictions because, "[a]t a high level of generality, the present ban is consistent with a longstanding tradition of targeting select groups' ability to access and to use arms for the sake of public safety."

to understanding the Second Amendment's scope." Docket No. 28 at 13-23. The Governor claims that the Nation has a longstanding history of placing age restrictions on firearm purchases and, in support, cites English common law, founding era restrictions, evidence of the conception of founding era militias, pre-Civil War restrictions, and post-Civil War restrictions on gun possession and ownership. Docket No. 28 at 13-18. The Court addresses each time period in turn.

i. Founding Era Laws

The Governor cites English common law to support the proposition that 18-to-20 year olds were not considered full adults and lacked legal contract authority, only having the capacity to be bound by contract for essentials like food, clothing, and lodging. *Id.* at 14. The Governor states that the American colonies followed the English common law in imposing legal limitations based on age. *Id.* As a result, the Governor argues that, because 18-to-20 year olds did not have full contractual rights at the founding, they did not have unfettered commercial rights which would extend to purchasing firearms. *Id.*

In *Bruen*, the Court states:

> As with historical evidence generally, courts must be careful when assessing evidence concerning English common-law rights. The common law, of course, developed over time. *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 533 n.28 (1983); *see also Rogers v. Tennessee*, 532 U.S. 451, 461 (2001). And English common-law practices and understandings at any given time in history cannot be indiscriminately attributed to the Framers of our own Constitution.

Bruen, 142 S. Ct. 2136. The Court further observed, "in interpreting our own Constitution, it is better not to go too far back into antiquity for the best securities of our liberties, unless evidence shows that medieval law survived to become our Founders'

law." *Id.* (internal citations, quotations, and alterations omitted).

The Cornell report opines that:

> Under English common law, individuals under the legal age of majority, 21, were entirely subsumed under the authority of their parents (usually their fathers) or guardians . . . . There was no recourse to legal redress for such minors against their parents or guardians (provided the punishment was deemed necessary and not excessively cruel).

Docket No. 28-1 at 21 (citing John E.B. Myers, *A Short History of Child Protection in America*, 42 Fam. L.Q. 449 (2008); Elizabeth Pleck, *Domestic Tyranny: The Making of American Social Policy Against Family Violence from Colonial Times to the Present* (1987)). The Cornell report further opines that in the decades after the American Revolution, courts became more involved in monitoring contractual arrangements involving minors and in protecting the interests of minors, demonstrating that, previously, minors had more state supervision over their commercial activity than any other legal entity in the founding era. *Id.* at 23 (citing Holly Brewer, *By Birth or Consent: Children, Law, and the Anglo-American Revolution in Authority* (2012)).

In support of the claim that parents' control over minors, consistent with English common law, continued into the founding era, the Cornell report provides evidence that, in the founding era, regulations on minors' ability to enter into contracts were commonplace because minors fell under their parents' authority. *Id.* at 22-23. The Cornell report and the Governor, however, do not identify any evidence that contractual restrictions on minors under the English common law or from the founding era were directed specifically at the acquisition of firearms by minors or whether the purchase of a firearm by 18-to-20 year olds, or anyone else, typically involved a contract, which limits the weight of this evidence in determining whether such evidence forms a

pertinent historical analogue to restrictions on 18-to-20 year olds' right to keep and bear arms. *See McCraw*, 623 F. Supp. 3d. at 755 (observing that "the age of majority — even at the [f]ounding — lacks meaning without reference to a particular right . . . . Instead, the relevant age of majority depends on capacity or activity." (citation omitted)).

The Governor states that gun safety regulations at the time the Second Amendment was adopted disarmed specific groups of people for safety reasons. Docket No. 28 at 14. For instance, founding era laws provided for "disarmament of those refusing to swear an oath of allegiance to the Nation or those who participated in Shays' Rebellion." *Id.* (citing *Nat'l Rifle Ass'n of America, Inc.*, 700 F.3d at 200). Additionally, the Governor identifies rules at certain colleges that prohibited 18-to-20 year old students from possessing or discharging firearms on campus, noting that "college campuses were one of the few places in founding era society where 18-to-20 year olds lived outside of direct parental authority." *Id.* at 15 (citing Docket No. 28-2 at 15-16, Declaration of Robert Spitzer[18]).

Colonial laws that disarmed persons who presented a risk of danger to the state or to the country are not analogous to a categorical ban on a segment of society that has not professed hostility to the state or to the nation. *Cf. Range*, 69 F.4th at 104-105 (ruling "[t]hat Founding-era governments disarmed groups they distrusted like Loyalists, Native Americans, Quakers, Catholics, and Blacks does nothing to prove that Range is part of

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[18] Dr. Robert Spitzer is a Distinguished Service Professor of Political Science Emeritus at the State University of New York at Cortland with expertise on "the history of gun laws, gun policy in American politics, and related historical, legal, political, and criminological issues." Docket No. 28-2 at 2-3.

a similar group today. And any such analogy would be 'far too broad.'" (quoting *Bruen*, 142 S. Ct. at 2134)). Additionally, college codes of conduct that banned possession of firearms on campuses are not analogous to SB23-169. The Spitzer Declaration does not indicate that college rules prohibited students from using or possessing firearms because of their age. *See* Docket No. 28-2 at 15-18. Such rules could just as easily have been based on their status as students living together in dormitories and are more comparable to "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings," *Bruen*, 142 S. Ct. at 2118, than a prohibition on purchasing firearms applicable to a category of people. *See Fraser v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, --- F. Supp. 3d ----, 2023 WL 3355339, at *20 (E.D. Va. May 10, 2023) (observing that "universities' regulations limiting the ability of students to carry firearms on campus are not 'analogous' to the wholesale prohibition on 18-to-20-year-olds from purchasing firearms manifest in the statutes and regulations here at issue"). Thus, the Court finds that the Governor has not identified founding era gun laws that are analogous to SB23-169.

ii. Founding Era Militia Laws

The Governor argues that militia service during the founding era does not demonstrate a right by 18-to-20 year olds to purchase firearms and "instead demonstrate[s] the extensive control that States had over 18-to-20-year-olds in early America." Docket No. 28 at 16. The Governor points out that minors participating in militias acted under the supervision of adults, that parents often supplied firearms for their minor children's participation in militias, and that militia members possessed firearms in "coordinated and rigorous military service, distinct from everyday civilian life."

Id. The Cornell report opines that:

> Any assertion that infants below the age of majority could claim the right to bear arms outside of the militia or related peacekeeping activities, without the authority of parents or a guardian, rests on an anachronistic interpretation of early American militia statutes, ignorance of Founding-era domestic law, and disregard of the social realities of domestic life at the Founding.

Docket No. 28-1 at 28. The Cornell report highlights 18-to-20 year olds' participation in militias as a duty under supervision by patriarchal authority frameworks that regarded minors as existing under the authority of their fathers. *Id.* at 26-27. The report notes that minors were regarded as being similar to "madmen" and "idiots." *Id.* at 27 (quoting John Fauchereaud Grimké, *The South Carolina Justice of the Peace*, 117 (1788)).

The Court agrees with the Governor that service by 18-to-20 year olds in militias does not prove that such persons had an unfettered right to possess firearms outside of militias. *See* Docket No. 28 at 16; *see also Fraser*, 2023 WL 3355339, at *15 ("The Court is also cognizant of the Eleventh Circuit's admonition not to confuse the legal *obligation* to perform militia service with the *right* to bear arms."). The Governor's argument, however, does not carry his burden to show an analogous restriction on the sale of firearms to 18-to-20 year olds.

<u>iii. Post Second Amendment Ratification Regulations</u>

The Governor argues that the Court cannot ignore 19th century history and focus only on founding era history because *Bruen* did not determine whether courts should look for historical analogues in founding era history or history at the time the Fourteenth Amendment was ratified. Docket No. 28 at 21-23. The Governor observes that *Bruen* declined to address "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 (as well as the scope of the right against the Federal Government)" because it ruled that public understanding of the right to keep and bear arms did not differ between 1791 and 1868 in any relevant way. *See* 142 S. Ct. at 2138.

Bruen observed that courts "must []guard against giving postenactment history more weight than it can rightly bear," that "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," and that "because post-Civil War discussions of the right to keep and bear arms 'took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources.'" *Id.* at 2136-37 (quoting *Heller v. District of Columbia*, 670 F.3d 1244, 1274 n.6 (D.C. Cir. 2011) (Kavanaugh, J., dissenting), and *Heller*, 554 U.S. at 614).

The Governor identifies several restrictions on the use of firearms by minors after the ratification of the Bill of Rights. Docket No. 28 at 17-18. The Governor identifies the following pre-Civil War firearm laws involving minors: (1) a law from New York City in 1803 that held parents liable for the unlawful discharge of firearms by minors, *id.* at 17 (citing Docket No. 28-2 at 8-9); (2) laws from cities in Delaware in 1812, South Carolina in 1817, and Connecticut in 1835 that similarly imposed liability on parents for unlawful discharge of firearms by minors, *id.* (citing Docket No. 28-2 at 9); (3) laws passed in Kentucky in 1853, 1859, and 1860 that penalized selling gunpowder to those under fifteen without parental consent and selling certain weapons including pistols to minors and to any "slave, or free negro," *id.*; Docket No. 28-2 at 8-9; Docket No. 28 at 17; (4) a law from Alabama in 1856 that fined "anyone who sold, gave or lent a pistol or fighting

knife to a minor," Docket No. 28 at 17; Docket No. 28-2 at 10 (citing 856 Ala. Acts 17, To Amend the Criminal Law, §1); and (5) a law from Tennessee in 1858 "prohibiting selling, giving, or lending to a minor a pistol, fighting knife or 'like dangerous weapon.'" Docket No. 28 at 17 (quoting Docket No. 28-2 at 9-10).

The description of the first two examples of firearm laws the Governor identifies reveals that certain cities prohibited discharging firearms within city limits and shifted liability to parents when minors discharged firearms. *See* Docket No. 28-2 at 8-9. These laws are not properly characterized as "restrictions on the use of firearms by minors." Docket No. 28 at 17. These statutes regulate the discharge of firearms by the general population and shift liability to parents for minors' tortious use of firearms.

The last three examples of laws that the Governor identifies can be properly construed as prohibitions on minors' possession or purchase of firearms. The Court largely agrees with *Fraser's* analysis on these laws:

> Thus, by the eve of the Civil War, only three states had passed any form of restrictions on the ability of minors to purchase firearms and each of these was passed 65 years or more after the ratification of the Second Amendment. This legislation therefore tells us nothing about the Founders' understanding of the Second Amendment.

Fraser, 2023 WL 3355339, at *21 (citations omitted). Without any confirmation in the form of founding era regulations, the Court does not consider three pre-Civil War regulations as strong evidence of the "public understanding of the right to keep and bear arms" at the time the Second Amendment was ratified. *Bruen*, 142 S. Ct. at 2138.

Finally, the Governor identifies post-Civil War regulations that some states adopted by the early 20th century. Docket No. 28 at 17-18. The Governor represents that, by 1900, 18 states and the District of Columbia adopted laws regulating firearm sales to

those under the age of 21 and that shortly thereafter 45 states had laws restricting the sale of firearms to minors. *Id.* at 17. The Individual Plaintiffs argue that, of the 17 post-Civil War laws the Governor identifies, *see* Docket No. 28-5 at 2-9, one did not prohibit the purchase of firearms, one is from a state that "operated under a fundamental misunderstanding of the right to bear arms," one was from a Western state that should be disregarded as overly restrictive under *Bruen*, and that seven other laws were adopted by States with no Second Amendment analogue. Docket No. 30 at 9-11. The Individual Plaintiffs argue that the remaining seven laws are not appropriate analogues to SB23-169 because they rely on a status, namely, legal minority, that does not apply to 18-to-20 year olds today. *Id.* at 11.

The Governor argues that the regulations he identifies burden the right to self-defense in a similar way to SB23-169 in that they burden persons under a certain age from accessing weapons, mostly by limiting their ability to purchase weapons. Docket No. 28 at 19-21. Additionally, the Governor argues that the regulations were in place for the same reason that SB23-169 was passed, to protect public safety, despite the fact that such laws would burden the right to self-defense. *Id.* at 20-21.

Bruen stated that the Court has "made clear that individual rights enumerated in the Bill of Rights and made applicable against the States through the Fourteenth Amendment have the same scope as against the Federal Government." 142 S. Ct. at 2137. While it remains an open question as to how a court should weigh historical understandings of the Second Amendment at the time that the Fourteenth Amendment was adopted, *id.* at 2138, because the Governor fails to point to any evidence during the founding era that a total prohibition on the sale of firearms to minors was consistent with

the right to bear arms, the Court gives little weight to evidence from the time of the Fourteenth Amendment's ratification to limit the scope of the right to keep and bear arms. *Cf. McCraw*, 623 F. Supp. 3d at 757 (observing that relying on evidence from the Reconstruction Era alone would "give postenactment history more weight than it can rightly bear" (quoting *Bruen*, 142 S. Ct. at 2136)). The Court finds that the Governor has failed to meet his burden to demonstrate that SB23-169 is consistent with the Nation's historical tradition of firearms regulation. For the purpose of obtaining a preliminary injunction, the Individual Plaintiffs have demonstrated a likelihood of success on the merits.

C. Irreparable Harm

In order to demonstrate entitlement to a preliminary injunction, the Individual Plaintiffs must show that the "[the movant] will suffer irreparable injury unless the injunction issues." *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003) (quoting *Resolution Trust Corp. v. Cruce*, 972 F.2d 1195, 1198 (10th Cir. 1992)). "[T]he 'showing of probable irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction.'" *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1268 (10th Cir. 2005) (quoting *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1260 (10th Cir. 2004)). The Supreme Court has opined that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976). The Tenth Circuit has observed that "[m]ost courts consider the infringement of a constitutional right enough and require no further showing of irreparable injury." *Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 805 (10th Cir. 2019). The Tenth Circuit has

ruled that violations of individual rights guaranteed under the Constitution constitute irreparable harm. *See Aposhian v. Barr*, 958 F.3d 969, 990 (10th Cir. 2020) (collecting cases).

The Individual Plaintiffs argue that they face irreparable harm in the absence of an injunction because "a showing of the infringement of a constitutional right requires no further showing of irreparable injury." Docket No. 12 at 16 (citing *Free the Nipple-Fort Collins*, 916 F.3d at 805). The Governor responds that the Individual Plaintiffs have not shown that a constitutional violation is imminent, arguing that, to the extent the Individual Plaintiffs argue an inability to acquire firearms is a violation of their rights, the Individual Plaintiffs' ability to purchase firearms before SB23-169 took effect and their ability to possess and use a firearm under SB 23-169 mitigates the harm to the Individual Plaintiffs. Docket No. 28 at 24. The Individual Plaintiffs reply that they need an injunction when SB23-169 becomes effective. Docket No. 30 at 14.

Here, because SB23-169 likely causes a violation of the Individual Plaintiffs' individual constitutional rights, *see Aposhian*, 958 F.3d at 990 (observing that "our cases finding that a violation of a constitutional right alone constitutes irreparable harm are limited to cases involving individual rights, not the allocation of powers among the branches of government"), resulting in damages that are potentially inadequately remedied by money and "difficult[to] calculat[e]," *Free the Nipple-Fort Collins*, 916 F.3d at 806, the Court finds the Individual Plaintiffs have shown irreparable injury.

D. Balancing the Equities and Public Interest

The Individual Plaintiffs must demonstrate "that the balance of equities tips" in their favor and "that the injunction is in the public interest." *RoDa Drilling Co.*, 552 F.3d at

1208. The Individual Plaintiffs argue that “the State’s interest in enforcing an unconstitutional law does not outweigh [the Individual] Plaintiffs’ interest in having their constitutional rights protected” and that “it is always in the public interest to prevent the violation of a party’s constitutional rights.” Docket No. 12 at 17. The Governor responds that the State suffers an injury when it cannot enact a law and that, in the case of SB23-169, public safety will be threatened if a pre-enforcement injunction issues. Docket No. 28 at 24-25 (citing *Maryland v. King*, 567 U.S. 1301, 1303 (2012)). On the record before the Court, the Individual Plaintiffs have made a sufficient showing that the balance of equities tips in their favor and that the Individual Plaintiffs’ proposed injunction is in the public interest because the Individual Plaintiffs have made a sufficient showing that SB23-169 infringes the Individual Plaintiffs’ Second Amendment rights.[19] *See Free the Nipple-Fort Collins*, 916 F.3d at 806-07 (“When a constitutional right hangs in the balance, though, even a temporary loss usually trumps any harm to the defendant. . . . [I]t’s always in the public interest to prevent the violation of a party’s constitutional rights.” (internal quotations and citations omitted)).

IV. SECURITY

Under Fed. R. Civ. P. 65(c), “[t]he court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court

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[19] Neither party addresses how the balance of the equities should be addressed in a Second Amendment case or what effect the government’s interest in public safety has on the cases. *See* Docket No. 28 at 24-25; Docket No. 30 at 14. The Court is unaware of any Tenth Circuit precedent describing how cases with these circumstances should be evaluated.

considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." A trial court has "wide discretion under Rule 65(c) in determining whether to require security." *Winnebago Tribe of Neb. v. Stovall*, 341 F.3d 1202, 1206 (10th Cir. 2003) (internal quotations and citation omitted). It is, however, reversible error to fail to consider whether to require a bond. *See Coquina Oil Corp. v. Transwestern Pipeline Co.*, 825 F.2d 1461, 1462 (10th Cir. 1987). The parties do not address whether a bond should be required.[20] *See generally* Docket Nos. 12, 28, 30. The Court finds a bond unnecessary as this case seeks to enforce a constitutional right against the government. *See United Utah Party v. Cox*, 268 F. Supp. 3d 1227, 1260 (D. Utah 2017) (citing *RoDa Drilling Co.*, 552 F.3d at 1215).

V. CONCLUSION

It is **ORDERED** that the portion of plaintiffs' Motion for Preliminary Injunction [Docket No. 12] brought on behalf of plaintiffs Tate Mosgrove and Adrian S. Pineda is **GRANTED**. It is further

ORDERED that the defendant and his officers, agents, servants, employees, and all persons in concert or participation with them who receive notice of this preliminary injunction are enjoined, effective immediately, from enforcing SB23-169. It is further

ORDERED that this preliminary injunction shall remain in effect pending disposition of the case on the merits. It is further

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[20] The proposed order in plaintiffs' motion for a temporary restraining order, Docket No. 34-1 at 2, ¶ 6, states "Plaintiffs do not need to post a security bond because enjoining the Defendant from prohibiting Plaintiffs' exercise of their Second Amendment rights does not interfere with the Defendant's rights."

ORDERED that no bond shall be required under Fed. R. Civ. P. 65(c). It is further

ORDERED that plaintiffs' Motion for Temporary Restraining Order [Docket No. 34] is **DENIED as moot**.

DATED August 7, 2023.

BY THE COURT:

s/Philip A. Brimmer
Philip A. Brimmer
Chief United States District Judge