

IN THE  
SUPREME COURT OF VIRGINIA

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Record No. 250588

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THOMAS AGEE FITZGERALD,

*Appellant,*

v.

COMMONWEALTH OF VIRGINIA,

*Appellee.*

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BRIEF OF GUN OWNERS OF AMERICA, INC., GUN OWNERS  
FOUNDATION, VIRGINIA CITIZENS DEFENSE LEAGUE,  
VIRGINIA CITIZENS DEFENSE FOUNDATION, TENNESSEE  
FIREARMS ASSOCIATION, TENNESSEE FIREARMS  
FOUNDATION, AMERICA'S FUTURE, U.S. CONSTITUTIONAL  
RIGHTS LEGAL DEFENSE FUND, CITIZENS UNITED, AND  
SECOND AMENDMENT LAW SCHOLAR F. LEE FRANCIS  
AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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## INTEREST OF THE *AMICI CURIAE*<sup>1</sup>

*Amici* include nonprofit advocacy and educational organizations and a legal scholar interested in the faithful application of the Second Amendment's textual and historical framework in this and future cases. Consistent application of this framework is essential not only to the proper resolution of the issues presented here, but also to ensuring clarity, stability, and uniformity in Second Amendment jurisprudence. *Amici* are concerned that departures from the Supreme Court's articulated approach risk introducing uncertainty and inconsistency into the law, thereby undermining the Second Amendment's role as a guarantor of life and liberty. *Amici* submit this brief to assist the Court in applying the Second Amendment in a manner consistent with controlling precedent and the text and intent of the Framers.

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<sup>1</sup> Pursuant to Va. Sup. Ct. R. 5:30(d)(2) and (e), it is hereby certified that no party's counsel authored this brief in whole or in part; that no party or a party's counsel contributed money that was intended to fund preparing or submitting this brief; and that no person, other than the *amici curiae*, their members, or their counsel, contributed money that was intended to fund preparing or submitting this brief.

## STATEMENT OF THE CASE

*Amici* adopt the Nature of the Case and Material Proceedings submitted by Appellant Fitzgerald in his Opening Brief, and write separately to highlight salient facts and methodologies employed below.

In 2023, Danville Police arrested Appellant Fitzgerald in connection to an investigation into Derek Miller, a suspected drug dealer and associate of Mr. Fitzgerald. *See Fitzgerald v. Commonwealth*, No. 0261-24-3, 2025 Va. App. LEXIS 319, at \*2–5 (June 3, 2025) (“*Fitzgerald*”). During an ensuing search of Mr. Fitzgerald’s home, Mr. Fitzgerald admitted to police that he occasionally used crack cocaine, and that he “kept a shotgun in his bedroom closet” for home defense. *Id.* at \*6. Police eventually discovered cocaine on Mr. Fitzgerald’s bedroom nightstand, as well as the shotgun Mr. Fitzgerald had disclosed. *Id.* However, at no point did police observe Mr. Fitzgerald possessing his shotgun while *under the influence* of cocaine. Rather, Mr. Fitzgerald was charged with violating Va. Code § 18.2-308.4(A), which prohibits “any person” from possessing “any firearm” while simultaneously in “unlawful[] ... possession of a controlled substance,” regardless of their present sobriety.

Before trial, Mr. Fitzgerald moved to dismiss his Section 18.2-308.4 charge on Second Amendment grounds, citing the textual and historical framework the U.S. Supreme Court adopted in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and reiterated in *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1 (2022). *See Fitzgerald* at \*8. Specifically, Mr. Fitzgerald asserted that the Commonwealth “must demonstrate that [its] regulation” of his firearm possession “is consistent with this Nation’s historical tradition of firearm regulation,” as applied. *Id.*

The trial court denied Mr. Fitzgerald’s motion, instead characterizing the question presented as whether “possessing *drugs* [is] something that the Second Amendment protects.” *Fitzgerald* at \*9 (emphasis added). The trial court then posited that *Bruen*’s “approach ... is *limited* to protecting the right of law abiding[,] responsible citizens” only. *Id.* at \*9–10 (emphasis added, internal quotations omitted). Thus, the trial court appeared to suggest that firearm regulations are immune from constitutional challenge in criminal cases, which often concern the “proscribed” “possession” of “contraband” by persons accused of being

non-law-abiding. *Id.* at \*10.<sup>2</sup> A jury subsequently convicted Mr. Fitzgerald on all counts. *Id.* at \*14.

In a June 3, 2025 unpublished opinion, a panel of the Virginia Court of Appeals affirmed. The panel first discussed its understanding of *Heller* and *Bruen*'s standard, and then affirmed Mr. Fitzgerald's Section 18.2-308.4 conviction on two separate grounds.

First, the panel described *Bruen*'s standard as a "two-prong test." *Fitzgerald* at \*18. Under what it called "step one," the panel understood that it "must determine whether Fitzgerald is a part of the people whom the Second Amendment protects." *Id.* (internal quotations omitted). "If so," the panel explained, the Commonwealth would bear the "burden to justify [its] regulation" historically. *Id.* And in "evaluating the historical tradition in question," the panel asserted that it "may examine 'regulations at the time the Second Amendment was adopted in 1791, or at the time the Second Amendment was incorporated against the states in 1868.'" *Id.* at \*19 (emphasis added). Finally, the panel noted that "Fitzgerald must prevail on both prongs" of *Bruen*. *Id.*

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<sup>2</sup> *But see United States v. Rahimi*, 602 U.S. 680, 701 (2024) (applying *Bruen* in a criminal appeal and rejecting the argument that "Rahimi may be disarmed simply because he is not 'responsible'").

Yet despite acknowledging *Heller* and *Bruen*'s call for a textual analysis of the Second Amendment's terms, the panel then adopted a different approach entirely. "[A]ssuming without deciding that Fitzgerald is among 'the people' protected by the Second Amendment," the panel declared that "there is no ... right to possess a firearm during the commission of a separate crime for purposes of the Second Amendment." *Fitzgerald* at \*27, \*29 n.11. Thus, rather than considering the threshold issue — whether Mr. Fitzgerald belongs to "the people" covered by the Second Amendment's plain text, or whether his simple possession of a shotgun constitutes the "keep[ing]" of an "Arm" — the panel relied on Mr. Fitzgerald's concurrent drug possession as *removing him entirely* from the Amendment's textual scope. *See id.* at \*35.

Separately, the panel claimed to have found "a sufficient historical analogue for Code § 18.2-308.4," citing "the historical prohibition against possessing firearms while smuggling contraband," including alcohol. *Fitzgerald* at \*35. Beginning with "Founding-era laws concerning guns and alcohol," the panel observed that these laws "were few" and "primarily concerned" (1) the "misuse of weapons while intoxicated" and (2) militia-related discipline. *Id.* at \*35–36. Later, during the mid-to-late

19th century, only approximately “nine states” adopted harsher prohibitions, “criminalizing the possession, sale, or distribution of alcohol” altogether. *Id.* at \*36.

The panel then turned its attention to an English smuggling law, which made it an “offence [to] import[] goods without paying the duties imposed thereon by the laws of the customs and excise.” *Fitzgerald* at \*36–37. According to the panel, convictions “for the offense of smuggling ... resulted in both the forfeiture of the contraband *and* any weapons possessed by the accused.” *Id.* at \*39. In support, the panel cited *one* ostensibly Founding-era source describing the removal of weapons from a ship. *See id.* (citing *Talbot v. Commanders & Owners of Three Brigs*, 1 U.S. 95, 97 (1784)). This sole authority was based on a decree in admiralty that did not once mention the term “contraband” in its opinion. *See generally Talbot*, 1 U.S. 95.

Based on this tenuous “historical background,” the panel “conclude[d] that the historical analogue to Code § 18.2-308.4 is the *English* smuggling felony,” surmising that “this felony would have been as the Founders knew it.” *Fitzgerald* at \*40 (emphasis added). But the panel did not identify historical evidence that the Founders *did in fact*

adopt or enforce the “English smuggling felony” as described. Rather, the panel affirmed Mr. Fitzgerald’s conviction for the simple, sober possession of a firearm within his home based on *another* country’s tax laws, an assumption about those laws’ enforcement, and a belief that the Founders imported the practice into the Second Amendment.

Mr. Fitzgerald’s timely appeal followed, allowing this Court to review the decision below under *Heller* and *Bruen*’s methodology.

### **ASSIGNMENTS OF ERROR**

*Amici* adopt the Assignments of Error submitted by Appellant Fitzgerald in his Opening Brief.

### **STANDARD OF REVIEW**

*Amici* adopt the Standard of Review submitted by Appellant Fitzgerald in his Opening Brief.

### **SUMMARY OF ARGUMENT**

This case presents one of this Court’s first opportunities to analyze the Second Amendment under its governing textual and historical

framework. Thus, in addition to deciding the outcome of this case, this Court's analysis also will guide Virginia's lower courts in future Second Amendment cases. Faithful application of the U.S. Supreme Court's precedents is therefore critical to preserving Virginians' rights to keep and bear arms in the years to come. And under these precedents, the Commonwealth cannot disarm an individual for the simple, sober possession of a shotgun within his own home.

Consider the many analytical errors in the panel's approach below. Rather than analyzing the "normal and ordinary" meaning of the Second Amendment's plain text, the panel declared "criminal[s]" exempt from the Constitution's protections, thereby relieving the Commonwealth of its historical burden. And, ultimately deciding that the historical record supported the statute challenged here, the panel relied not on an *American* tradition of disarming drug users, but rather an *English* practice of criminalizing the evasion of import duties. If that is all it takes to criminalize the peaceful possession of a firearm, then the Second Amendment will have lost virtually all its meaning.

Of course, the Founders never criminalized the conduct at issue here, and that historical precept resolves this case in Mr. Fitzgerald's

favor. In fact, firearm regulations concerning intoxicants did not appear until after Reconstruction. And even then, those regulations reached only the possession of firearms while in a state of active intoxication. Taken together, the Second Amendment’s text and history demand reversal of the judgment below.

## ARGUMENT

### I. THE PANEL MISAPPLIED THE U.S. SUPREME COURT’S SECOND AMENDMENT METHODOLOGY, WARRANTING CORRECTION HERE.

The Second Amendment guarantees “the right of the people to keep and bear Arms.” In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court explained that these terms plainly “guarantee the individual right to possess and carry weapons in case of confrontation.” *Id.* at 592. In so holding, the Court conducted a rigorous textual and historical analysis to ascertain the Amendment’s original meaning, because “[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them.” *Id.* at 634–35. As the Court instructed, original meaning would control. Indeed, no “judge-empowering ‘interest-balancing inquiry’” may water down or negate the intent of the Framers. *Id.* at 634.

Elaborating on this textual and historical framework in *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1 (2022), the Court explained:

[W]hen the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. To justify its regulation, ... the government must demonstrate that the regulation is consistent with this Nation’s historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation’s historical tradition may a court conclude that the individual’s conduct falls outside the Second Amendment’s “unqualified command.” [*Id.* at 17.]

In other words, courts hearing Second Amendment challenges are to conduct “a ‘textual analysis’ focused on the ‘normal and ordinary’ meaning of the Second Amendment’s language.” *Bruen*, 597 U.S. at 20. If a law regulates the “keep[ing]” or “bear[ing]” of an “Arm” by a member of “the people,” then that regulation must “comport[] with history and tradition.” *Id.* at 20, 22.

The High Court’s latest pronouncement on the Second Amendment reaffirmed this analytical approach. *See United States v. Rahimi*, 602 U.S. 680, 692 (2024) (explaining that *Bruen* reiterates “the appropriate analysis”); *see also id.* at 714 (Gorsuch, J., concurring) (“reinforc[ing] the focus on text, history, and tradition, following exactly the path we described in *Bruen*”). Thus, “when the Government regulates arms-

bearing conduct, ... it bears the burden to ‘justify its regulation,’” and courts “must ... ‘apply[] faithfully the balance struck by the founding generation.” *Id.* at 691, 692 (majority opinion).

Contrary to these principles, the panel below fashioned an entirely new methodology — one that paid lip service to *Heller*, *Bruen*, and *Rahimi*, but ultimately bore no resemblance to them. First, the panel “assum[ed] without deciding” that Mr. Fitzgerald belonged to “the people” covered by the Second Amendment. *Fitzgerald* at \*27. But then, in place of any *actual* textual analysis, the panel ordained that any person committing a crime — *any crime* — simply has no Second Amendment rights at all. *See id.* at \*28–29. Thus, in the panel’s view, Mr. Fitzgerald’s possession of cocaine voided his Second Amendment rights and rendered historical analysis unnecessary. *See id.* at \*35.

Then, the panel concluded, in the alternative, that the challenged statute could be historically justified based not on any *American* tradition of *firearm regulation*, but rather on an *English* tradition of seizing contraband from alcohol smugglers evading import duties. *See Fitzgerald* at \*40.

The panel’s contrived methodology violates *Heller*, *Bruen*, and *Rahimi*’s teachings at least six times over. In the following sections, *amici* highlight key methodological precepts that should guide this Court’s analysis. Applying these precepts faithfully not only will resolve this case, but also will provide critical guidance to Virginia’s lower courts in future Second Amendment cases.

**A. The Panel’s Limitless Approach Exempts “All Americans” from the Second Amendment.**

Instead of analyzing the “normal and ordinary’ meaning of the Second Amendment’s” plain text (*Bruen*, 597 U.S. at 20), the panel charted its own course, asserting broadly that “there is no traditional Second Amendment right to possess a firearm during the commission of a *separate* crime.” *Fitzgerald* at \*29 n.11.<sup>3</sup> The panel did not limit its

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<sup>3</sup> In support of this proposition, the panel relied on: (1) a 19th-century treatise by William Rawle; and (2) an early draft of the Second Amendment containing text that the Framers ultimately *rejected*. See *Fitzgerald* at \*27–28. But the Rawle treatise discussed “unlawful purpose[s]” in the context of “disturbance[s] of the public peace.” *Heller*, 554 U.S. at 607–08. How Mr. Fitzgerald’s possession within the home could have disturbed the public, the panel did not say. The panel’s reliance on a rejected Second Amendment draft likewise fails. Indeed, Justice Kavanaugh explains the opposite is true: “pre-ratification history can be probative of what the Constitution does *not* mean.” *Rahimi*, 602 U.S. at 720 (Kavanaugh, J., concurring).

assertion to violations of Section 18.2-308.4. Rather, the panel swept far beyond the challenged statute, reaching any “*criminal offense.*” *Id.* at \*29. The panel thus relieved the Commonwealth of its historical burden, claiming that the mere presence of cocaine within Mr. Fitzgerald’s home voids the protections of the Second Amendment with respect to the shotgun in his bedroom closet. The implications of this truly stunning conclusion appear to have been lost on the panel below. Indeed, if the panel were correct, then virtually *no American* could claim to have Second Amendment rights.

Start with Mr. Fitzgerald’s alleged crime — possession of an illegal drug within the home. Given that 24.9 percent of Americans over the age of 12 have illegally abused drugs within the past year,<sup>4</sup> including 13 percent within the last month,<sup>5</sup> nearly a quarter of Americans could be disqualified on that basis alone. But that is barely the tip of the iceberg.

Consider the jaywalker caught crossing a public street while carrying a handgun. While no longer a primary offense under Virginia law, jaywalking remains a traffic infraction punishable by fine “not more

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<sup>4</sup> *Drug Abuse Statistics*, NCDAS, <https://drugabusestatistics.org> (last visited Jan. 15, 2026).

<sup>5</sup> *Illicit Drug Use*, CDC (Sept. 9, 2025), <https://tinyurl.com/4jzad5ax>.

than that” of a Class 4 misdemeanor. *See* Va. Code § 46.2-113. Under the panel’s approach, a jaywalker would have no “Second Amendment right to possess a firearm *while committing a criminal offense.*” *Fitzgerald* at \*28–29. Suddenly, the jaywalker’s peaceful possession of a firearm while jaywalking could be criminalized, as there would be no “right” to carry a firearm while illegally crossing the street. The same would be true for the far more attenuated tax cheat. Indeed, without any limiting principle identified below, a person’s *ongoing* evasion of income taxes — like with the drug possessor — would create an ongoing deprivation of any “Second Amendment right to possess a firearm during the commission of [that] *separate* crime.” *Id.* at \*29 n.11.

The panel’s approach crumbles further when one realizes that *most Americans* regularly commit criminal acts — almost always unintentionally. Just at the federal level, the current number of committable crimes is so vast that it is *incalculable*. U.S. Senator Mike Lee (R-UT) once requested the Congressional Research Service (“CRS”) to estimate the then-current total number of federal crimes on the books. CRS responded that the answer is “unknown and unknowable, but it’s at

least 300,000.”<sup>6</sup> Perhaps unsurprisingly, one legal scholar estimates that the average American unwittingly commits crimes with regularity. See Harvey A. Silverglate, Three Felonies a Day: How the Feds Target the Innocent (2009). Indeed, famous racecar driver Bobby Unser could attest to the overcriminalization of American society, as he was once convicted of a federal offense for getting lost on a snowmobile in a blizzard.<sup>7</sup> Under the panel’s decision below, Unser would have no Second Amendment rights had he been carrying a gun while fighting for his life in the snow. That cannot be the law.

Given such overcriminalization, a number of Supreme Court Justices have rejected any notion that Second Amendment rights inhere *only* in the “law-abiding,” whatever that may mean. During oral argument in *Rahimi*, Chief Justice Roberts queried: “Is someone who drives 30 miles an hour in a 25 ... mile-an-hour zone — does that person qualify as law-abiding ... or not?”<sup>8</sup> Justice Barrett likewise noted “the

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<sup>6</sup> *The Tucker Carlson Show*, X, at 40:00 (July 30, 2024), <https://x.com/TuckerCarlson/status/1818330870551572920>.

<sup>7</sup> See Brief for the United States in Opposition at 2, *Unser v. United States*, No. 98-1600 (U.S. July 1999), <https://tinyurl.com/yicydyp7a>.

<sup>8</sup> Transcript of Oral Argument at 8:1–4, *United States v. Rahimi*, No. 22-915 (U.S. Nov. 7, 2023), <https://tinyurl.com/2d2rsdnt>.

ambiguities in that [‘law-abiding’] phrase.” *Id.* at 49:3–4. Indeed, as Justice Thomas explained in his *Rahimi* dissent, “[n]ot a single Member of the Court adopt[ed] the Government’s theory” that “the Second Amendment allows Congress to disarm anyone who is not ‘responsible’ and ‘law-abiding.’” *Rahimi*, 602 U.S. at 772–73 (Thomas, J., dissenting).

If all it takes to sidestep Second Amendment analysis is the Commonwealth’s identification of some — any — “separate crime,” then virtually *no American* can claim any substantive right to keep or bear arms, despite the “strong presumption that the Second Amendment right ... belongs to *all Americans*.” *Heller*, 554 U.S. at 581 (emphasis added). This Court should reject the panel’s expansive conclusion and untenable textual analysis. To affirm would “throttle gun ownership without implicating Second Amendment scrutiny.... What a marvelous, Second Amendment loophole!” *United States v. Hicks*, 649 F. Supp. 3d 357, 360 (W.D. Tex. 2023), *rev’d on other grounds*, 2025 U.S. App. LEXIS 18297 (5th Cir. July 23, 2025).

**B. *Bruen* Established a One-Step Test Where the Court’s Initial Textual Analysis Is Merely a Subject-Matter Qualifier.**

At the outset of its analysis, the panel claimed that *Bruen* established a “two-prong test,” with a distinct “step one” (text) and

“second prong” (history). *Fitzgerald* at \*18. But that is the *opposite* of what *Bruen* said. Rather, *Bruen* repudiated the two-step interest-balancing tests that had proliferated in the lower courts after *Heller*, calling that approach “one step too many.” *Bruen*, 597 U.S. at 19. Accordingly, *Bruen* directed courts to conduct a *one-step* test: “text, as informed by history.” *Id.*

This distinction is not merely semantic. Properly understood, a court’s textual analysis asks only a practical, threshold question: *Are we dealing with a firearm<sup>9</sup> regulation, or not?* Here, the answer is abundantly clear. Section 18.2-308.4 regulates the possession (keeping) of firearms (arms), and so the Commonwealth “bears the burden to ‘justify its regulation.’” *Rahimi*, 602 U.S. at 691.

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<sup>9</sup> Of course, the Second Amendment also protects defensive articles, accoutrements, and weapons besides firearms. *See, e.g., Caetano v. Massachusetts*, 577 U.S. 411 (2016) (stun guns); *United States v. Miller*, 307 U.S. 174, 181 (1939) (surveying militia acts requiring, *inter alia*, “a sufficient Bayonet and Belt, ... two spare Flints, a Blanket and Knapsack”). *Amici* use the term “firearm regulation” here simply because Mr. Fitzgerald’s weapon was in fact a firearm.

Contrary to the approach taken below, a textual analysis is no place to screen out challenges to *obvious* firearm regulations at the threshold.<sup>10</sup> Other courts have rejected such approaches as “obviously silly,”<sup>11</sup> as they would “narrowly define the regulated conduct at the outset, improperly conflating the first and second steps of *Bruen*.”<sup>12</sup> Indeed, *Heller*, *Bruen*, and *Rahimi* exemplify the ease with which this case should clear the analytical qualifier:

First, as *Heller* explained, to “keep” an arm means to own, “possess[],” or “have” it. *Heller*, 554 U.S. at 582. Mr. Fitzgerald’s possession of a shotgun within his home clearly constitutes “keep[ing].” *See Bruen*, 597 U.S. at 32 (noting “individuals often ‘keep’ firearms in their home, at the ready for self-defense”). Next, the term “Arms” means “[w]eapons of offence, or armour of defence,” and “any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another,” including “all firearms,” as originally understood.

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<sup>10</sup> *Accord Reese v. BATFE*, 127 F.4th 583, 590 (5th Cir. 2025) (“The baleful implications of limiting the right at the outset ... are obvious; step by step, other limitations ... could easily displace the right altogether.”).

<sup>11</sup> *Beckwith v. Frey*, 766 F. Supp. 3d 123, 130 n.4 (D. Me. 2025).

<sup>12</sup> *United States v. Martinez*, 2025 U.S. Dist. LEXIS 70187, at \*13 (E.D. Tex. Apr. 14, 2025).

*Heller*, 554 U.S. at 581. Moreover, “the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.” *Id.* at 582. Thus, Mr. Fitzgerald’s shotgun unquestionably is an “Arm” under the Second Amendment’s plain text. Finally, the term “the people” “unambiguously refers to all members of the political community, not an unspecified subset.” *Id.* at 580. Consequently, “[w]e start ... with a strong presumption that the Second Amendment right ... belongs to all Americans.” *Id.* at 581. Here, too, Mr. Fitzgerald satisfies the plain text, simply because he is an adult American. *See also Rahimi*, 602 U.S. 686–88 (proceeding to historical analysis despite the respondent’s violent history); *Range v. Att’y Gen. U.S.*, 124 F.4th 218, 228 (3d Cir. 2024) (internal quotations omitted) (“reject[ing] the Government’s contention that felons are not among the people protected by the Second Amendment”).

Thus measured against *Bruen*’s methodological “hold[ing],” Section 18.2-308.4 clearly regulates conduct “cover[ed]” by the Second Amendment’s plain text — the possession of a shotgun within the home. *Bruen*, 597 U.S. at 17. Accordingly, “the Constitution presumptively

protects that conduct” (*id.*), and the Commonwealth must bear its historical burden to show that Americans historically could be disarmed merely based on the presence of intoxicating substances within the home.

**C. Section 18.2-308.4 Is Presumptively Unconstitutional Under *Bruen*, and the General Assembly’s Challenged Enactment Is Entitled to No Judicial Deference.**

Prior to beginning its analysis of Section 18.2-308.4, the panel asserted that “[a]ll legislative acts are presumed to be constitutional,” and that “[t]his presumption is one of the strongest known to the law.” *Fitzgerald* at \*14 (internal quotations omitted). Thus, the panel claimed that “[t]he party challenging an enactment has the burden of proving that the statute is unconstitutional.” *Id.* at \*14–15. These statements are impossible to square with *Bruen*’s governing standard, and they render constitutional rights *presumptively violable* unless and until an individual proves otherwise. But this would render the Second Amendment “no constitutional guarantee at all.” *Heller*, 554 U.S. at 634.

As *Bruen* made clear, the opposite is true: “when the Second Amendment’s plain text covers an individual’s conduct, the Constitution *presumptively protects* that conduct.” *Bruen*, 597 U.S. at 17 (emphasis added). In other words, a regulation of that conduct is *presumptively*

*unconstitutional*, and the only “burden” lies with the government to prove otherwise. *See id.* at 34 (“Only if [the government] carr[ies] that burden can [it] show that ... the Second Amendment ... does not protect petitioners’ proposed course of conduct.”). Indeed, *Bruen* left open only one possibility for a firearm regulation *not* to be unconstitutional — “consisten[cy] with this Nation’s historical tradition.” *Id.* at 17; *see also id.* (“[o]nly if”); *id.* at 24 (“[o]nly then”).

The panel’s approach inverts the rule of *Bruen* in the Commonwealth’s favor. This Court should apply *Bruen* as written.

**D. *Bruen* Requires a Historical Showing of American “Firearm Regulations,” Not a Single Foreign “Smuggling” Law of Dubious Relevance.**

Despite concluding that Mr. Fitzgerald’s Second Amendment challenge could be resolved without any resort to history, the panel proceeded to rule “that the historical analogue to Code § 18.2-308.4 is the English smuggling felony described by Blackstone.” *Fitzgerald* at \*40. But upholding a modern *firearm regulation* using something other than historical *firearm regulations* conflicts with *Bruen*’s clear instruction. This error permeated the panel’s historical analysis, allowing the panel to contrive a historical tradition justifying Mr. Fitzgerald’s disarmament

when no such tradition actually existed and, in fact, the historical tradition demonstrates otherwise. *See* Section II.B, *infra*.

Consider *Bruen*'s instruction that the "government must demonstrate that [its] regulation is consistent with this Nation's historical tradition of *firearm regulation*." *Bruen*, 597 U.S. at 17 (emphasis added). So critical was this notion of requiring historical *gun laws* to uphold a modern *gun law* that the Court reiterated variations of the term "firearm regulation" seven more times throughout the majority opinion. *See id.* at 17-67. In *Rahimi*, this requirement appeared again, upholding a federal statute temporarily disarming those "who threaten physical harm to others" because, "[s]ince the founding, our Nation's *firearm laws* have included provisions preventing individuals" from doing just that. *Rahimi*, 602 U.S. at 690 (emphasis added). In other words, courts must seek direct historical comparators.

Rather than seeking such benchmarks, the panel compiled a hodgepodge of disparate regulations lacking any direct relationship to firearms. As the panel conceded in a footnote, "[t]here was very little regulation of drugs (related to firearm possession or otherwise) until the late 19th century." *Fitzgerald* at \*35 n.15. So, the panel claimed,

“intoxication via alcohol” is the “next-closest” analogue. *Id.* But the panel never identified a single historical regulation banning the concurrent possession of *alcohol and firearms* the same way Section 18.2-308.4 regulates mere possession of *controlled substances and firearms* today. *See id.* at \*35–36. Indeed, as demonstrated below, the Founding generation never disarmed someone for merely possessing an intoxicating substance — drugs, alcohol, or otherwise. *See* Section II.A, *infra*.

Left without any direct historical tie between alcohol and firearms, the panel sought to link alcohol with “*contraband*,” observing that, by the 19th century, some states had criminalized possession of alcohol. *Fitzgerald* at \*36. Thus, theorizing that alcohol had been labeled “*contraband*,” the panel turned to a smuggling law, which reportedly provided for the forfeiture not only of “*contraband*,” but also of “any weapons possessed by the accused.” *Id.* at \*39. Voilà — from alcohol to *contraband*, *contraband* to smuggling, and smuggling to weapons, the panel discovered a linkage between an intoxicant and firearms. All it took was three degrees of separation.

Of course, this highly attenuated approach bears no resemblance to the Supreme Court’s search for analogous *firearm regulations*. *Heller* sought historical evidence that handguns could be banned, and concluded that “[f]ew laws” in the historical record ever “c[a]me close.” *Heller*, 554 U.S. at 629. Similarly, *Bruen* sought evidence of jurisdictions “broadly prohibiting ... public carry,” and found none. *Bruen*, 597 U.S. at 38. And *Rahimi* sought evidence that “individuals who threaten physical harm to others” could be “prevent[ed] ... from misusing firearms.” *Rahimi*, 602 U.S. at 690. None of these analyses required the analytical gymnastics used below.

Surveying the historical record, this Court should rely on firearm regulations only. And, finding none that regulated simple possession during the operative time period, this Court should reverse.

**E. The Founding Era Is the Primary Time Period for Historical Analysis, While Pre- and Post-Enactment History Serves (at Most) a Confirmatory Role.**

In deciding the relevant historical time period, the panel endorsed alternative approaches, positing that it could “examine ‘regulations [either] at the time the Second Amendment was adopted in 1791, or at the time the Second Amendment was incorporated against the states in

1868.” *Fitzgerald* at \*19 (emphasis added). Even so, the panel took neither approach, ultimately relying on an “English smuggling felony,” which it theorized “would have been as the Founders knew it.” *Id.* at \*40. But aside from *presuming* Founding-era approval, the panel never cited *actual* Founding-era laws endorsing this English approach. The panel’s approach merely pays lip service to the Supreme Court’s temporal focus on the Founding, which this Court should clarify is the primary time period for historical analysis.

As *Bruen* explained, “not all history is created equal.” *Bruen*, 597 U.S. at 34. And despite acknowledging “an ongoing scholarly debate” as to the relevance of Reconstruction-era history, the Court has “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 37. Thus, prior “English common-law practices ... cannot be indiscriminately attributed to the Framers of our own Constitution.” *Id.* at 35. The same is true for post-Founding history, which “[i]s ‘treated as mere confirmation of what the Court thought had already been established.’” *Id.* at 37. In other words, this Court is to “‘apply[] faithfully the balance struck by the

founding generation to modern circumstances.” *Rahimi*, 602 U.S. at 692. Pre- and post-enactment history may help confirm this Court’s understanding if it is consistent with original meaning, but such history alone “obviously cannot overcome or alter th[e] text.” *Bruen*, 597 U.S. at 36.

Founding-era primacy comports with the Supreme Court’s approach to all manner of other constitutional rights. For instance, in a First Amendment challenge to state action, the Court observed that “a tradition” that “arose in the second half of the 19th century,” even in “more than 30 States,” “cannot by itself establish an early American tradition.” *Espinoza v. Mont. Dep’t of Revenue*, 591 U.S. 464, 482 (2020). Likewise, in another First Amendment challenge to state action decided within days of *Bruen*, the Court explained that the “line” courts must draw under the Establishment Clause must “accor[d] with history and faithfully reflec[t] the understanding of the Founding Fathers.” *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 535, 536 (2022). And in a Sixth Amendment challenge to state action, the Court also examined the “historical record,” “admitting only those exceptions established *at the time of the founding*.” *Crawford v. Washington*, 541 U.S. 36, 54 (2004)

(emphasis added). In contrast, the Supreme Court has never held — as the panel below did — that the Reconstruction era can provide the lens with which to interpret constitutional rights.

Consistent with these precedents, this Court should clarify that the Founding era *alone* controls historical analysis under the Second Amendment, with later history providing, at most, confirmation. And, surveying the history through this focal point, this Court should reverse the decision below.

**F. Historical Laws Are “Relevantly Similar” to the Challenged Statute Only if They Share Similar Mechanisms and Motivations.**

Finally, the panel claimed that “the historical prohibition against possessing firearms while smuggling contraband” is a “sufficient historical analogue for Code § 18.2-308.4.” *Fitzgerald* at \*35. But under *Bruen*, smuggling laws are no analogue for regulations of firearm possession within the home. Indeed, they fail both of *Bruen*’s “how” and “why” metrics for analogical reasoning. *Bruen*, 597 U.S. at 29.

Consider “how” the English smuggling law “burden[ed] a law-abiding citizen’s right to armed self-defense” (*Bruen*, 597 U.S. at 29) — it did not. The smuggling law made it an “offence [to] import[] goods

without paying the duties imposed thereon by the laws of the customs and excise.” *Fitzgerald* at \*36–37. It did not prevent a person from possessing a firearm. Indeed, insofar as the smuggling law contemplated firearm possession, it was only for felony-grading purposes, and only when “three or more persons ... assemble[d]” to smuggle. *Id.* at \*37. Not only did Mr. Fitzgerald possess his firearm *alone*, but the Commonwealth never alleged he *imported* his cocaine without paying customs duties. The smuggling law operated completely differently from Section 18.2-308.4.

The smuggling law also addressed an entirely different “why.” It sought to ensure that *taxes were paid*, not that possessors of intoxicants were *disarmed*. See *Fitzgerald* at \*37. Moreover, English smuggling laws precipitated the very “general warrants” and “writs of assistance” that the Founders so reviled, and in response to which the Fourth Amendment was adopted. *Carpenter v. United States*, 585 U.S. 296, 303 (2018). It seems unlikely that the Founders intended the *reason for* one Amendment to simultaneously undermine the protections of *another*. See *Rahimi*, 602 U.S. at 723 (Kavanaugh, J., concurring) (“[C]ourts must

exercise care to rely only on the history that the Constitution actually incorporated and not on the history that the Constitution left behind.”).

The panel failed to engage with any of these clearly distinguishing features. This Court should clarify that historical analogues must share *both* a “how” *and* “why” with the challenged statute. Applying this rigorous standard here, no Founding-era analogue exists for Section 18.2-308.4.

## **II. THERE IS NO HISTORICAL PRECEDENT FOR LIMITING AN INDIVIDUAL’S RIGHT TO KEEP AND BEAR ARMS FOR BEING A MERE USER OF AN INTOXICANT.**

At the Founding, despite intoxicating drugs being broadly available and widely used, there was no tradition of disarming individuals based on drug use, and that absence is dispositive under *Bruen*. As explained below, neither colonial legislatures nor the early states restricted firearm possession based on the use of intoxicants, including drugs. *See* Section II.A, *infra*. Yet, throughout the 19th century, substances such as cocaine were widely used for medicinal and commercial purposes without any corresponding practice of disarmament. *See* Section II.B, *infra*. Nevertheless, regulations addressing intoxicants appeared in only a minority of jurisdictions after Reconstruction. *See* Section II.C, *infra*.

Thus, even if a general user/active intoxication distinction existed in those few jurisdictions in the 19th century, it sheds no light on the public understanding of the Second Amendment at the time of its ratification in 1791. *See* Section I.E, *supra*.

**A. There Was No Tradition at the Founding of Disarming Individuals Based on Drug Use or Intoxication.**

From prior to the Second Amendment’s adoption through the early 19th century, legislatures did not limit the individual right to keep and bear arms merely because one sometimes used an intoxicant. To the extent these jurisdictions *did* regulate firearms vis-à-vis intoxicants, the historical record is sparse, and in no way analogous to Section 18.2-308.4.

For instance, Virginia colony enacted a law in 1655 that prohibited any person from “shoot[ing] any guns at drinking (marriages and funerals only excepted) that such person or persons so offending shall forfeit 100 lb. of tobacco.” *See* 1655 Va. Acts 401, Acts of March 10, 1655, Act XII. Notably, the law did not even prohibit possession of a firearm *while* drinking — for good reason. Historical scholarship explains the purpose of the Virginia law was to prevent false alarms of an Indian attack. *See* Ann E. Tweedy, “*Hostile Indian Tribes ... Outlaws, Wolves, ... Bears ... Grizzlies and Things Like That?*” *How the Second Amendment*

*and Supreme Court Precedent Target Tribal Self-Defense*, 13 U. Pa. J. Const. L. 687, 698 (2011) (“Virginia ... passed a statute in 1655–56.... The reason for the law was that ‘gunshots were the common alarm of Indian attack,’ ‘of which no certainty can be had in respect of the frequent shooting of guns in drinking.’”).

Also in 1655, colonial New York restricted the discharge of firearms on specific occasions. *See Ordinance of the Director General and Council of New Netherland to Prevent Firing of Guns*, 1665 N.Y. Laws 205 (“[M]uch Drunkenness and other insolence prevail on New Year’s and May Days, by firing of guns, ... [leading] to deplorable accidents such as wounding, ... the director General ... expressly forbids from this time forth all firing of Guns.”). Thus, where the colonies occasionally regulated firearm *discharge*, they were notably silent as to firearm *possession*, even alongside intoxicants.

Similarly, early militia enactments reveal no effort to screen out the intemperate. Even men known for drunkenness were counted among those obligated to appear with firearms. *See W.J. Rorabaugh, The Alcoholic Republic: An American Tradition* 15 (1979) (“Liquor was so popular that the army dared not bar the recruitment or reenlistment of

habitual drunkards.”). Even as the Founding generation dealt with widespread drunkenness, the historical record reveals no corresponding practice of disarmament. Accordingly, intemperance alone did not place an individual outside the protections of the right to keep and bear arms.<sup>13</sup>

At bottom, these early enactments did not prevent firearm possession or ownership while intoxicated, nor was intoxication (or intoxicant possession) an element of any of these offenses. More importantly, the applicability of these colonial statutes was not exclusive to intoxicant users or possessors. Instead, the plain language of these statutes indicates that these laws generally applied to all individuals, and only with respect to certain *conduct* with firearms.

It was not until after the Civil War that some states began to pass firearm regulations concerning intoxicants. Even so, these enactments only restricted firearm possession during *active* intoxication. *See* General Statutes of the State of Kansas 378, ch. 31, § 282 (John M. Price et al.,

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<sup>13</sup> *See also* F. Lee Francis, *Armed and Under the Influence: The Second Amendment and the Intoxicant Rule After Bruen*, 107 Marq. L. Rev. 803, 806 (2024) (“From before the enactment of the Second Amendment through the early nineteenth century, legislatures did not limit the individual right to keep *or* bear arms merely because one sometimes used an intoxicant.”).

eds., 1868) (“[A]ny person under the influence of intoxicating drink ... carrying on his person a pistol ... or other deadly weapon, shall be subject to arrest upon charge of misdemeanor.”); Revised Code of the Statute of Laws of the State of Mississippi 776, ch. 77, § 2986 (J.A.P. Campbell ed., 1880) (“It shall not be lawful for any person to sell to any ... person intoxicated, knowing him to be ... in a state of intoxication” any concealable, deadly weapon.); Supplement to the Revised Statutes of Wisconsin 848, ch. 181, § 4397b(3) (A. L. Sanborn & J. R. Berryman eds., 1883) (“It shall be unlawful for any person in a state of intoxication to go armed with any pistol or revolver.”); 1 Revised Statutes of the State of Missouri 854, ch. 47, § 3502 (Samuel C. Major et al., eds., 1889) (“If any person ... shall have or carry any [deadly or dangerous weapon] upon or about his person when intoxicated, or under the influence of intoxicating drinks ... shall, upon conviction, be punish by a fine ... or by imprisonment.”); Statutes of Oklahoma 1890 495, ch. 25, art. 47, § 4 (Will T. Little et al. eds., 1891) (prohibiting “any public officer” from “carrying” certain specified arms, including a pistol or revolver, “while under the influence of intoxicating drinks”). Of these post-Civil War statutes, each

applied only when an individual was actively under the influence of, or actively using, intoxicants.

Critically, these 19th-century enactments did not restrict an individual's right to keep arms when, although an intoxicant user, he or she was sober. That is, none of these laws prohibited the mere possession of a firearm.<sup>14</sup> And certainly never *within the home*, as here. The Kansas, Wisconsin, and Oklahoma laws prohibited the bearing — carrying — of a firearm *while* an individual was under the influence or actively using intoxicants. None restricted sober intoxicant users from carrying or possessing firearms.

All told, from the colonial period through the end of the 19th century, *amici* have found no analogue to the challenged statute's restriction on firearm possession while sober.

### **B. Nineteenth-Century Medicinal and Commercial Use of Cocaine Products Occurred Without Any Practice of Firearm Disarmament.**

Contrary to Mr. Fitzgerald's conviction for concurrent possession of a firearm with cocaine, the Nation saw no need to regulate cocaine at all

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<sup>14</sup> The Supreme Court explained that “keep[ing]” arms is synonymous with possession. *See Heller*, 554 U.S. at 582–83.

for more than a century after the Revolution. See F. Lee Francis, *The Addiction Restriction: Addiction and the Right to Bear Arms*, 127 W. Va. L. Rev. 135 (2024). In fact, meaningful federal oversight of cocaine would not arrive until the early 20th century. See Pure Food and Drug Act (1906); Harrison Narcotics Tax Act (1914); Narcotic Drugs Import and Export Act (1922); and Narcotic Control Act (1956). But these enactments came decades *after* cocaine first became popular.

Indeed, beginning in the mid-19th century, coca products, the leaves from which cocaine is derived, were first administered in low doses. See W. G. Mortimer, Peru: The History of Coca 255–56 (1901) (“Coca was introduced to Europe by the reports of sixteenth-century explorers, seventeenth-century chroniclers, eighteenth-century naturalists, and nineteenth-century botanists.”); Ronald K. Siegel, *Repeating Cycles of Cocaine Use and Abuse*, in 2 Treating Drug Problems: Commissioned Papers on Historical, Institutional, and Economic Contexts of Drug Treatment (Dean Gerstein & H.J. Harwood. eds. 1992) (“After Mantegazza’s 1857 and 1859 essays on the virtues of coca, medical and nonmedical coca products appeared, and European use initially followed the same low-dose patterns observed in South America.”). And

in the decades that followed, cocaine's use expanded well beyond controlled medical settings. It became a common ingredient in commercial tonics and over-the-counter preparations. See Francis, *Addiction Restriction, supra* (detailing the historical uses of cocaine).<sup>15</sup>

Yet at no point during this time period did legislatures enact laws similar to Section 18.2-308.4. Thus, 19th-century and later history do not establish a tradition of regulating even *cocaine*, much less the possession of firearms *and* cocaine.

**C. Post-Reconstruction Laws Regulating Active Intoxication Were Narrow, Conduct-Based, and Cannot Justify Status-Based Disarmament.**

To summarize, there was no tradition of disarming individuals based on drug use at the time of the Second Amendment's ratification in 1791, a historical absence that is dispositive under *Bruen*. The historical record departs from this Founding-era silence only after Reconstruction. Even so, this minority of post-Civil War statutes implicitly distinguished

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<sup>15</sup> See also Gopal Das, *Cocaine Abuse in North America: A Milestone in History*, 33 J. Clinical Pharmacology 296, 296 (1993) ("Initially, there were no laws restricting the consumption or sale of cocaine. In fact, cocaine was freely available in drug stores, saloons, from mail-order vendors and even in grocery stores."); see also Richard H. Blum et al., *Society and Drugs: Social and Cultural Observations* 45–46 (1st ed. 1969).

between those who used intoxicants generally, and those who were actively intoxicated at the time they possessed firearms. Of course, only the latter's right to carry arms was restricted. That poses some analytical problems for the panel opinion below.

First, statutes criminalizing active intoxication are premised on the notion that dangerousness is heightened when one possesses a firearm while intoxicated. *See State v. Christen*, 958 N.W.2d 746, 766 (Wis. 2021) (Hagedorn, J., concurring) (“[T]he unique danger of intoxication when combined with potentially deadly force has long been acknowledged.”).<sup>16</sup> But absent intoxication, dangerousness is at its lowest ebb. *See Rahimi*, 602 U.S. 680 (surveying historical laws requiring individualized showings of dangerousness for disarmament, and rejecting the notion that the Second Amendment permits disarmament based merely on perceived lack of “responsibility”). If dangerousness is the operative standard for disarmament, it is difficult to claim Mr. Fitzgerald should

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<sup>16</sup> It is important to note that, in analyzing the statute at issue in *Christen*, the majority relied on a test that has since been repudiated by the Supreme Court. *See Bruen*, 597 U.S. at 19 (“Despite the popularity of th[e] two-step approach, it is one step too many.”).

be disarmed, considering he was sober at the time he cooperated with police, voluntarily disclosing to them that he owned a shotgun.

Second, the 19th-century record further confirms that the general use of intoxicants, including substances capable of producing impairment, was not understood as a basis for disarmament. In fact, prominent public figures such as Abraham Lincoln were known to consume intoxicating substances during their lifetimes, yet such use was not thought to place them outside the community of arms-bearing citizens. *See* Harry E. Pratt, The Personal Finances of Abraham Lincoln 153 (1943) (describing a pharmacy ledger reflecting the purchase of 50 cents' worth of cocaine).

Historians have long documented Lincoln's struggles with depression. *See* Joshua Wolf Shenk, Lincoln's Melancholy: How Depression Challenged a President and Fueled His Greatness (2005). Historical accounts indicate that, in treating his symptoms, Lincoln relied on mercury-based medicines and other substances then used in medical practice, including cocaine. *See* Norbert Hirschhorn, Robert G. Feldman & Ian Greaves, *Abraham Lincoln's Blue Pills: Did Our 16th President Suffer from Mercury Poisoning?*, 44 *Persps. Biology & Med.*

315, 315 (2001). Yet in spite of his personal cocaine possession, in 1863 President Lincoln met with rifle maker C. W. Spencer and personally fired Spencer's newly patented seven-shot repeating rifle during a live-fire demonstration near the Washington Monument. *See* Harold Holzer, Dear Mr. Lincoln: Letters to the President 188 (1993). Despite his known use of intoxicating substances, Lincoln's possession and use of a firearm drew no objection, reflecting a conduct-based, rather than status-based, understanding of dangerousness.

The historical response to intoxication focused on regulating dangerous conduct when it occurred, not on stripping individuals of constitutional rights based on substance use — or here, mere possession — alone. Even if such conduct-based understandings were widespread by the mid-19th century, they shed no light on the public understanding of the Second Amendment at the time of its ratification in 1791.

### **III. HISTORICAL-TRADITION FRAMEWORK FOR DETERMINING THE DANGEROUSNESS OF AN INDIVIDUAL.**

The historical record shows that any restrictions governing firearm possession were justified only when tied to concrete findings of dangerousness, not broad assumptions or status-based disarmament. *See Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J.,

dissenting) (“History ... demonstrates that legislatures have the power to prohibit dangerous people from possessing guns. But that power extends only to people who are *dangerous*.”).

In contrast, the English tradition of disarming “dangerous” persons was rooted not in concerns about personal risk or irresponsibility, but in the Crown’s efforts to suppress political threats. Dating back to at least the seventh century, English disarmament practices targeted those viewed as disloyal to the sovereign — rebels, Catholics, and other “disaffected persons” whose perceived sedition made them potential participants in insurrection. See F. Lee Francis, *Defining Dangerousness: When Disarmament Is Appropriate*, 56 Tex. Tech L. Rev. 593 (2024). These measures rested on mere association: a person could be disarmed not because of any individualized finding of dangerous conduct, but because membership in a distrusted group signaled possible disloyalty. In this sense, English law required only a generalized showing of political dangerousness, not a demonstration of behavioral risk. *Id.*

The American tradition developed in conscious reaction to English practices. See *Rahimi*, 602 U.S. at 720 (Kavanaugh, J., concurring)

("[S]ome pre-ratification history can be probative of what the Constitution does *not* mean. The Framers drafted and approved many provisions of the Constitution precisely to depart from rather than adhere to certain pre-ratification laws, practices, or understandings."). Thus, pre-ratification history can illuminate not only the practices the Constitution preserved, but also those the Framers deliberately chose to abandon. *Id.* Broudscale disarmament based on disfavored class was one of those abandoned practices.

The colonists depended on arms for survival, resisted group-based disarmament, and grounded their firearms culture in individual rights rather than loyalty-based restrictions. The Founding generation therefore did not adopt England's political-association model of dangerousness, and the Second Amendment cannot be read to somehow have incorporated it.

Modern attempts to justify categorical disarmament based on status — rather than individualized conduct — find no support in the American experience, properly understood. *See Bruen*, 597 U.S. at 59, 55 ("Under the common law, individuals could not carry deadly weapons in a manner likely to terrorize others. ... These laws were not *bans* on public

carry, and they typically targeted only those threatening to do harm.”). *Bruen* makes clear that the historical “going-armed” and “surety” laws were targeted, individualized, and reactive measures, imposed only when someone was shown to pose a concrete threat to another, not broad categorical disarmament regimes of the sort that Section 18.2-308.4 attempts to create. *Id.*

Applied here, the Commonwealth cannot satisfy the required showing of dangerousness. Nothing in the record demonstrates illicit use of a firearm by Mr. Fitzgerald, nor does it show that he posed any imminent risk of harm to the public. The record shows only that he had a history of drug use and that he associated with a suspected dealer, not that he ever brandished, misused, or threatened anyone with a firearm, or otherwise posed a danger to anyone. The evidence establishes, at most, mere status or association untethered from any contemporaneous dangerous conduct. And the mere possession of drugs, standing alone, does not establish dangerousness under a historically grounded framework, because it says nothing about whether an individual is likely to misuse a firearm or cause immediate injury. *See United States v. Connelly*, 117 F.4th 269 (5th Cir. 2024) (holding that 18 U.S.C. § 922(g)(3)

could not constitutionally be applied based solely on drug possession absent evidence of active intoxication), *followed by United States v. Daniels*, 124 F.4th 967 (5th Cir. 2025); *accord United States v. Cooper*, 127 F.4th 1092, 1096 (8th Cir. 2025) (“Nothing in our tradition allows disarmament simply because Cooper belongs to a category of people, drug users, that Congress has categorically deemed dangerous.”).

Under *Bruen*’s historically grounded framework, mere possession of drugs is insufficient. Because the statute did not require the Commonwealth to establish that Mr. Fitzgerald presented a genuine, significant, and imminent danger, his disarmament cannot be justified consistent with the Second Amendment’s history and tradition. If dangerousness is demonstrated by past violent behavior, threatening conduct, or active intoxication with a firearm in hand, the Commonwealth’s case does not satisfy that historical threshold.

## CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Dated: January 23, 2026

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Va. Sup. Ct. R. 5:26(g), I hereby certify that the foregoing Brief of Gun Owners of America, Inc., Gun Owners Foundation, Virginia Citizens Defense League, Virginia Citizens Defense Foundation, Tennessee Firearms Association, Tennessee Firearms Foundation, America's Future, U.S. Constitutional Rights Legal Defense Fund, Citizens United, and Second Amendment Law Scholar F. Lee Francis as *Amici Curiae* in Support of Appellant complies with the requirements of Rule 5:26. Moreover, this brief complies with Rule 5:26(b) because this brief contains 8,248 words, based on the "Word Count" feature of Microsoft Word and excluding the parts of the brief exempted by Rule 5:26(b).

/s/ Gilbert J. Ambler  
Gilbert J. Ambler

## CERTIFICATE OF SERVICE

On February 12, 2026, this Brief of Gun Owners of America, Inc., Gun Owners Foundation, Virginia Citizens Defense League, Virginia Citizens Defense Foundation, Tennessee Firearms Association, Tennessee Firearms Foundation, America's Future, U.S. Constitutional Rights Legal Defense Fund, Citizens United, and Second Amendment Law Scholar F. Lee Francis as *Amici Curiae* in Support of Appellant was filed electronically with the Court through VACES, and a copy of this document was emailed to all counsel for the Appellant and Appellee at the addresses below:

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