TESTIMONY OF
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Chairman Sears, Vice Chairman Hashim, and distinguished members of the Committee, thank you for the opportunity to testify today.

I am Darrell A. H. Miller, the Melvin G. Shimm Professor of Law at Duke University School of Law and faculty co-director of the Duke Center for Firearms Law. I provide this testimony today in my personal capacity.

I understand this Committee is considering legislation that touches on matters related to firearms and gun violence prevention, and that you seek information about the past, present, and future of the federal Second Amendment, with focus on the meaning and effect of the U.S. Supreme Court's June 2022 decision in *New York State Rifle & Pistol Association v. Bruen*.

My conclusions are as follows:

- First, *Bruen*, properly applied, leaves ample room for regulation to promote safety and gun violence prevention.

- Second, *Bruen* has and will generate considerable short- to medium-term legal uncertainty, until such time as appellate courts converge on an administrable test for the Second Amendment and/or the United States Supreme Court clarifies the test for deciding Second Amendment cases.

- Third, historical sources, information and expertise will be more important than ever in justifying the constitutionality of regulations in the nation's courts.

- Fourth, empirical data on firearms policy remains relevant, but will need to be translated into a historical frame for litigants and judges to evaluate whether the regulations are compliant with Second Amendment limits.

Let me elaborate.

The Second Amendment is short; it reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed." For over 200 years, every federal case to consider this Amendment held that it did not confer any individual right to keep or possess firearms unrelated to membership in a well regulated militia. State constitutions may have conferred greater rights; but the Second Amendment was largely inert as a matter of law.

District of Columbia v. Heller (2008)

That changed dramatically in 2008 in a Supreme Court case called *District of Columbia v. Heller*. *Heller* concerned a challenge to a regulation in the District of Columbia that made it practically impossible for a person to possess a functional handgun in the home for purposes of self defense. Dick Heller, a District resident, sued the city, claiming that this regulation violated his Second Amendment rights. The Supreme Court, in a 5-4 decision written by Justice Antonin Scalia, agreed, holding for the first time that the Second Amendment guaranteed a right to possess firearms in the home for personal purposes unrelated to membership in an organized militia like the National Guard.

That said, the *Heller* majority was clear that the Second Amendment—like all constitutional rights—is not absolute. "Nothing in our opinion," Justice Scalia wrote, "should be taken to cast doubt on long-standing prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." The Court also said that only weapons in "common use" enjoy constitutional protection; weapons that are "dangerous and unusual" can be regulated or prohibited.

Heller addressed only the District of Columbia regulation on firearms in the home and left a host of questions unanswered. Does the Second Amendment right extend beyond the home? Who are the people protected by Second Amendment? Does "the people" include undocumented immigrants or minors? What qualifies as a weapon "in common use" as opposed to "dangerous and unusual"?

The Two-Part Framework in Lower Courts (2008-2022)

To answer these questions, lower courts fashioned a two-part framework, based on the language in *Heller* and a doctrinal approach used to implement the First Amendment. At step one, courts examined whether firearm-related activity fell within the Second Amendment's scope or if it was categorically excluded; the second step of the test looked to the stated purpose of the regulation, how well the regulation accomplished that purpose, and how much otherwise protected activity would be affected by it.

So, for example, for prohibitions on devices like fully automatic rifles; courts would say that they were categorically excluded from Second Amendment coverage because they were "dangerous and unusual" and stop there. For prohibitions on firearms with obliterated serial numbers, the court first asked whether firearms with obliterated serial numbers were categorically excluded from the definition of "arms" according to *Heller*. If they were not, the court would then examine the stated goal of the prohibition (crime detection and prevention), the effectiveness of the regulation in accomplishing the goal, and the effect of that regulation on otherwise protected activity. In the case of prohibitions on guns with obliterated serial numbers, the courts upheld these regulations because crime detection and prevention is an important government interest, this was a logical way to pursue that goal, and the prohibition did not sweep in too much protected activity, because it was still possible to defend one's home with a firearm that had a serial number.

Every appellate court to directly address the issue used this two-part framework for Second Amendment cases for the next fourteen years.

***New York State Rifle & Pistol Association v. Bruen* (2022)**

That all changed in 2022. *New York State Rifle & Pistol Association v. Bruen* upended this settled lower court precedent in a 6-3 majority opinion written by Justice Clarence Thomas. *Bruen* considered the constitutionality of New York's discretionary permitting for a license to carry a pistol. At issue was whether the Second Amendment right to "bear" arms extended beyond the home. The Court held it did. The Court also held that the discretionary "may-issue" licensing law of New York and five other states violated the Second Amendment. But the major change *Bruen* inaugurated was to reject the two-part framework lower courts had been using, and to replace it with a new, text, history and tradition framework. From now on, the constitutionality of gun laws depend on whether they are, in some yet ill-defined sense, consistent with this nation's historical tradition of firearm regulation.

This new text, history and tradition approach itself appears composed of two parts. The first step of this new framework asks whether "the Second Amendment's plain text covers an individual's conduct." (Elsewhere, the majority says that the first part of the test is "text, as informed by history.") If the text (or text, as informed by history) covers the conduct, "the Constitution presumptively protects that conduct." The burden then shifts to the government to justify its regulation in step two. At step two, "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."

Of course, there will be numerous regulations that don't have precise historical parallels. There are societal problems or technologies completely unknown in the 1700s, when the Second Amendment was ratified. For these circumstances, courts can apply a "nuanced approach" and rely upon analogous historical regulations. The historical regulation need not be "a historical twin" but must be "a well-established and representative historical analogue" in order to prove that the contemporary regulation fits within an American tradition of firearm regulation. The mechanics of this analogical process are still being worked out in lower courts, but *Bruen* instructs they are to be guided by "how and why the regulations burden a law-abiding citizen's right to armed self-defense."

Three justices wrote concurrences, but the one written by Justice Brett Kavanaugh, joined by Chief Justice John Roberts, is especially noteworthy. "First," said Justice Kavanaugh, "the Court's decision does not prohibit States from imposing licensing requirements for carrying a handgun for self-defense." Second, Justice Kavanaugh said, "[p]roperly interpreted, the Second Amendment allows a 'variety' of gun regulations." Justice Kavanaugh then reiterated the list of "presumptively lawful" regulations from *Heller*, including "prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms" or prohibitions on "dangerous and unusual weapons."

***Post-Bruen* (2022-present)**

The few months following *Bruen* have been marked by innovation and uncertainty. In response to horrible mass shootings like those at an elementary school in Uvalde, Texas and a grocery store in Buffalo, New York, the federal government passed the Bipartisan Safer Communities Act, the first federal firearms regulation to make it through Congress in decades. In addition, in response to *Bruen* and the continuing problem of gun violence in our country, New York, New Jersey, California and other states have passed or are considering firearm regulation.

Simultaneously, *Bruen* has created constitutional vulnerability for laws that had long seemed secure under the old two-part framework, including restrictions on firearms in the hands of felons, in the hands of those under domestic violence restraining orders, and in places such as hospitals and summer camps.

The law is currently in flux, with trial courts coming to different conclusions about the lawfulness of a host of regulations.

The axes of division between the courts fall into a few categories:

- Plain text: Does the "plain text" prong of *Bruen*'s framework mean just contemporary linguistic meaning of people, keep, bear, and arms; or is it understood as "text, as informed by history," to include categorical exclusions for factors like possession by minors, those with felony convictions or indictments, possession of "dangerous and unusual weapons," or activities like manufacturing arms? What is the test if the plain text does not directly cover the activity, but implicates it?

- Use of analogs: At step two of *Bruen*, what kind of technological or social change, or modern societal problem is sufficient to trigger the more "nuanced approach" with respect to analogs? For example, are mass shootings a modern societal problem sufficiently different from historical violence to activate a more nuanced approach? What amount of historical regulations, over what period of time, distributed across how many jurisdictions, at what level of generality is required to establish a "historical tradition of firearm regulation"? For example, there are a number of historical regulations prohibiting firearms in places where people gather for educational purposes: Are there enough historical examples of them to be "representative"? Are they in the right jurisdictions? Are the regulations relevant for prohibitions on guns in modern facilities like day care centers or sports stadiums?

- Kavanaugh's concurrence: How should courts read Justice Kavanaugh's assurances that "[p]roperly interpreted, the Second Amendment allows a 'variety' of gun regulations?" Do "longstanding regulations" such as prohibitions on firearms in the hands of felons and the mentally ill remain untouched by the *Bruen* decision?

Legislators and litigants are reacting in the following ways:

- Legislating within the boundaries of *Bruen*: Some legislators are taking comfort in the fact that *Bruen* is sufficiently ambiguous, with sufficiently open questions, that most regulations at least have the potential to be upheld by the courts under this new text,

history and tradition approach. Other legislators are using *Bruen* to justify voting against gun regulations or to vote for expanded gun rights not otherwise required by *Bruen*.

- Searching for historical sources and expertise: Lawmakers and those defending regulations both old and new realize that they must compile a record of historical regulations that can be described as both "representative" and "analogous" to the modern regulation. This requires relying on trained historians and on databases of historical materials like the Duke Repository of Historical Firearms Laws, located here.

- Explaining empirical data within the historical framework of *Bruen*: Finally, *Bruen* now makes the mere assertion of the importance and effectiveness of a regulation insufficient to render the regulation constitutional. Instead, the regulation must be translated into a historical register. So, for example, whereas once it may have been sufficient to simply specify certain individuals as posing a risk of violence based on criminological or empirical data; now that data must be tied to a historical tradition of disarming dangerous people. So, one may aim to defend a prohibition on arms in the hands of those guilty of domestic violence misdemeanors—not because the Founders disarmed those convicted of domestic violence (they didn't)—but because historically, there is a tradition of prohibiting dangerous people from possessing firearms, a domestic violence prohibitor is aimed at dangerous people, and we know those convicted of domestic violence are dangerous by modern empirical data.

Conclusion

Thank you again for the invitation to testify today. I'm happy to discuss any questions the Committee may have about these remarks.