No. 131191

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- JAMES BENSON, Defendant-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, No. 1-22-1230. There on appeal from the Circuit Court of Cook County, Illinois , No. 22 CR 1006. Honorable James B. Linn, Judge Presiding.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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ARGUMENT

Under the new text-and-historical-tradition analysis announced by *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, James Benson is one of "the people" protected by the Second Amendment, and the unlawful possession of a weapon by a felon statute, 720 ILCS 5/24-1.1(a), as applied to him, is inconsistent with our nation's historical traditional of firearm regulation.

The State asks this Court to skip the *Bruen* test entirely, citing case law based on a single line from *Heller* that references felon dispossession. *New York State Rifle & Pistol Ass'n Inc. v. Bruen*, 597 U.S. 1, 17-18, 28-30 (2022); *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008). (St. Br. 11) But *Heller*, and cases since, made clear the Supreme Court has never decided that issue or conducted any relevant historical analysis. Beyond that, the State presents no historical law that is relevantly similar to both "why" and "how" unlawful possession of a weapon by a felon (UPWF) permanently disarms felons. If anything, the State's argument confirms that the historical throughline for gun regulation is based on a person's present dangerousness, consistent with James Benson's argument. Finally, the State devotes a significant portion of its brief to policy concerns, directly contrary to *Bruen*'s rejection of legislative interest balancing. And even so, those concerns are vastly overstated.

A. The Second Amendment

The State declares that "the United States Supreme Court has always recognized that felon-in-possession laws are constitutional, without qualification." (St. Br. 10) But its argument and the authority it cites stems from a single line from *Heller*, that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill . . ."*See Heller*, 554 U.S. at 626. But nothing in *Heller* indicates the Court ruled on this issue, nor that the *Bruen* test is inapplicable.

Indeed, *Heller* itself made clear that it was not deciding the constitutionality of felon-in-possession laws. *See Heller*, 554 U.S. at 626 ("we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment"). In fact, the dissent in *Heller* criticized

the same "longstanding prohibitions" line by emphasizing the lack of historical justification for it, to which the majority responded that it was not "clarify[ing] the entire field" of Second Amendment cases, and that "there will be time enough to expound upon the historical justifications" for felon dispossession "if and when" the issue "comes before us." *Id*. at 635, 721 ("The majority fails to cite any colonial analogues."). To that point, while *Heller*'s "longstanding prohibitions" language also referred to "sensitive places," *Bruen* itself rejected New York's attempt to characterize its proper-cause requirement as a "longstanding . . . sensitive place" regulation, finding no "historical basis" for that argument. *Bruen*, 597 U.S. at 30-31.

Since *Heller*, the Supreme Court has repeatedly cabined its Second Amendment holdings to the issue presented by each case, and it has yet to consider a ban on firearm possession by all felons. (Op. Br. 14) (citing *Rahimi*, *Bruen*, *Heller*, and justice concurrences) This Court has likewise recently recognized that the constitutionality of felon-in-possession laws remains unresolved after *Bruen*. *See People v. Thompson*, 2025 IL 129965, ¶ 47.

Relatedly, federal courts of appeals that have addressed felon-in-possession laws have uniformly recognized that *Heller*'s "longstanding prohibitions" dicta is not dispositive and have conducted a *Bruen* analysis. (*See* Op. Br. 17, citing authority from the Third, Fifth, Seventh, Ninth, and Tenth Circuit Courts of Appeals) *See United States v. Williams*, 113 F. 4th 637, 648 (6th Cir. 2024) ("applying *Heller's* dicta uncritically," is "at odds with *Heller* itself, which stated courts would need to 'expound upon the historical justifications' for firearm-possession restrictions when the need arose"). Even in *Duarte*, relied on by the State, the court did not rest on *Heller* as dispositive; instead, it acknowledged *Heller*'s dicta before conducting *Bruen*'s text-and-history analysis. *United States v. Duarte*, 137 F.4th 743, 752 (9th Cir. 2025) (finding the defendant's "proposed course of conduct is covered under the plain text of the Second Amendment"). (St. Br. 11)

Indeed, the notion that the *Bruen* test applies to all firearm regulations, *except for this*

one, defies logic and Supreme Court authority, especially where the Supreme Court explained that the *Bruen* test is derived from *Heller* itself. *Bruen*, 597 U.S. at 17, 19-22 (describing its text-and-history analysis as "[t]he test that we set forth in *Heller*"). To that point, *Heller* supports Benson's argument that the *Bruen* framework applies to felon-in-possession laws, in that *Heller* applied a "text and history" approach, held that the Second Amendment right belongs to "all Americans" and "not a specified subset," and rejected legislative interest balancing. *Heller*, 554 U.S. at 580-81, 634-35.

The State's *Heller* argument is therefore incompatible with *Bruen*, and this Court should reject the State's attempted end-run around the *Bruen* analysis.

B. The Second Amendment's plain text covers Benson and the UPWF statute, under *Bruen*'s first step.

The State seems to suggest that the Supreme Court's passing references to "law-abiding citizens" have already resolved the first step of the *Bruen* inquiry against Benson. (St. Br. 15) Such argument contends that the Second Amendment does not cover felon firearm possession, because felons are not part of "the people" protected by the Second Amendment. (St. Br. 15) But the State offers little to support its argument–just a handful of Illinois appellate court decisions–and does not respond to any of Benson's contrary arguments or authority, including that the Supreme Court and every federal court of appeals to have addressed this issue have stated that the term "the people" refers to all Americans, without exception. (*See* Op. Br. 16-17) Indeed, *Heller* recognized the "strong presumption that the Second Amendment right is exercised individually and belongs to all Americans," "not an unspecified subset."*Heller*, 554 U.S. at 580-581. And notably, in *Rahimi*, the Supreme Court concluded that Rahimi was part of "the people" and moved straight to the second part of the *Bruen* analysis, despite his history of criminality and violence. *United States v. Rahimi*, 602 U.S. 680, 686-689, 692-693 (2024).

The analysis in the Illinois appellate court cases the State cites is thus at odds with the overwhelming majority of federal law post-*Bruen*, which has found that the Second

Amendment's plain text encompasses firearm possession by a felon. *Compare People v. Baker*, 2023 IL App (1st) 220328, ¶¶ 2, 37 (*Bruen*'s references to "law abiding, responsible" citizens mean that the Second Amendment does not apply to persons convicted of a felony under *Bruen's* first step, so no historical analysis was required under *Bruen*'s second step), *with Range v. Att'y General*, 124 F. 4th 218, 226 (3d Cir. 2024) (en banc) (*Heller*'s reference to "law-abiding citizens" should not be read as a limitation on the rights of "the people," meaning "all members of the political community"); *see also People v. Travis*, 2024 IL App (3d) 230113, ¶ 25 (same).

The State also offers no response to the fact that excluding felons from "the people" would mean that the right to bear arms could be improperly eliminated or restricted based on legislative whims in categorizing felonies, turning it into a "second-class right." (Op. Br. 15) (citing authority). *See Bruen*, 597 U.S. at 26 (rejecting "judicial deference to legislative interest balancing" in Second Amendment cases); *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 780 (2010) (the right to bear arms in public for self-defense is not "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees").

Nor does the State respond to the point that excluding felons from "the people" would absurdly require that term to have different meanings in the Constitution. *Heller*, 554 U.S. at 580 ("in all six other provisions of the Constitution that mention 'the people,' the term unambiguously refers to all members of the political community, not an unspecified subset."); *see also Williams*, 113 F.4th at 649 (it would be "implausible" for the meaning of "the people" to vary from provision to provision). (Op. Br. 16) And finally, the State offers no response to the fact that the court in *Rahimi* conducted a historical analysis, despite the respondent's past criminality. *Rahimi*, 602 U.S. at 686-689, 692-693. (Op. Br. 15)

Therefore, under *Bruen*'s first textual step, the Second Amendment covers firearm possession by Americans, including those with past felony convictions.

C. The State cannot carry its burden to prove that the UPWF statute, as applied to Benson, is consistent with the Nation's historical tradition of firearm

regulation, under *Bruen*'s second step.

The UPWF statute disarmed Benson based solely on his past nonviolent, nondangerous conduct ("why"), for the rest of his life, with severe criminal penalties ("how"). *See* 720 ILCS 5/24-1.1(a). The State has the burden to show that applying UPWF to Benson is "consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 17. To do so, it must prove to this Court that UPWF is "relevantly similar" to historical laws, in both "why" *and* "how" it burdens the Second Amendment. *Rahimi*, 602 U.S. at 692.

It bears emphasizing that if this Court is not persuaded by the State's historical evidence here, it can reverse on the basis of the State's failure to carry its burden in this case alone, without making any broader historical findings. *See Thompson*, 2025 IL 129965, ¶ 35 ("courts are not tasked with addressing historical questions," they instead resolve "legal questions presented in particular cases"; in a *Bruen* case, under the "principle of party presentation," courts can "decide a case based on the historical record compiled by the parties").

The State has not carried its burden here. It has not clearly explained what exactly is the relevantly similar historical tradition of firearm regulation that it relies on, for either "why" or "how." Instead, it offers a hodgepodge of varied possible justifications for the law, focusing primarily on authority that goes to the "how" analysis. (St. Br. 16-38) Nothing it points to demonstrates a relevantly similar historical tradition of firearm regulation for *both* why *and* how UPWF restricted Benson's right to bear arms. *See Bruen*, 597 U.S. at 17.

(1) "Why" firearm possession was historically restricted

The State presents no historical tradition of firearm regulation that restricts firearm rights for persons based solely on their prior conviction of a felony, irrespective of dangerousness.

(a) Disarming Benson is not justified by legislatures' historical discretion to define felonies, nor by a few historical proposals that never became law.

The State suggests that there is a historical tradition of legislatures designating certain

offenses as "felonies" (St. Br. 26), but the relevance of this comparison is unclear. Indeed, a historical legislative right to classify an offense as a felony does not speak to whether there is a historical tradition *of firearm regulation*, much less one that bans the possession of firearms based on a person's prior felony conviction, which is the issue before this Court. To the contrary, our Nation's broad criminalization of firearm possession by past felons is a recent legislative phenomenon, dating to 1938, not to the time of the founding. Federal Firearms Act, Pub. L. No. 75-785, 52 Stat. 1250 (1938) (repealed 1968). And regardless, the Supreme Court's recent jurisprudence has emphasized that the scope of Second Amendment rights *cannot* depend on legislative decisions. *See Bruen*, 597 U.S. at 26 (rejecting practice of judicial deference to legislative judgment). That legislatures could classify a crime as a felony does not establish a relevantly similar historical analogue to UPWF.

Still, the State claims that ratification-era "regulations support the view that legislatures viewed disarmament as an alternative available remedy for those who committed serious crimes." (St. Br. 22) But it presents just three isolated, unrelated historical references. *See Bruen*, 597 U.S. at 46 ("we doubt that *three* colonial regulations could suffice to show a tradition of public-carry regulation") (emphasis in original). And none are relevantly similar to UPWF.

First, the State points to the 1689 English Bill of Rights, which provided "[t]hat the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions and as allowed by law." Bill of Rights 1688, 1 W. & M. Sess. 2 c. 2, sch. 1. (Eng.). (St. Br. 22) On its face, this regulation for Protestants bears no resemblance to UPWF. And even so, "[t]here is no evidence that any Protestants were excluded from the 1689 arms right for being insufficiently loyal or law-abiding." *See* Joseph G.S. Greenlee, *Disarming the Dangerous: The American Tradition of Firearm Prohibitions*, 16 Drexel L. Rev. 1, 23 (2024).[1]

[1] Greenlee's research has been favorably cited by the Supreme Court and other federal courts. *See, e.g.*, *Rahimi*, 602 U.S. at 680; *Bruen*, 597 U.S. at 30; *Duarte*, 137 F.4th at 794-95 (VanDyke, J., concurring in part, dissenting in part).

The founders themselves rejected the limitations on the right to bear arms set out in the 1689 English Bill of Rights. *See e.g.*, James Madison, Notes for speech in Congress supporting Amendments (June 8, 1789) (reprinted in 12 The Papers of James Madison 193–94 (Charles F. Hobson et al. eds., 1979) (criticizing its limitations on the right to bear arms, including that it only protected Protestants); Greenlee, *Disarming the Dangerous* at 25. The right codified in the 1689 English Bill of Rights had "matured" and expanded by the founding, *Bruen*, 597 U.S. at 45, with Americans "swe[eping] aside" England's "as allowed by law" limitation. Joyce Lee Malcolm, *To Keep and Bear Arms*, 136–37, 162 (1994); *see also Bruen*, 597 U.S. at 35 ("English common-law practices ... cannot be indiscriminately attributed to the Framers of our own Constitution."); *Bridges v. California*, 314 U.S. 252, 264 (1941) ("'one of the objects of the Revolution was to get rid of the English common law...' " (citations omitted)). Indeed, it should be obvious that the Second Amendment does not include any qualifying language; it instead states that the right to bear arms "shall not be infringed." U.S. Const., amend. II.

For its second and third analogues, the State cites Pennsylvania anti-federalist delegates' proposed limitation on the right to bear arms–"unless for crimes committed, or real danger of public injury from individuals"–and Edward Livingston's proposed criminal code for Louisiana enacting forfeiture of the right to bear arms for certain crimes. (St. Br. 23) But these drafts and proposals were not adopted and never became law, and the Second Amendment includes no such limiting language. (St. Br. 23) These two never-adopted provisions hardly establish a consistent historical tradition of restricting firearm rights for persons previously convicted of even a nonviolent crime. *See Kanter v. Barr*, 919 F. 3d 437, 455 (7th Cir. 2019) (Barrett, J., dissenting) (emphasizing that "none of the relevant limiting language made its way into the Second Amendment," nor even "in any of the . . . parallel state constitutional provisions enacted before ratification of the Second Amendment"). If anything, these proposals were animated by concerns about "threatened violence and the risk of public injury"; "no one even

today reads this [Pennsylvania] provision to support the disarmament of literally all criminals, even nonviolent misdemeanants." *See Kanter*, 919 F. 3d at 456 (Barrett, J., dissenting).

(b) Disarming groups of people due to fear of revolt or a temporary status is not an analogous historical tradition.

The State next argues that a historical analogue exists in the founding-era tradition of disarming groups of people believed to be dangerous, including"loyalists and non-associators" and people with suspicious religious affiliation, pacifist beliefs, or certain ethnicities. (St. Br. 30-32) However, these categorical disarmament laws are not analogues to UPWF because they were motivated by a different "why" that is inapplicable to felons: the danger of revolt against the government. *See Range*, 124 F. 4th at 245 (3d Cir. 2024) (Matey, J., concurring) ("Laws imposing class wide disarmament were enacted during times of war or civil strife where separate sovereigns competed for loyalty."). During the Revolutionary War, former colonies enacted laws to disarm the Loyalists and others who did not take an oath to the union. *See* C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 Harv. J.L. & Pub. Pol'y 695, 711 (2009). Moreover, these Loyalist laws were temporary measures, and are therefore also not relevantly similar to"how" UPWF imposes a lifetime ban on firearm possession, under *Bruen*'s second step. *See id*. at 726; *see also* Greenlee, *Disarming the Dangerous* at 29–36. The colonies also justified disarming Blacks based on the perceived threat of violence they posed as a collective group. *See Heller*, 554 U.S. at 611-612 ("free blacks were treated as a 'dangerous population,'" prompting disarmament laws) (*citing Waters v. State*, 1 Gill 302, 309 (Md. 1843)).

The State presents no historical evidence that legislatures believed that persons with a past felony conviction posed a *collective* threat to the government or the public. And in fact, no historical laws imposed firearm bans based on the fact of a person's past criminal conviction, at all–though such persons existed at the time of the Founding. (Op. Br. 26) At most, the laws the State points to just reinforce the fact that our nation has historically limited firearm rights

based on a person's present dangerousness, not simply based on their past conviction of a crime.

The State next refers to historical practices of disarming people based on intoxication, drug addiction, youth, mental illness, and status as a "tramp." (St. Br. 34-36) But all of the laws cited by the State date from the Civil War era or later; none from the time of the founding, which decreases their relevance. (St. Br. 34-36) Regardless, these laws all concern a *mutable* status a person is *presently* experiencing; they are not based on *past* conduct. *See, e.g.*, *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 837 F.3d 678, 710 (6th Cir. 2016) (en banc) (Sutton, J., concurring in most of the judgment) ("[o]ur common law heritage has long recognized that mental illness is not a permanent condition"); *see also* Anthony Highmore, *A Treatise on The Law of Idiocy and Lunacy* 73 (Exeter, George Lamson 1822) ("A lunatic is never to be looked upon as irrecoverable.").To that point, laws that restricted the possession or purchase of firearms by intoxicated persons did not ban the wholesale possession of firearms by those who used intoxicating substances, nor did they ban carry by those who were not actively under the influence. *See Connelly*, 117 F.4th at 281; *see also* Act of Feb. 28, 1878, in Laws of the State of Mississippi 175 (Jackson, Power & Barksdale) (simply prohibiting the "s[ale] to any minor or person intoxicated," and not prohibiting the carrying of firearms generally).

Laws disarming "tramps" applied only to people engaged in certain activities, such as men who were not "in the county in which he usually lives or has his home" and were "found going about begging and asking subsistence by charity." *State v. Hogan*, 63 Ohio St. 202, 208 (1900). And such laws existed because "tramps" were thought to be presently dangerous. *Id.* at 213-214 (upholding a "tramp" restriction because the Second Amendment "was never intended as a warrant for vicious persons to carry weapons with which to terrorize others"; referring to "the genus tramp" as "dangerous," "a public enemy," and "a thief, a robber, often a murderer," who uses "vicious violence" to "terroriz[e] the people"—including "unprotected women and children"). Indeed, tramps were "an object of fear," who were "accused…of every conceivable crime" and "probably the most common and widespread of all nineteenth century bogeymen."

Lawrence Friedman, CRIME AND PUNISHMENT IN AMERICAN HISTORY 102 (1993).

Thus, even assuming a historical tradition of preventing people who are *presently* intoxicated, under the influence of drugs, young, mentally ill, or "tramps" from possessing a firearm, there is no tradition of denying gun rights based solely on the fact that a person *used to be* intoxicated, a drug user, a youth, mentally ill, or a tramp, at some time in the past. Restricting firearm rights based on a present, temporary, mutable status is nothing like doing so based on a person's past conviction for an offense, even years earlier. *See United States v. Connelly*, 117 F. 4th 269, 279 (5th Cir. 2024).

Furthermore, these regulations are not analogous to UPWF because historically, gun rights were restored after the completion of a sentence. *See* 2 *Backgrounds of Selective Service: Military Obligation: The American Tradition*, Pts. 1–14 (Vollmer ed., 1947) (compiling Colonial- and Founding-Era militia acts) (". . . upon completing their sentences, offenders not only had full access to their Second Amendment protected rights, but able-bodied males were required to keep and bear arms under the state and federal militia acts"). Although militia laws occasionally provided exemptions for people employed in certain professions, *see, e.g.*, 1 Stat. 271, §2 (1792) (federal Uniform Militia Act providing exemptions for elected officials, post officers, stage drivers, ferrymen, inspectors, pilots, and mariners), no militia law in the Colonial or Founding periods provided any exemption based on prior incarceration or crimes committed. *See United States v. Quailes*, 126 F.4th 215, 222-23 (3d Cir. 2025) (finding historical tradition of restricting firearm possession for persons convicted of crimes who are "still serving their sentences," but that this disability lasted only "until they had finished serving their sentences"); *Range*, 124 F. 4th at 229-31 (no historical tradition justified restricting firearm possession for a person previously convicted of a nonviolent offense); *Kanter*, 919 F.3d at 458-560 (Barrett, J. dissenting) (recognizing that the denial of rights due to a criminal conviction historically only lasted until the sentence was complete). *See also United States v. Seiwert*, 152 F.4th 854, 865-869 (7th Cir. 2025) (historical laws restricting the gun rights of persons who were intoxicated or mentally

ill analogous because those conditions shows they posed a threat of current firearm misuse).

The core concern with all of these mutable characteristics is that such persons, with a firearm, pose a present, immediate threat to others. The State similarly references historical "surety" and "going armed" laws, which the Supreme Court recognized as establishing a historical tradition of restricting firearm possession by those who "pose[ ] a clear threat of physical violence to another." *Rahimi*, 602 U.S. at 693-700; *see Bruen*, 597 U.S. at 49-50. (St. Br. 17, 33) However, as these restrictions required proof of a specific, individualized, and present threat before disarmament, they are not relevantly similar to how UPWF indiscriminately prohibits firearm possession based solely on any type of past offense. *Rahimi*, 602 U.S. at 696 (surety laws required "a complaint ... to be made to a judge or justice of the peace by 'any person having reasonable cause to fear' that the accused would do him harm or breach the peace") (citation omitted).

(2) "How" firearm possession was historically restricted

Seeking a relevantly similar historical method for UPWF, the State points to the historical practice of imposing capital punishment and estate forfeiture, and requiring surety bonds. None provide a relevantly similar analogy to UPWF's lifetime prohibition on firearm possession.

(a) Historic penalties of capital punishment and estate forfeiture do not justify Benson's permanent disarmament.

The State contends that because certain historical felony offenses were punished by death or estate forfeiture, including for nonviolent offenses (like horse theft and forgery), there exists a historical tradition of restricting firearm rights for felons. (St. Br. 18, 20) But, of course, neither punishment is a *firearm* regulation or *firearm*-specific penalty, nor does the State cite even one historical law or principle relating directly to firearms. *See Rahimi*, 602 U.S. at 740 ("a court must be careful not to read a principle at such a high level of generality that it waters down the right") (Barrett, J., concurring).

Nonetheless, for capital punishment, the State asserts that "the historical application of a greater penalty means that a lesser penalty is also permissible." (St. Br. 22) But this way

of thinking defies the *Bruen* analysis, which demands an evaluation of *firearm regulations* specifically and requires the State to identify a relevantly similar historical tradition to both "why" and "how" UPWF restricts gun rights. *See Rahimi*, 602 U.S. at 699 ("The going armed laws provided for imprisonment, 4 Blackstone 149, and if imprisonment was permissible to respond to the use of guns to threaten the physical safety of others, then the lesser restriction of temporary disarmament that Section 922(g)(8) imposes is also permissible.").

In any event, the very premise of the State's argument is questionable, as "even before the Founding, the link between felonies and capital punishment was frayed." *Folajtar v. Attorney General*, 980 F.3d 897, 920 (3d Cir. 2020) (Bibas, J., dissenting). In Blackstone's telling, at common law not all felonies faced capital punishment; it was only certain felonies "according to the degree of guilt," "to which capital or other punishment may be superadded." 4 W. Blackstone, Commentaries on the Laws of England 95 (10th ed. 1787); *see also id.* at 97 ("Felony may be without inflicting capital punishment ... and it is possible that capital punishments may be inflicted, and yet the offence be no felony ...."). The American colonies further limited the scope of crimes eligible for the death penalty relative to the English Common Law. *Folajtar*, 980 F.3d at 920 (Bibas, J., dissenting). And even for those crimes that were capital, "[t]he colonies carried out the death penalty 'pretty sparingly,' and '[p]roperty crimes were, on the whole, not capital.'" *Id*. (quoting Lawrence M. Friedman, *Crime and Punishment in American History* 42 (1993)). "Colonial Pennsylvania, for instance, on average sentenced fewer than two people per year to die and executed only one of those two per year." *Id*. (citation omitted).

The relationship between the death penalty and felonies continued to diverge at the founding. "[M]any states were moving away from making felonies . . . punishable by death in America." *Range*, 124 F.4th at 227. James Madison explained in The Federalist that the term "felony is a term of loose signification, even in the common law of England." The Federalist No. 42, at 234 (Clinton Rossiter ed., 1961) (James Madison). What defined a felony "is not precisely the same in any two of the States; and varies in each with every revision of its criminal

laws." *Id*. As a result, there were "many felonies, not one punished with forfeiture of estate, and but a very few with death." Nathan Dane, *A General Abridgment and Digest of American Law* 715 (Boston, Cummings, Hilliard & Co. 1824). Thus, any "Founding-era practice of punishing some nonviolent crimes with death does not suggest that the particular (and distinct) punishment at issue here—*de facto* lifetime disarmament for all felonies [ ]—is rooted in our Nation's history and tradition." *Range*, 124 F.4th at 231.

The State's capital punishment argument also makes little sense as a constitutional analysis. Indeed, "we wouldn't say that the state can deprive felons of the right to free speech because felons lost that right via execution at the time of the founding." *Kanter*, 919 F.3d at 461-62 (Barrett, J., dissenting); *see United States v. Jackson*, 85 F.4th 468, 474 (8th Cir. 2023) (Stras, J., dissenting) ("[d]ead men do not speak, assemble, or require protection from unreasonable searches and seizures . . ."). To the same point, "[n]o one suggests that [someone with a prior felony conviction] has no right to a jury trial or [to] be free from unreasonable searches and seizures." *Williams*, 113 F.4th at 658; *Bruen*, 597 U.S. at 70 (Second Amendment is not "a second-class right"). Thus, "the obvious point that the dead enjoy no rights does not tell us what the founding-era generation would have understood about the rights of felons *who lived, discharged their sentences, and returned to society*." *Kanter*, 919 F.3d at 462 (Barrett, J., dissenting) (emphasis supplied). In fact, "in the Founding era, a felon could acquire arms after completing his sentence and reintegrating into society." *Range*, 124 F.4th at 231; *see Quailes*, 126 F.4th at 222 (historical disarmament lasted until a person's sentence was complete).

Regarding estate forfeiture, the State does not account for the fact that firearms were generally not a part of civil estate forfeiture. Several Colonial- and Founding-Era laws expressly protected criminals' arms. In 1786 Massachusetts, estate sales were held to recover funds stolen by corrupt tax collectors and sheriffs–but it was forbidden to include "arms" in the sales. 1786 Mass. Acts 265. Laws exempting arms from civil action recoveries existed since 1650 in Connecticut. The Public Records of the Colony of Connecticut, Prior to the Union with New

Haven Colony, May 1665, at 537 (Trumbull ed., 1850). Maryland and Virginia enacted similar exemptions. 13 Archives of Maryland, at 557 (1692 Maryland); 30 *id*. at 280 (1715 Maryland); 3 Hening, Statutes, at 339 (1705 Virginia); 4 *id*. at 121 (1723 Virginia). And the federal Uniform Militia Act in 1792 exempted militia arms "from all suits, distresses, executions or sales, for debt or for the payment of taxes." 1 Stat. 271, §1 (1792).

Further, the State's point that a person could historically lose their firearm or other property upon being convicted of a crime does not speak to their rights *after serving their sentence and re-entering society*. *See also Range*, 124 F. 4th at 231 (Founding-era laws that prescribed for the forfeiture of a weapon did so for a weapon "used to commit a firearms-related offense without affecting the perpetrator's right to keep and bear arms generally"). In fact, the loss of property or civil rights as a result of a felony conviction historically only applied during a person's sentence and did not continue after the sentence was completed; permanent loss of such rights applied only to those who received life sentences. *See Kanter*, 919 F.3d at 458-61 (Barrett, J. dissenting) (collecting sources); *Quailes*, 126 F.4th at 222 (while there is "a longstanding and uninterrupted tradition of disarming convicts still serving a criminal sentence," such historical disarmament lasted only "until they had finished serving their sentences") (quotation and citation omitted); *Range*, 124 F.4th at 231 ("in the Founding era, a felon could acquire arms after completing his sentence and reintegrating into society").

Thus, historical punishments of estate forfeiture and capital punishment for certain felonies do not reflect a consistent historical practice of firearm regulation "relevantly similar" to "how" the UPWF statute permanently prohibits firearm possession based on any prior felony conviction, after a person has completed their sentence and returned to society.

(b) Surety and "going armed" laws are not relevantly similar to "how" UPWF imposes a lifetime ban on firearms possession.

"Surety" and "going armed" laws, discussed in Arg. (C)(1)(b) above, are not relevantly similar to statutes that permanently prohibit firearm possession following a felony conviction.

Such statutes "required certain individuals to post bond before carrying weapons in public." *Bruen*, 597 U.S. at 55. Unlike UPWF, these surety laws "were not *bans* on public carry" or possession and "typically targeted only those threatening to do harm." *Id*. (emphasis in original). A judicial determination of cause for the charge was required, and, importantly, surety bonds could not be required for more than six months at a time. *Rahimi*, 602 U.S. at 696-697 (upholding temporary disarmament of a person subject to a temporary domestic violence restraining order). Going armed laws also amounted to a prohibition on terrorizing the public and therefore also relate to present conduct. *Id.* at 697. UPWF and historical surety and "going armed" laws therefore do not "impose a comparable burden on the right of armed self-defense," nor a burden that is "comparably justified," as *Bruen* mandates. *Bruen*, 597 U.S. at 29.

(c) There is no historical analogy for obtaining relief through the FOID Card Act.

The State disputes that UPWF imposes a "lifetime ban," because subsection 10(c) of the FOID Card Act provides a procedure for felons to regain firearm rights.[2] (St. Br. 24) But despite claiming that this procedure is analogous to historical laws, the State cites none. (St. Br. 25) Indeed, to show that the theoretical ability to regain gun rights has any bearing on UPWF's constitutionality as applied to Benson, the State would have to show historical support – a "well-established and representative historical analogue" – in the form of a presumptive, blanket, lifetime ban on gun possession for anyone convicted of any felony, limited only by the possibility of discretionary relief from a government official. *See Bruen*, 597 U.S. at 30. The State's silence on this score is especially striking given that *Bruen* itself invalidated a regime that "grant[ed] licensing officials discretion to deny [firearms] licenses based on a perceived lack of need *or suitability*." *Id*. at 13 (emphasis added).

The larger point is that constitutional rights cannot turn on government discretion.

[2] Although it is theoretically possible for a felon to obtain a FOID Card, Illinois law makes it a crime to sell or give a firearm to anyone with a felony conviction, making any resumption of Second Amendment rights illusory. 720 ILCS 5/24-3(A)(d).

A statute that bars a person from exercising a core constitutional right does not become permissible simply because the government might, in its discretion, grant an exception. *See Ex parte Parker*, 131 U.S. 221, 225 (1889) ("Rights under our system of law and procedure do not rest in the discretionary authority of any officer."). For example, in the First Amendment context, "broad licensing discretion [by] a government official" is a vice, not a virtue. *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (prior restraints subject to such discretion are invalid). And the Second Amendment, no less than the First, "protects against the Government; it does not leave us at the mercy of noblesse oblige. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *United States v. Stevens*, 559 U.S. 460, 480 (2010).

As the State acknowledges, relief under subsection 10(c) of the FOID Card Act is not automatic. (St. Br. 24) Nor are there clear, objective criteria, which, if satisfied, entitle a person to relief. To the contrary, the factors that government officials must consider are vague or highly subjective, including that the circumstances of the applicant's conviction and criminal history are such that they "will not be likely to act in a manner dangerous to public safety," and that "granting relief would not be contrary to the public interest." 430 ILCS 65/10(c)(2), (3). Worse, the determination of these highly subjective factors turns entirely on the discretionary grace of government officials. Indeed, section 10(c) states that this subjective criteria must be met to the "satisfaction" of the Board or court. 430 ILCS 65/10(c). And even if those criteria are satisfied, this provision provides only that the Board or court "may" grant relief. 430 ILCS 65/10(c). That standard provides an almost unreviewable level of discretion. This kind of highly-subjective discretion to awarding core Second Amendment rights is exactly what the Supreme Court found fault with in *Bruen*: it is "constitutionally problematic" to leave the right to bear arms to the "open-ended discretion" of government officials. *Bruen*, 597 U.S. at 79 (Kavanaugh, J., concurring). *See also Evans v. Cook Cnty. State's Att'y*, 2021 IL 125513, ¶ 43 (acknowledging, before *Bruen*, that "it is possible to quibble with some of the circuit court's reasoning" regarding

its consideration of section 10(c) factors). Thus, whether UPWF imposes a lifetime firearm ban, or a lifetime ban limited only by the possibility of discretionary relief from a government official, there is no relevantly similar historical analogue. Instead, historical firearm restrictions, even for dangerous people, were temporary. (Op. Br. 27)

Again, it is the State's burden to present a sufficient historical justification; it does not rest with Benson nor this Court to unearth historical sources to justify or disprove the UPWF statute's constitutionality. *See Thompson,* 2025 IL 129965, ¶ 34 (citing *Bruen,* 597 U.S. at 60). Thus, because the evidence the State cited, in this case, does not prove that there was a consistent historical tradition relevantly similar to both "why" and "how" the UPWF statute restricted Benson's firearm rights, this Court should reverse his conviction on that basis alone.

D. The UPWF statute violates the Second Amendment, as applied to Benson, notwithstanding the State's policy concerns.

Instead of responding to Benson's as-applied challenge, the State presents two separate policy-based arguments: that an alternative remedy to an as-applied challenge already exists in the aforementioned FOID Card Act, and that entertaining as-applied challenges in the Second Amendment context would be "unworkable" and create"endless litigation." 720 ILCS 5/24-1.1(a); 430 ILCS 65/10(c). (St. Br. 38-40) However, such legislative or policy-based arguments are inappropriate; and regardless, the State's concerns are overblown.

The Supreme Court has repeatedly emphasized that because firearm possession is a constitutional right, it cannot be restricted by legislative policy considerations. *Bruen*, 597 U.S. at 17 ("To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation."); *Heller*, 554 U.S. at 634, 636 ("the enshrinement of constitutional rights necessarily takes certain policy choices off the table"; rejecting "a judge-empowering 'interest-balancing inquiry that 'asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the

statute's salutary effects upon other important governmental interests'"); *McDonald*, 561 U.S. at 790.

In any event, the existence of an alternative administrative process to raising an as-applied constitutional challenge in court, does not somehow negate the merit of such constitutional challenge. Also, as discussed, the legislative scheme outlined in the FOID Card Act–a presumptive lifetime ban on firearm possession, subject to inexact criteria and complete government discretion–has no relevant historical analogue, nor does the State even try to provide one. It thus does not establish that UPWF is constitutional, as applied to Benson.[3] *See* Arg. (C)(2)(c).

Further, the State's fear that permitting as-applied Second Amendment challenges will "mire courts in endless litigation" and "produce uncertainty and confusion" is overblown. (St. Br. 40, 44) Our nation's tradition of restricting firearm rights for dangerous people is consistent with prohibiting gun possession by persons with prior convictions involving violent behavior, or with convictions for offenses posing a unique danger that violence would result (like residential burglary). It therefore remains constitutional to restrict the firearm rights based on prior offenses qualifying as an expansively-defined "forcible felony," which includes any "felony which involves the use or threat of physical force or violence against any individual." 720 ILCS 5/2-8.[4] A dangerousness analysis could similarly be informed by the body of law on forcible felonies under the Armed Career Criminal Act (ACCA). 18 U.S.C. § 924(e). Relying on such settled categories of violent offenses would establish a workable standard and avoid unnecessary litigation.

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[3] To be clear, Benson is not challenging the constitutionality of the FOID Card Act; he argues only that the Act does not render UPWF constitutional as applied to him.

[4] "Forcible felony" means treason, first degree murder, second degree murder, predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, robbery, burglary, residential burglary, aggravated arson, arson, aggravated kidnaping, kidnaping, aggravated battery resulting in great bodily harm or permanent disability or disfigurement and any other felony which involves the use or threat of physical force or violence against any individual. 720 ILCS 5/2-8.

Other prior offenses, such as certain drug crimes the State mentions (St. Br. 44), could be addressed at a pretrial hearing, little different than other motions *in limine*. Judges would need only decide if a prior felony involved violence or posed a unique risk of violence. Such task should not be burdensome for prosecutors or judges, and does not require specific factual analysis. In fact, the Cook County prosecutor's office has already adopted a similar practice, by voluntarily sending some people with gun possession charges–which that office deems a nonviolent offense–to Cook County's Restorative Justice Community Courts (RJCC).[5] This approach is far more workable, fair, and less complex than the individualized FOID Card Act reinstatement hearings that the State advocates as a means to restore firearm rights. (St. Br. 38-39) But, of course, this is an as-applied challenge; this Court need not determine the full scope of the Second Amendment in this case.

In this case, the record of Benson's prior nonviolent convictions is more than sufficient for this Court to find that, considering the particular circumstances of this case, the UPWF statute is incompatible with our nation's historical tradition of firearm regulation, and thus violated the Second Amendment, as applied to him. (Op. Br. 32) While the State speculates that failing to obtain a gun license is an offense that "poses a threat to public safety and reflects a propensity for dangerous behavior" (St. Br. 42), it ignores Illinois law characterizing firearm possession as nonviolent. 720 ILCS 5/2-8. (Op. Br. 13) The State's reliance on a series of studies entirely circumvents the *Bruen* test, which does not consider such policy effects of legislation. (St. Br. 42-43); *see United States v. Freeman*, 701 F. Supp. 3d 716, 729 (N.D. Ill. 2023) ("Although there are strong policy reasons for doing everything possible to keep guns off our streets and out of our communities—policies that could be addressed by legislation rather than judicial edict—this court can find no such historical analog" under *Bruen*.). In any event, the

[5] Blair Paddock, Cook County State's Attorney Reverses Course, Diverts Nonviolent Gun Cases to Restorative Justice Courts, WTTW https://news.wttw.com/2026/01/28/cook-county-state-s-attorney-reverses-course-diverts-nonviolent-gun-cases-restorative, accessed on January 30, 2026.

studies showing a statistical connection between licensing laws and gun violence in the community at large do not speak to the precise issue here, which is whether UPWF violates the Second Amendment as applied to Benson. Crime statistics are no substitute for the fact that he simple possession of a gun without a license sometime in the past is *not a judicial finding* that a person is *presently dangerous*.

This Court should therefore find the UPWF statute violates the Second Amendment as applied to Benson. Yet, if this Court determines that an evidentiary hearing is required to assess the historical record or to determine if Benson's prior convictions establish dangerousness under *Rahimi*, it should remand for such hearing and provide the lower courts with guidance on how to review such as-applied *Bruen* challenges. *See Thompson*, 2025 IL 129965, at ¶ 87 (Overstreet, J., dissenting) (finding that a remand for the lower court to conduct the kind of historical analysis mandated by *Bruen* can be appropriate).

CONCLUSION

For the foregoing reasons, James Benson, defendant-appellant, respectfully requests that this Court reverse his conviction for unlawful possession of a weapon by a felon, or in the alternative, remand for a *Bruen* hearing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 20 pages.

/s/Elizabeth Cook
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No. 131191

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- JAMES BENSON, Defendant-Appellant.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 1-22-1230. There on appeal from the Circuit Court of Cook County, Illinois , No. 22 CR 1006. Honorable James B. Linn, Judge Presiding.

NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On February 11, 2026, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

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