No. 1037996

IN THE WASHINGTON STATE SUPREME COURT

Geoffrey G. McLellan, et al.
Respondents,

vs.

Nicholas W. Brown,
as Attorney General
Petitioner.

Respondents' Answering Brief

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ARGUMENT

To prevail on appeal, the Attorney General must demonstrate that the challenged regulation, RCW 9.41.040(2)(a)(i)(D), is supported by the history and tradition of gun control as it existed during the founding of the nation. This is the prevailing framework for a Second Amendment challenge under Supreme Court precedent. To accomplish this, the Attorney General must prove both "why" and "how" the challenged regulation fits into that history and tradition. Furthermore, given the Respondents' as-applied challenge and the procedural posture of this case being before the Court on a motion for discretionary review, the State[1] must prove that the application of the challenged regulation to Respondents is categorically constitutional.

[1] This brief refers to the Attorney General interchangeably as "the State," since the Attorney General is named in his official capacity and is a state officer.

The State cannot meet this heavy burden. There is no historical analogue for the challenged regulation. The founding generation regulated the mixture of alcohol and firearms in ways significantly more limited in scope and duration than the RCW. Nor would the founders have treated a conviction for an alcohol-related offense as sufficiently serious for disarmament (or worse). At most, history supports the imposition of a temporary prohibition while presently intoxicated and no more. Because the challenged RCW goes much farther, it fails the "how" test. Therefore, this Court should affirm and remand.

A. The Supreme Court's Second Amendment jurisprudence.

1. The Second Amendment is an individual right.

For the first 200 years since the founding, the Second Amendment had received scant treatment from the Supreme Court. *See, e.g., United States v. Cruikshank*, 92 U.S. 542 (1876) (the Second Amendment only applies to restrict the federal government); *Presser v. Illinois*, 116 U.S. 252 (1886)

(same); *United States v. Miller*, 307 U.S. 174 (1939) (the Second Amendment does not protect possession of a sawed-off shotgun). *Miller* was the Court's last Second Amendment case until the landmark case *District of Columbia v. Heller*, 554 U.S. 570 (2008). In *Heller*, the Supreme Court held for the first time that the Second Amendment is an individual right that protects "the right of law-abiding,[2] responsible citizens to use arms in defense of hearth and home." 554 U.S. at 635.

The Court noted that its opinion "should [not] be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill," *id.* at 626, but acknowledged that the case represents the Court's first foray into this area of law and that "one should not expect it to clarify

[2] The Attorney General posits, *arguendo*, that Respondents are not "law-abiding citizens," which removes them from the ambit of the Second Amendment. Opening Brief at 17 n5. By that rationale, anyone convicted of any crime, no matter how minor, would lose Second Amendment protections. The Supreme Court already rejected this approach in *United States v. Rahimi*, 602 U.S. 680 (2024).

the entire field." *Id.* at 635. Importantly, the Court noted that "there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us." *Id.*

The Court also rejected an "interest-balancing" approach to resolving Second Amendment challenges. *Id.* at 634-35 ("We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach.").[3] Naturally, the very first thing the lower courts did following this pronouncement was adopt an interest-balancing approach to the Second Amendment.

"Applying the lessons from *Heller* and *McDonald*, we have adopted a two-step inquiry for assessing whether a law violates the Second Amendment. This test (1) asks whether the challenged law burdens conduct protected by the Second

[3] The Court later incorporated the Second Amendment to the states via the Fourteenth Amendment in *McDonald v. Chicago*, 561 U.S. 742 (2010).

Amendment and (2) if so, directs courts to apply an appropriate level of scrutiny." *Mai v. United States*, 952 F.3d 1106, 1113 (9th Cir. 2020); *see also N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 17 (2022) ("In the years since [*Heller*], the Courts of Appeals have coalesced around a 'two-step' framework for analyzing Second Amendment challenges that combines history with means-end scrutiny. This "anemic" approach resulted in the Ninth Circuit having an "undefeated, 50-0 record against the Second Amendment." *Duncan v. Bonta*, 19 F.4th 1087, 1167 n.8 (9th Cir. 2021) (VanDyke, J., dissenting). It took the Supreme Court another 14 years to correct the framework used by the lower courts.

2. The correct framework is historical analogue.

Unsurprisingly, the Court struck down the use of means-end scrutiny in *Bruen*, abrogating all of the litigation that had been done since 2008. The Court "decline[d] to adopt that two-part approach," instead holding "that when the Second

Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." 597 U.S. at 17. The second step in the "two-step" approach is "one step too many," *id.* at 19, because it is "inconsistent with *Heller*'s historical approach and its rejection of means-end scrutiny." *Id.* at 24. "[W]hen *Heller* expressly rejected [an] interest-balancing inquiry, it necessarily rejected intermediate scrutiny." *Id.* at 23.

> If the last decade of Second Amendment litigation has taught this Court anything, it is that federal courts tasked with making such difficult empirical judgments regarding firearm regulations under the banner of "intermediate scrutiny" often defer to the determinations of legislatures. But while that judicial deference to legislative interest balancing is understandable—and, elsewhere, appropriate—it is not deference that the Constitution demands here.
>
> *Id.* at 26.

Instead, the Second Amendment "presumptively" applies, unless "[t]he government [can] justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 24. This generally

involves asking "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id.* at 29. Confronting present-day firearm regulations requires "reasoning by analogy" to resolve "whether a historical regulation is a proper analogue for a distinctly modern firearm regulation." *Id.* at 28-29. This requires determining "whether the two regulations are relevantly similar." *Id.* at 29.

"[W]hether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are *central* considerations when engaging in an analogical inquiry." *Id.* Such an approach "is neither a regulatory straightjacket nor a regulatory blank check." *Id.* at 30.

> On the one hand, courts should not uphold every modern law that remotely resembles a historical analogue, because doing so risks endorsing outliers that our ancestors would never have accepted. 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. Importantly, it is the government's burden to defend a challenge to a firearm regulation, not a plaintiff's burden to prove its unconstitutionality. *Id.* at 34-35 ("[T]he burden falls on respondents to show that New York's proper-cause requirement is consistent with this Nation's historical tradition of firearm regulation. Only if respondents carry that burden can they show that the pre-existing right codified in the Second Amendment . . . does not protect petitioners' proposed course of conduct.").

The Supreme Court addressed the Second Amendment again two years later in *United States v. Rahimi*, 602 U.S. 680 (2024). There, the Court upheld the constitutionality of a firearm prohibition under 18 USC § 922(g)(8) for possession while restrained by an active protection order. *Id.* Contrary to the Attorney General's contention that *Rahimi* held that legislatures may categorically disarm categories of people they

deem dangerous, Opening Brief at 1, the Court "conclude[d] only this: An individual *found by a court* to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment." 602 U.S. at 702 (emphasis added). This explicit limitation of the holding undermines the Attorney General's reliance on it. Nor could *Rahimi* be implicitly read that way since a principal tenet of the holding was that a court had made an *individualized finding* of dangerousness. And the case had nothing to do with criminal convictions at all.

Rahimi is important for two reasons. First, it establishes that the Court is "all-in" on the historical analogue framework without modification.

> As we explained in *Bruen*, the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition. A court must ascertain whether the new law is relevantly similar to laws that our tradition is understood to permit, applying faithfully the balance struck by the founding generation to modern circumstances. Why

> and how the regulation burdens the right are central to this inquiry.

Id. at 692. Second, the Court firmly rejected the government's argument that a person could be disarmed simply because he is not "responsible." *Id.* at 701-02.

> "Responsible" is a vague term. It is unclear what such a rule would entail. Nor does such a line derive from our case law. In *Heller* and *Bruen*, we used the term "responsible" to describe the class of ordinary citizens who undoubtedly enjoy the Second Amendment right. But those decisions did not define the term and said nothing about the status of citizens who were not "responsible." The question was simply not presented.

Id.

Despite two cases in relatively quick succession, there remains a lot of doubt about the proper application of these principles and where the exact contours of historical analogue and historical twin truly lie.

B. The lower courts continue to struggle following *Bruen*.

Following *Bruen*, an ideological tug-of-war has been playing out across the country in the lower courts as judges

apply the same historical sources to reach different conclusions. Two lines of cases are particularly relevant here: cases analyzing 18 USC § 922(g)(1), colloquially known as the federal "felon in possession" prohibition; and cases analyzing § 922(g)(3), which prohibits possession by illegal drug users.

1. Cases analyzing § 922(g)(1).

In *United States v. Duarte*, the Ninth Circuit upheld the constitutionality of § 922(g)(1) as applied to a nonviolent felon. 137 F.4th 743 (9th Cir. 2025) (en banc). In doing so, the court relied on historical felony punishments, *id.* at 756-59, and laws categorically disarming dangerous individuals. *Id.* at 759-62. First, the court noted that "death was the standard penalty for all serious crimes at the time of the founding," and that such punishments were available for "nonviolent crimes such as forgery and horse theft." *Id.* at 756. It then concluded that "[c]ertainly, if the greater punishment of death and estate

forfeiture was permissible to punish felons, then the lesser restriction of permanent disarmament is also permissible." *Id.*

Second, the court found that history supports "disarming categories of persons thought by a legislature to present a special danger of misuse." *Id.* at 759. To support this contention, the majority pointed to historical laws restricting firearm access for Catholics, Native Americans, free Blacks, traitors, tramps, and those who refused to swear oaths of loyalty. *Id.* at 759-60. And these prohibitions were allowed to be imposed on a categorical basis "without having to perform an individualized determination of dangerousness as to each person in a class of prohibited persons." *Id.* at 760.

The court ultimately held that either of these principles "supplies a basis for the categorical application of § 922(g)(1)." *Id.* at 755. Before concluding, the majority took an opportunity to gloat about its end-run around the Supreme Court's repudiation of means-end scrutiny: "[W]e recognize that these historical principles may allow greater regulation than would an

approach that employs means-end scrutiny with respect to each individual person who is regulated. However, these are the fruits of *Bruen*'s constitutional test." *Id.* at 762.

Some sister circuits have taken a similar approach. *See, e.g., United States v. Hunt*, 123 F.4th 697 (4th Cir. 2024) (holding that § 922(g)(1) regulates activity outside of the scope of the Second Amendment, but even if it didn't, history supports the imposition of a categorical prohibition); *United States v. Jackson*, 110 F.4th 1120 (8th Cir. 2024) ("[The] historical record suggests that legislatures traditionally possessed discretion to disqualify categories of people from possessing firearms to address a danger of misuse by those who deviated from legal norms, not merely to address a person's demonstrated propensity for violence.").

However, at least three circuit courts have taken a different position. In *Range v. Attorney General*, the Third Circuit ruled that § 922(g)(1) is unconstitutional as applied to a

conviction for lying on a food stamp application.[4] 124 F.4th 218 (3d Cir. 2024) (en banc). In so holding, the court "refuse[d] to defer blindly to § 922(g)(1) in its present form," *id.* at 230, finding that it is "far too broad" and "operates at such a high level of generality that it waters down the right." *Id.* It noted that "[w]hile some states at first punished nonviolent crimes such as forgery and horse theft with death, by the early Republic, many states assigned lesser punishments." *Id.* at 231. Furthermore, "[f]ounding-era laws that forfeited felons' weapons or estates are not sufficient analogues either. Such laws often prescribed the forfeiture of the specific weapon used to commit a firearms-related offense without affecting the perpetrator's right to keep and bear arms generally." *Id.* In short,

[4] Range had been convicted of a misdemeanor under Pennsylvania state law punishable by a maximum of five years confinement. 124 F.4th at 223. Section 922(g)(1) applies to any crime "punishable by imprisonment for a term exceeding one year," but excludes "any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less." § 921(a)(20)(B). Thus, Range's conviction triggered the application of § 922(g)(1).

"the Nation's historical tradition of firearm regulation [does not] support depriving Range of his Second Amendment right to possess a firearm." *Id.* at 232.

The Fifth and Sixth Circuits have come to similar conclusions. The Fifth Circuit rejected the notion that Congress can categorically disarm all felons:

> We emphasize that our holding is not only premised on the fact that Diaz is a felon. Simply classifying a crime as a felony does not meet the level of historical rigor required by *Bruen* and its progeny. The legislature has determined that the term "felony" encompasses all crimes punishable by more than one year of imprisonment, rendering Diaz a felon today. But not all felons today would have been considered felons at the Founding. Further, Congress may decide to change that definition in the future. Such a shifting benchmark should not define the limits of the Second Amendment, without further consideration of how that right was understood when it was first recognized.

United States v. Diaz, 116 F.4th 458, 469 (5th Cir. 2024). However, the court went on to uphold § 922(g)(1) as applied because "at least one of the predicate crimes that Diaz's § 922(g)(1) conviction relies on—theft—was a felony and thus

would have led to capital punishment or estate forfeiture." *Id.* at 469-70.

Likewise, the Sixth Circuit rejected deference to Congress in *United States v. Williams*, finding that doing so "would be inconsistent with *Heller*" because "[i]f courts uncritically deferred to Congress's class-wide dangerousness determinations, disarmament laws would most often be subject to rational-basis review." 113 F.4th 637, 660 (6th Cir. 2024). Complete deference would also "allow legislatures to define away a fundamental right." *Id.* "The very premise of constitutional rights is that they don't spring into being at the legislature's grace." *Id.* at 661. The Sixth Circuit ultimately went on to hold that § 922(g)(1) can be constitutional, but endorsed the notion that an individual must be given an opportunity to demonstrate that "he is not dangerous, and thus falls outside of § 922(g)(1)'s constitutionally permissible scope." *Id.* at 657.

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2. Cases analyzing § 922(g)(3).

The line of cases analyzing § 922(g)(3), prohibiting illegal drug users from possessing firearms, is less controversial but equally important. Several circuits that have considered an as-applied challenge to § 922(g)(3) have come to similar conclusions. "The history and tradition before us support, at most, a ban on carrying firearms while an individual is *presently* under the influence." *United States v. Connelly*, 117 F.4th 269, 282 (5th Cir. 2024). But regulating possession "based on habitual or occasional drug use . . . imposes a far greater burden on . . . Second Amendment rights than our history and tradition of firearms regulation can support." *Id.*

The Third Circuit also emphasized this limitation in *United States v. Harris*, 144 F.4th 154 (3d Cir. 2025). "Someone who regularly uses mind-altering substances that make him a credible threat to the physical safety of others with a gun may be disarmed *temporarily until he stops using drugs*." 144 F.4th at 161-62 (emphasis added). "[B]y its own terms, §

922(g)(3) *temporarily* bars anyone who often uses drugs from possessing a gun *shortly* before, during, or after using drugs." *Id.* at 162 (emphasis added). Likening a period of inebriation to a period of lunacy, the court noted that § 922(g)(3)'s limited duration "tracks the historical restrictions on lunatics or drunks, which were also *temporary and ceased once someone regained his senses or sobered up*." *Id.* at 163 (emphasis added).

In *United States v. Cooper*, the Eighth Circuit remanded an as-applied challenge for further consideration after noting that "[n]othing in our tradition allows disarmament simply because Cooper belongs to a category of people, drug users, that Congress has categorically deemed dangerous." 127 F.4th 1092, 1096 (8th Cir. 2025). Addressing a facial challenge, the Ninth Circuit remarked that "our nation's tradition of firearms regulation at least supports restricting possession of firearms *by those who are presently intoxicated* and, therefore, hindered in their ability to exercise sound judgment and self-control." *United States v. Stennerson*, No. 23-1439, 2025 U.S. App.

23236 at *14 (9th Cir. Sept. 9, 2025) (emphasis added). The court left the question of whether it would reach the same conclusion in an as-applied challenge "for another day." *Id.* at *16.

C. There is no historical support for categorical disarmament based solely on a recidivist DUI offense.

Against this backdrop of *Bruen* and its progeny, the State makes three arguments: the legislature can categorically disarm groups of people who pose a heightened risk of danger, Opening Brief at 19-40; the legislature can categorically disarm persons convicted of serious crimes, Opening Brief at 40-49; and the legislature can categorically disarm those who are likely to abuse alcohol, Opening Brief at 49-55.

In other words, the State asks this Court for a "regulatory blank check." *Bruen*, 597 U.S. at 30. This request is antithetical to the Second Amendment's "unqualified command." *Id.* at 17. Any federal court decision to the contrary, including *Duarte*, is wrongly decided. The history and tradition of gun control in

America does not support the imposition of a categorical ban for a recidivist DUI offense. Second Amendment analysis requires consideration of both the "why" and the "how." The risk of firearm misuse when mixed with alcohol is not new. The proper resolution to this case hinges on drawing historical analogues to how the founding generation dealt with this societal ill. When framed correctly, the conclusion is clear: RCW 9.41.040(2)(a)(i)(D)'s "how" has no analogue in history.

1. There is no historical analogue between modern determinations of dangerousness and founding era laws.

The State first argues that legislatures can disarm groups of people who pose a heightened risk of danger. Opening Brief at 19. To support this conclusion, the State cites *Rahimi* and *Duarte*. Opening Brief at 20-21. It argues that these cases have already endorsed the notion that "legislatures may categorically disarm those they deem dangerous, without an individualized determination of dangerousness." Opening Brief at 20-21 (quoting *Duarte*, 137 F.4th at 755). *Duarte* is wrongly decided,

and is not binding on this Court. *State v. Glasmann*, 183 Wn.2d 117, 124, 349 P.3d 829 (2015) ("[T]he Ninth Circuit's decisions are not binding on this court."). And *Rahimi* does not support the State's point. *Rahimi* "conclude[d] only" that § 922(g)(8) was constitutional as applied in that case. 602 U.S. at 702. That holding was explicitly based on the fact that a court had made an *individualized* finding of dangerousness. *Id.* ("An individual *found by a court* to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment.") (emphasis added).

The State's approach is not a faithful application of Supreme Court precedent for two reasons. First, RCW 9.41.040(2)(a)(i)(D) is an "outlier[] that our ancestors would never have accepted." *Bruen*, 597 U.S. at 30. Second, extreme deference to the legislature, which is what the approach requires, is explicitly forbidden.

First, the State's argument (relying on *Duarte* and other similarly decided cases) is essentially: at the time of the

founding, legislatures had authority to categorically disarm individuals deemed to be dangerous. The Washington state legislature categorically deemed recidivist DUI offenders dangerous in 2023 and totally disarmed them. Therefore, the legislation is constitutional. What's missing is the link between now and then. If the rule truly was as the State (and *Duarte*) contend, then the Supreme Court in *Rahimi* would have just held that legislatures can disarm dangerous people and ended the opinion. But the Court went through the historical analysis and found founding-era laws that were *relevantly-similar* to the present-day regulation. In that case, it was surety and affray laws. 602 U.S. at 695-97.

To prevail here, the State has to show more than disarmament of dangerous people during the founding era. It has to demonstrate how the founding generation treated recidivist alcohol offenders and how this treatment is analogous to RCW 9.41.040(2)(a)(i)(D). A "historical twin" is not required, *Bruen*, 597 U.S. at 30, but the State has failed to

produce any evidence that the founding generation deemed recidivist alcohol offenders dangerous enough to disarm beyond the present state of intoxication. *See* Part C-3, *infra*.

To demonstrate the proper application of historical scrutiny to a firearm regulation, consider cases from the Fifth and Sixth Circuits. In *Diaz*, the Fifth Circuit rejected deference but upheld the application of § 922(g)(1) because one of the defendant's predicate convictions would have subjected him to capital punishment during the founding era. 116 F.4th at 469-70. Likewise, in *Williams*, the Sixth Circuit rejected deference but upheld application of § 922(g)(1) because the defendant's criminal record consisted of aggravated robbery and attempted murder. 113 F.4th at 662; *see also Duarte*, 137 F.4th at 791 (VanDyke, J., dissenting) ("[A]pplying *Bruen* requires the government to proffer Founding-era felony analogues that are 'distinctly similar' to Duarte's underlying offenses and would have been punishable either with execution, with life in prison, or permanent disarmament.").

Ultimately, the Attorney General wants this Court to hold that the 2023 legislature is better at identifying risk factors and regulating gun violence than the founding generation, so it should receive deference. But the Second Amendment "is the *very product* of an interest balancing by the people." *Bruen*, 597 U.S. at 26. "It is this balance—struck by the traditions of the American people—that demands our unqualified deference." *Id.* The mixture of firearms and alcohol was already identified as a societal ill by the founding generation and regulated accordingly. *See* Part C-3, *infra*. RCW 9.41.040(2)(a)(i)(D) is a significant departure from this regulation and represents an "outlier[] that our ancestors would never have accepted." *Bruen*, 597 U.S. at 30; *see also Rahimi*, 602 U.S. at 692 ("Even when a law regulates arms-bearing for a permissible reason, though, it may not be compatible with the right if it does so to an extent beyond what was done at the founding.").

A further problem is that this approach inherently requires courts to blindly defer all determinations of

dangerousness to the legislature. But this is exactly what *Bruen* forbids. 597 U.S. at 26 ("But while that judicial deference to legislative interest balancing is understandable—and, elsewhere, appropriate—it is not deference that the Constitution demands here."). "If courts uncritically deferred to Congress's class-wide dangerousness determinations, disarmament laws would most often be subject to rational-basis review. . . . [C]omplete deference to legislative line-drawing would allow legislatures to define away a fundamental right." *Williams*, 113 F.4th at 660.

Indeed, it is difficult to imagine what the *Bruen* test means if deference to the legislature is all that's required to defeat it. And there is no end to disarmament under this approach. The legislature could disarm individuals with a low IQ; people who are unemployed, less educated, or low-income; individuals under the age of 25; all men; people who play video games; and so on. *See Duarte*, 137 F.4th at 800 (VanDyke, J., dissenting) (collecting sources supporting a finding that each of

these groups is more prone to violence). *Bruen* itself rejected New York's claim that its proper cause standard for issuing carry licenses was necessary to combat handgun violence in urban areas. 597 U.S. at 27. In every case, the government could simply raise legislative deference as an impenetrable shield. The court would then perform a barebones review of the basis for the finding of dangerousness, and we're right back to means-end scrutiny again. *Duarte*, 137 F.4th at 799 (VanDyke, J., dissenting) ("By granting legislatures unreviewable discretion to disarm entire categories of individuals, the majority necessarily returns right back to a regime of deference to legislative interest-balancing rejected by the Supreme Court in *Bruen*.").

The Attorney General attempts to subtly steer the framework back to means-end scrutiny by citing studies for the proposition that DUI offenders are more prone to violence. Opening Brief at 4-12. These studies would have been relevant pre-*Bruen*, but the days of means-end scrutiny are (supposedly)

over, so these studies are of little help to deciding the question presented. Therefore, it is unnecessary to address these studies individually or as a whole.

The State argues that the logic of *Range* does not extend to crimes that "regularly result in death and dismemberment – like drunk driving." Opening Brief at 37. But, the danger stems from the act of drunk driving itself and has nothing to do with firearm misuse. Yet, the legislature does not impose a total ban on *driving* after multiple DUI offenses, and driving isn't even a constitutional right. *See* RCW 46.20.720 (authorizing an ignition interlock license).

The Attorney General also cites *Goins* as "the one appellate court that has ruled on this specific issue." Opening Brief at 37. But "critical" to the outcome in *Goins* was the fact that Goins was on active probation and the state sentencing court ordered Goins not to possess a "firearm or weapon of any type except for a pocketknife" as a condition of that probation. *United States v. Goins*, 118 F.4th 794, 796 (6th Cir. 2024). The

record in this case is not developed on this point, but will ultimately show that this did not occur in either of Respondents' cases. Furthermore, the concurring judge in *Goins* joined in the judgment only because Goins was specifically barred from possession while on active probation. *Id.* at 805 (Bush, J., concurring). Judge Bush disagreed that Goins could be disarmed by the fact of the conviction alone. *Id.* Thus, *Goins* is partially helpful to both parties.

The only case to truly have considered this exact question is *Williams v. Garland*, No. 17-cv-2641, 2023 U.S. Dist. LEXIS 203304 (E.D. Pa. Nov 14, 2023).[5] There, a federal district court dealt with a challenge to the application of § 922(g)(1) in similar circumstances to *Range* (misdemeanor conviction

[5] *Williams v. Garland* went on appeal to the Third Circuit and was stayed while the Third Circuit reconsidered *Range* after the Supreme Court vacated *Range* and remanded with instructions to reconsider in light of *Rahimi*. The Third Circuit finally heard argument in *Williams v. Garland* on July 21, 2025 and then inexplicably sent the case to its appellate mediation program without resolution, where it remains today. *See* No. 24-1091, Third Circuit Court of Appeals.

punishable by a maximum of five years confinement under PA state law) where the challenger was a repeat DUI offender. *Id.* at *1-2. The district court invalidated § 922(g)(1) because "that legislatures have historically labelled certain groups and conduct dangerous for the purposes of disarmament does not, in of itself, create a historical analogue to the present-day prohibition on firearm possession by those convicted of DUI." *Id.* at *10-11. "Additionally, a DUI cannot be considered to belong to the class of convictions — namely for crimes of violence — for which there is a longstanding regulatory tradition justifying permanent disarmament." *Id.* at *12.

Finally, the Attorney General argues that RCW 9.41.040(2)(a)(i)(D) is no big deal because it is temporary and Respondents can have their firearm rights restored in five years under RCW 9.41.041. Opening Brief at 33-34. Reliance on a restoration scheme is inadvisable for two reasons. First, it doesn't really help resolve whether the prohibition is constitutionally imposed to begin with. Respondents do not

argue that RCW 9.41.040(2)(a)(i)(D) is unconstitutional specifically because it imposes a permanent prohibition. Second, restoration statutes are subject to change and may be different or repealed altogether by the time the five-year mark rolls around. *See, e.g.*, Laws of 2023, ch. 295, § 3-4 (changing waiting period for restoration after domestic violence misdemeanor from three years to five years). And the right to restore firearm rights does not vest. *Arends v. State*, 31 Wn. App. 2d 257, 548 P.3d 553 (2024), *rev'd on other grounds,* 573 P.3d 906 (Wash. 2025).

2. Respondents have not been convicted of a serious crime from a historical perspective.

The Attorney General argues that Respondents fall under the "presumptively lawful" ban on "felons and the mentally ill" that the Supreme Court has repeated since *Heller*. Opening Brief at 40-41. Beyond making these bare pronouncements in passing, the Supreme Court has never squarely answered to what extent history supports application of § 922(g)(1) or §

922(g)(4) (the prohibition on possession by the mentally ill). But even taking this dictum at face value, the obvious answer is that Respondents are not felons.

Of course, that's not dispositive of the issue because labels don't mean much and are subject to change. *See Diaz*, 116 F.4th at 469. Given the sheer breadth of the State's reasoning and the line of cases it relies on, "[t]hose with misdemeanor convictions could be disarmed too." *Duarte*, 137 F.4th at 800 (VanDyke, J., dissenting). In fact, the Attorney General posits that the felony/gross misdemeanor distinction is not meaningful because disarmament is constitutionally appropriate anytime "the offense of conviction demonstrates a 'disrespect for legal norms of society.'" Opening Brief at 47 (quoting *Jackson*, 110 F.4th at 1127). Of course, that is an immensely broad classification of crimes. Doesn't the commission of every crime demonstrate a disrespect for legal norms of society? This sounds awfully like the "responsible person" standard rejected in *Rahimi*. 602 U.S. at 701-02.

In the end, the State's second argument suffers from the same defects as its first argument. By brushing with broad strokes, it absolves the State's burden to prove a historical analogue for RCW 9.41.040(2)(a)(i)(D). Okay, so forgery and horse theft may have been punished as serious crimes during the founding era. Opening Brief at 48. How does that translate to the founding generation treating alcohol-related offenses as equally serious? In what ways is drunk driving like forgery or horse theft? The State attempts to put a square peg into a round hole.

The Attorney General cites drunk driving as a "modern danger," Opening Brief at 30, and that may strictly be true, given the development and ubiquity of cars over time. But alcohol abuse is not new, and operating heavy machinery while intoxicated is not new. The founding generation used ships and trains came shortly thereafter, both capable of mass destruction if misused. Was operating these apparatuses while intoxicated punished, and if so, to what extent?

The fact remains that the Attorney General fails to point to any historical analogue for support that the founding generation would have considered alcohol-based offenses serious enough to warrant categorical and total disarmament or worse. On the contrary, this case is much more like *Range* than any of the cases from the other circuits. And "[f]ounding-era laws that forfeited felons' weapons or estates are not sufficient analogues either. Such laws often prescribed the forfeiture of the specific weapon used to commit a firearms-related offense without affecting the perpetrator's right to keep and bear arms generally." *Range*, 124 F.4th at 231.

3. History supports some regulation of firearms and alcohol, but not to the extent the challenged statute imposes.

The Attorney General's last argument is that those likely to abuse alcohol may be disarmed. Opening Brief at 49. To an extent, this is true. Recall that a modern regulation must have a historical analogue both as to "why" and as to "how." *Rahimi*,

602 U.S. at 692 ("Why and how the regulation burdens the right are central to this inquiry."). Recall, too, that "[e]ven when a law regulates arms-bearing for a permissible reason, though, it may not be compatible with the right if it does so to an extent beyond what was done at the founding." *Id.*

Although the State puts a lot of emphasis on the fact of Respondents' recidivist convictions and supports its arguments with reference to § 922(g)(1) cases, RCW 9.41.040(2)(a)(i)(D) is ultimately intended to regulate the mixture of alcohol and firearms and is therefore closer in spirit to § 922(g)(3) than § 922(g)(1). After all, which part of drinking and driving is the problem, the "drinking" or the "driving"? If the latter, then we are all in trouble.

To that end, *Connelly* is instructive. We begin with the understanding that "early Americans, including the Founders, consumed copious amounts of alcohol." *Connelly*, 117 F.4th at 279. Thus, the "Founders were well familiar with the commonsense notion that those presently impaired by alcohol

lack the restraint needed to handle firearms safely." *Id.* So, "[i]t is unsurprising that historical laws dealing with firearms and alcohol exist." *Id.* at 280. Still, even as the founding generation disarmed people they deemed dangerous, such as "Catholics and politically disaffected citizens, they left ordinary drunkards unregulated." *Id.* at 279. The Fifth Circuit ultimately concluded that the government failed to "offer[any] Founding-era law or practice of disarming ordinary citizens for drunkenness, even if their intoxication was routine." *Id.* at 280. Turning to post-Reconstruction laws, the court found that "history and tradition before us support, at most, a ban on carrying firearms while an individual is *presently* under the influence." *Id.* at 282. "[H]istorical intoxication laws . . . may address a comparable problem—preventing intoxicated individuals from carrying weapons—but they do not impose a comparable burden on the right holder. In other words, they pass the 'why' but not the 'how' test." *Id.* at 281.

Just like § 922(g)(3), RCW 9.41.040(2)(a)(i)(D) passes the "why" test but fails the "how" test. The burden it imposes – categorical and total disarmament for years at a time – has no basis in history. Therefore, the statute fails the *Bruen* test.

CONCLUSION

Based on the foregoing, the Court should affirm the superior court and remand for further proceedings.

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Respectfully submitted,

Vitaliy Kertchen #45183
Date: 10/17/25

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I, Vitaliy Kertchen, being of sound age and mind, declare that on 10/17/25, I served this document on the Attorney General by uploading it using the Court's e-filing application and emailing a copy of the document using that process to all registered users.

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Place: Puyallup, WA

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