No. 22-1482

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JENNIFER J. MILLER, DARIN E. MILLER, SECOND AMENDMENT FOUNDATION, INC., ILLINOIS STATE RIFLE ASSOCIATION, and ILLINOIS CARRY,

Plaintiffs-Appellants

v.

MARC D. SMITH, in his official capacity as Director of the Illinois Department of Children and Family Services, and KWAME RAOUL, in his official capacity as Attorney General of the State of Illinois

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS (No. 3:18-cv-3085)
HONORABLE SUE E. MYERSCOUGH

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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INTRODUCTION

Plaintiffs' opening brief showed why the Day Care Home and Foster Home Rules at issue in this case—which ban law-abiding adults licensed to provide day or foster care in their own homes from keeping "any lawful firearm in the home operable for the purpose of immediate self-defense," *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008)—violated the Second Amendment under the doctrinal framework that then applied. But since that brief was filed, the Supreme Court issued its opinion in *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S.Ct. 2111 (2022), which significantly—and decisively—changed the analysis by abrogating the "two-step" framework previously applied in this Circuit. Defendants acknowledge the decisive import of *Bruen*, but they get the takeaway exactly backwards: rather than "underscore[ing]" "the constitutionality of the [Department of Children and Family Services ("DCFS")] rules," Appellees' Br. 3, *Bruen* is fatal to them.

The decision in *Bruen* makes double-clear the "the standard for applying the Second Amendment": if "the Second Amendment's plain text covers an individual's conduct," then the government's attempt to restrict that conduct is unconstitutional, full stop, unless the government can "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." 142 S.Ct. at 2129-30. While Defendants try to show that the challenged limits are consistent with the Nation's history, they do not succeed, because their historical analysis

suffers from two fatal defects: (1) They focus on the *wrong historical period*—giving too little weight to the firearms restrictions that were accepted close-in-time to "when the Bill of Rights was adopted in 1791" and too much to "late-in-time outliers" from the late nineteenth and early twentieth centuries. *Id.* at 2137, 2156. And (2) rather than finding "well-established and representative" historical restrictions that are closely analogous to the challenged bans, *id.* at 2133, Defendants point to all manner of completely unrelated restrictions, cobble them together into a purported "historical tradition of protecting children from the dangers of firearms," Appellees' Br. 19, and then use this tradition to "eviscerate the general right to [keep] arms for self-defense" in precisely the manner *Bruen* condemns, 142 S.Ct. 2134. When *Bruen*'s careful instructions for applying its text and history test are followed, it becomes inescapably clear that the challenged rules find no justification in "this Nation's historical tradition of firearm regulation." *Id.* at 2135.

Nor do Defendants succeed in justifying the challenged bans on the basis of Plaintiffs' status as government contractors, or the suggestion that they relinquished their Second Amendment rights in exchange for a foster-care or day-care license. Defendants fail to show that their proposed rule empowering the State to "impose reasonable standards on its contractors" that effectively nullify their Second Amendment rights, Appellees' Br. 38, has *any support* in the "Nation's historical tradition of firearm regulation," *Bruen*, 142 S.Ct. at 2135; and under "the standard

for applying the Second Amendment" set forth in *Bruen*, that is dispositive. And even if Defendants could establish some sort of super-constitutional rule governing the extent to which "the government may impose conditions on contractors," Appellees Br. 40—a rule that applies to Second Amendment rights *regardless* of its historical justification (contrary to *Bruen*'s clear holding setting forth the *exclusive* "standard for applying the Second Amendment," 142 S.Ct. at 2129)—that overarching principle would be limited by another: that "what a government cannot compel, it should not be able to coerce," *Planned Parenthood of Ind., Inc. v. Commissioner of Ind. State Dep't Health*, 699 F.3d 962, 986 (7th Cir. 2012) (quotation marks omitted).

ARGUMENT

I. *Bruen* makes clear that the Second Amendment requires a categorical approach based on text and history.

The district court upheld the challenged bans under the pre-*Bruen* "two-step inquiry," based entirely on its conclusion that the restrictions "survive[ ] step two's 'means-ends' scrutiny." App.30, 32. As Defendants concede, Appellees' Br. 19, *Bruen* makes clear that this analysis was in error and can no longer justify Illinois's bans. The Supreme Court explicitly rejected the "two-step approach" applied below, concluding that "it is one step too many." 142 S.Ct. at 2127. Instead the Court reaffirmed, and clarified beyond further dispute, what it had said in *Heller*: to justify a restriction on keeping or bearing arms, the government *must* "demonstrat[e] that it

is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command." *Id.* at 2129-30 (cleaned up); *cf.* Appellants' Br. 31-32.

Illinois argues that the outcome below can be salvaged "even after *Bruen*," Appellees' Br. 19, because of its arguments based on the "sensitive places" exception, Plaintiffs' status as state licensees, and Plaintiffs' purported waiver of their Second Amendment rights, and we address all of those contentions below. But make no mistake: *the district court did not uphold the challenged restrictions for any of these reasons.* Instead, it *rejected* Defendants' waiver argument, App.24; and while it gave some weight to Plaintiffs' status as state licensees, and its conclusion that day-care homes are purportedly "sensitive places," it specifically *declined* to uphold the challenged restrictions on either of these bases alone, instead opting to fold these considerations into the "means-end analysis under step two" that *Bruen* has now repudiated. App.30, 45. Under the district court's own reasoning, rather than Defendants' reconstruction of it, *Bruen*'s elimination of means-ends scrutiny completely vitiates the court's justifications for upholding the challenged bans.[1]

[1] Defendants argue that this Court's analysis "should be limited to plaintiffs' as-applied challenge" because the district court declined to address Plaintiffs' facial challenge and we purportedly "do not dispute this determination." Appellees' Br. 26. Not so. The *reason* the district court declined to address our facial challenge was

II. The Foster Home Ban and Day Care Home Ban are inconsistent with the Second Amendment's text and history.

The State does not dispute that the conduct burdened by the rules challenged here—keeping "any lawful firearm in the home operable for the purpose of immediate self-defense," *Heller*, 554 U.S. at 635—is covered by the Constitution's plain text and thus "presumptively protect[ed]" by the Second Amendment. *See* Appellees' Br. 16-17. Accordingly, the burden falls to the government to justify its bans under the Second Amendment's history. It attempts to do so, but its arguments on that score are all based on a fundamental misunderstanding of what era of "historical tradition" is relevant to the analysis and how to reason by analogy from restrictions enacted during the relevant era. We begin by clarifying both points.

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not any independent determination that "plaintiffs cannot satisfy the standard for facial challenges," *id.*, but rather its conclusion that "the appropriate response to a dual challenge like Plaintiffs' is to consider the as-applied challenge first, and then, if the as-applied challenge succeeds, to address the facial challenge if doing so is appropriate," App.26. Yes, we "do not dispute" that that was the appropriate *structure* of analysis; but we obviously dispute the determination below that the restrictions are valid as applied, and so it is equally obvious that the district court's conclusion that it need not "address the facial challenge" no longer follows. Moreover, because all of the reasons that render the challenged bans unconstitutional as applied to Plaintiffs also render them unconstitutional as applied *to anyone*, the appropriate relief in this case is an order declaring them unconstitutional on their face. *See Ezell v. City of Chicago* (*Ezell I*), 651 F.3d 684, 697-98 (7th Cir. 2011).

A. The proper historical analysis focuses on Founding-Era restrictions, and late-nineteenth-century laws cannot be used to contradict the Second Amendment's plain meaning.

The great bulk of Illinois's historical evidence comes from long after the ratification of the Second Amendment in 1791, from "regulations enacted throughout the nineteenth century and into the twentieth." Appellees' Br. 36 (internal quotation marks omitted). Because the key period for understanding the Second Amendment is the time of its ratification—1791—all of this later evidence is irrelevant. *See* Mark W. Smith, *"Not all History is Created Equal": In the Post-Bruen World, the Critical Period for Historical Analogues is when the Second Amendment was Ratified in 1791, and not 1868* (Oct. 1, 2022), *available at* https://bit.ly/3CMSKjw. Two principles—both established by binding and unequivocal Supreme Court precedent—necessitate the conclusion that 1791 is the critical year, not 1868—and *certainly* not historical evidence from "into the twentieth [century]." Appellees' Br. 36.

First, incorporated Bill of Rights provisions have the same meaning applied to the States as to the federal government. *See McDonald v. City of Chicago*, 561 U.S. 742, 765 (2010) ("incorporated Bill of Rights protections 'are all to be enforced against the States … according to the same standards that protect those personal rights against federal encroachment' " (citation omitted)). It has been a bedrock principle of Bill of Rights jurisprudence *for over five decades* that while it is the

Fourteenth Amendment that *incorporates* the Bill of Rights guarantees against the States, once incorporated, those rights have *exactly the same meaning against the States* as they do against the federal government. As the Court put the point in *Malloy v. Hogan* in 1964, the protections in the Bill of Rights are "to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." 378 U.S. 1, 10-11 (1964). The Court has repeatedly reiterated that fundamental rule in the ensuing years, most recently *in Bruen itself*: "individual rights enumerated in the Bill of Rights and made applicable against the States through the Fourteenth Amendment have the same scope as against the Federal Government." 142 S.Ct. at 2137. Indeed, the State's amicus expressly concedes that "*Bruen* rejected the possibility of different standards for the state and federal governments." Everytown Amicus Br. 7.

Second, as *Bruen* also makes clear, the Supreme Court has always treated the ratification of the Bill of Rights as the key period for understanding the scope of the rights enumerated therein. 142 S.Ct. at 2137 (citing *Crawford v. Washington*, 541 U.S. 36, 42-50 (2004); *Virginia v. Moore*, 553 U.S. 164, 168-69 (2008); *Nevada Comm'n on Gaming Ethics v. Carrigan*, 564 U.S. 117, 122-25 (2011)). Almost a century ago, the Court explained that the First Congress of 1789, is "a Congress whose constitutional decisions have always been regarded, as they should be regarded, as of the greatest weight in the interpretation of that fundamental

instrument," *Myers v. United States*, 272 U.S. 52, 174-75 (1926), and this practice is no less true in the context of the Bill of Rights, *see, e.g.*, *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984) ("The interpretation of the Establishment Clause by Congress in 1789 takes on special significance in light of the Court's [reasoning in *Myers*].").

Illinois's amicus argues, instead, that 1868 should be the relevant date for *both* the Second Amendment's application against the States *and the federal government*. But nothing in *Bruen* hints that the Court meant to usher in such a sea-change in incorporation doctrine. And the fact that Supreme Court precedent makes "the public understanding of [a] right in 1868 … central to whether the right was incorporated against the states" but "irrelevant" to determining the *meaning* of the right, far from "extraordinary" or contrary to originalist principles, Everytown Br. 9, follows directly from those principles. For while the generation that adopted the Fourteenth Amendment engaged in a robust debate about *whether* to apply the Bill-of-Rights guarantees against the States, *no one* thinks they engaged in any kind of meaningful debate over whether to *change the substantive meaning of each of those rights*.

To be sure, *Bruen* "acknowledge[d] that there is an ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope (as well as the scope of the right against the Federal Government)," and it stated that it did not "need [to] address this issue." 142 S.Ct. at 2138. But the Court's

decision not to wade into a "scholarly debate" cannot be read as changing or casting doubt on the longstanding precedent described above. And that precedent dictates that 1791 is the critical date. Indeed, as this Court has recognized, unless and until the Supreme Court overturns one of its precedents it remains binding no matter how "wobbly" or "moth-eaten" its "foundations" have become. *See Khan v. State Oil Co.*, 93 F.3d 1358, 1363 (7th Cir. 1996), *vacated by State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (overruling precedent but stating that "[t]he Court of Appeals was correct in applying" it because "it is this Court's prerogative alone to overrule one of its precedents.").

Justice Barrett's concurring opinion in *Bruen* provides further confirmation of the point. Justice Barrett strongly suggested that "Reconstruction-era history" is "simply too late," and she cautioned that "today's decision should not be understood to endorse freewheeling reliance on historical practice from the mid-to-late 19th century to establish the original meaning of the Bill of Rights." 142 S.Ct. 2163 (Barrett, J., concurring). It would be difficult to come up with a more apt description of Defendants' discussion of history in this case.

The *Bruen* majority opinion—despite its aside about not wading into the "scholarly debate" on the issue—is fully consistent with Justice Barrett's analysis. For the majority, too, treated evidence surrounding 1791 as generally dispositive of the contours of the Second Amendment. "[W]hen it comes to interpreting the

Constitution, not all history is created equal." *Bruen*, 142 S.Ct. at 2136. That is why courts "must … guard against giving postenactment history more weight than it can rightly bear." *Id.* "As [the Court] recognized in *Heller* itself, because post-Civil War discussions of the right to keep and bear arms 'took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources.' " *Id.* at 2137 (quoting *Heller*, 554 U.S. at 614). In fact, "post-ratification adoption or acceptance of laws that are *inconsistent* with the original meaning of the constitutional text obviously cannot overcome or alter that text." *Bruen*, 142 S.Ct. at 2137.

Despite Defendants' protestations to the contrary, Appellees' Br. 36-37, this Court's precedent leads to the same destination. While the Court initially suggested in *Ezell I* that 1868 was "the relevant historical moment," *Ezell I*, 651 F.3d at 701, it subsequently departed from that mistaken proposition, holding in *Moore v. Madigan* that "1791" was "the critical year for determining the amendment's historical meaning, according to *McDonald*." 702 F.3d 933, 935 (7th Cir. 2012). The State asserts that *Moore* "also considered nineteenth-century regulations." Appellees' Br. 37. But even if that were true, we have never disputed that nineteenth-century history can be *considered*—for the purpose, as *Bruen* described it, of "mere confirmation" of the original meaning established based on evidence contemporaneous with "the ratification of the Second Amendment." 142 S.Ct. at 2137. What we do insist on is

this: as *Moore* held, the Second Amendment's ratification in 1791 is "the *critical* year for determining the amendment's historical meaning." 702 F.3d at 935 (emphasis added). And as *Bruen* held, "to the extent later history contradicts what the text says, the text controls." 142 S.Ct. at 2137.

B. Modern firearm restrictions must be closely analogous to historical restrictions, and the inquiry into historical analogues does not give the State a regulatory blank check.

Bruen also contains clear instructions governing *how closely modern restrictions must match* historical restrictions to pass muster: while "a modern-day regulation" need not be "a dead ringer for historical precursors," the process of analogical reasoning does not give the government "a regulatory blank check," and "courts should not uphold every modern law that remotely resembles a historical analogue." 142 S.Ct. at 2133 (cleaned up).

The Court set forth "two metrics" to guide the inquiry into what types of "regulations [are] relevantly similar under the Second Amendment": "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id.* at 2132-33. "[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.* at 2133 (cleaned up). And the process of reasoning by historical analogy *is not* "an invitation to revise" the "balance struck by the founding generation" "through means-end

scrutiny." *Id.* at 2133 n.7. Here again, it would be hard to think of a more apt description of the historical analysis in Defendants' brief.

Defendants invoke a passage in *Bruen* indicating that there may be greater scope for analogical reasoning when the government seeks to address "new circumstances" "beyond those the Founders specifically anticipated." 142 S.Ct. at 2132." But schools are not new—and neither is in-home childcare—so this passage is irrelevant. Instead, this case is governed by *Bruen*'s directive that where the government adopts a regulation "that the Founders themselves could have adopted," the historical inquiry is "relatively simple": if no closely analogous regulation is part of our Nation's history, it is unconstitutional. *Id.* at 2131, 2132.

C. The challenged bans are not justified by any historical tradition of firearm regulation.

Once *Bruen*'s instructions governing the proper application of its text and history standard are kept in mind, the State's two attempts to conjure a historical justification for the challenged bans both fall apart at the seams.

1. Neither foster homes nor home day cares qualify as "sensitive places."

One set of historical restrictions—mentioned in dicta in *Heller* and "assumed" to exist by *Bruen*—is comprised of "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." *Bruen*, 142 S.Ct. 2133 (quoting *Heller*, 554 U.S. at 626). *Bruen* identified a "few 18th- and 19th- century

'sensitive places' "—"legislative assemblies, polling places, and courthouses"—and suggested that "courts can use analogies to those historical regulations of 'sensitive places' to determine that modern regulations prohibiting the carry of firearms in *new* and analogous sensitive places are constitutionally permissible." *Id.* Illinois seizes upon this passage, but it ignores the key limits in *Bruen* that completely foreclose its argument.[2]

1. Beginning with *Bruen*'s first metric, the "burden on the right of armed self-defense" posed by the bans challenged here and the "sensitive place" restrictions identified in *Bruen* are not even remotely comparable. *Id.* at 2133. The difference is both spatial and temporal, and it is stark. The spatial difference can be described in terms of the Second Amendment's text: while the restrictions identified in *Bruen* limited "the *carrying* of firearms in sensitive places," *id.* (emphasis added), the bans here bar law-abiding citizens from *keeping* them—in *their own homes*. And this entails a further difference as to *when* the restrictions apply. Limits on carrying arms

[2] Illinois suggests that Plaintiffs "forfeited" the argument that day-care homes are not sensitive places because they "only specifically contested the sensitive places analysis in the context of foster homes." Appellees' Br. 31. That would be astonishing indeed, given that Appellees concede that they *only raised* their sensitive-places defense *as to day-care homes, not foster homes*. *Id.* at 47 n.6. In reality, no one reading Plaintiffs' district-court brief could conclude that they only meant to contest that *foster* homes are sensitive places. Dist. Ct. Doc. 63 at 11, 12, 13, 14 (repeatedly referring to both "foster or day-care homes"). And even if the argument were forfeited, the Court should excuse the forfeiture for the very reason that Appellees ironically set forth in excusing *their actual* forfeiture of the argument in the context of foster homes. Appellees' Br. 47 n.6.

in specific public places, by definition, only apply for as long as an individual is in one of those places—and the individual can avoid the disability by avoiding those places. Because the restrictions here apply to the home, however, they apply whenever the individual is home and cannot be avoided in this way.

Defendants reiterate their argument below that the Day Care Rule "only applies during the day care's operating hours." Appellees' Br. 32. We explained in our opening brief why this interpretation of the rule is flatly contrary to its text, and Defendants do not even try to respond to those arguments. Instead, they point, again, to the fact testimony below of their Rule 30(b)(6) witness, and they fault Plaintiffs for failing to "offer[ ] any evidence to support" our interpretation. *Id.* But—as befits a pure question of law—our evidence *is the text of the statute and regulation themselves*.

The burden posed by the challenged bans is also unlike any historical restriction on carrying of firearms in schools for an independent reason: while some Founding-Era rules restricted *students* from carrying firearms on school grounds, there is *no* evidence from this period extending such limits to *teachers or other adult school employees*. *See* Appellants' Br. 21. That is a massive difference in the "burden on the right of armed self-defense" posed by the two types of restrictions. *Bruen*, 142 S.Ct. at 2132. The State responds that this argument "is inconsistent with *Bruen*" which did not "distinguish[ ] between students and teachers," Appellees' Br.

31, but the fact that the Court did not discuss the nuances of an issue it only mentioned in passing hardly means that it somehow settled all of the details of the permissible scope of firearms restrictions in schools as a matter of binding precedent.

Defendants attempt to show that teachers *were* prohibited from carrying in schools, but the only evidence they come up with is a Texas law from 1870 (and an 1889 case interpreting it). Appellees' Br. 32; *see* Doc. 57-48. This law applied only to certain types of firearms apparently deemed particularly dangerous at the time (including pistols). And in any event, for the reasons discussed above, it comes far too late to be of any use in interpreting the Second Amendment; indeed, the Supreme Court in *Bruen* held that a similar Texas statute from this period, and case-law upholding it, were "late-in-time outliers" entitled to little weight. 142 S.Ct. at 2156; *see also id.* at 2153.

The analogy to schools fails for both foster and day-care homes, but the fact that neither Defendants nor the district court *even claimed* the analogy extended to foster homes before *Bruen* was decided demonstrates how weak that particular comparison is. Even if Defendants' forfeiture of this issue is excused, *see supra* note 2, the late-breaking nature of their 180-degree change in course speaks volumes about the strength of the argument.

Unable to justify the challenged bans based on historical restrictions on where firearms could be carried, Defendants argue—for the first time on appeal—that the

Foster Care Ban draws historical support from "the 'house of refuge' system, which was the historical precursor to the foster care system" and "was considered a school." Appellees' Br. 48. This too-little, too-late argument fails for multiple reasons: (1) the secondary sources and smattering of cases that Illinois cites indicate that this " 'house of refuge' system" did not originate until the mid-19th-century, *see id.*; (2) they also show that "houses of refuge" were *not* private homes, but rather state-chartered institutions that vagrant or delinquent children were committed to by judicial order, *see* Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1190 (1970); and (3) in all events, none of Defendants' sources discusses any firearms restrictions that might have applied in these institutions—and they *certainly* do not suggest that the *adult caregivers in charge* of the institutions were barred from keeping arms.

2. The *justifications* of the Foster and Day-Care Home Rules here also differ markedly from Defendants' claimed historical analogues. Again, most of the Founding-Era "sensitive place" restrictions concerned locations where *government officials engaged in lawmaking or other government functions*—"legislative assemblies, polling places, and courthouses," *Bruen*, 142 S.Ct. at 2133—and the justification for those limits were obviously to *safeguard those government functions*. That justification has no application here.

Nor is the justification for Founding-Era restrictions on carrying firearms in schools comparable. That is obvious from the key distinction already discussed: they applied *only to students*. The justification behind those limits is thus plain to see: the fear that the students attending one of the schools in question would *misuse* firearms if they were allowed to carry them to school. Given that these limits did not apply to teachers, the justification *cannot* have been the supposed risk to public safety posed by *teachers and other adults* having access to firearms (even if safely locked away and inaccessible to any students).

Defendants attempt to get around this difficulty by describing their interest more abstractly, as "protecting the health and safety of children." Appellees' Br. 28. But if one is allowed to describe a restriction's justification at this abstract a level of generality, then it will be no trick to justify *every conceivable* modern firearm restriction as "analogous enough to pass constitutional muster." *Bruen*, 142 S.Ct. at 2133. After all, the overarching justification for virtually *every* historical restriction was "protecting the public health and safety." At that level, *Heller*, *McDonald*, and *Bruen* were all wrongly decided, since the restrictions at issue were *all* justified by historical analogues. *Bruen* directly repudiates such an approach. *Id.* at 2133 n.7 ("courts may [not] engage in independent means-end scrutiny under the guise of an analogical inquiry").

Defendants also assert that the limitation of Founding-Era school regulations to *students* rather than *adult caregivers* is irrelevant because "one way by which States protected children … was by regulating the conduct of the adults who were responsible for the children's care and custody," through "singling out guardians for punishment for firearms infractions for those under their charge or by allowing an exception for guns used while under the supervision of a parent." Appellees' Br. 34, 38 (cleaned up). Merely to quote this argument is to refute it. *None* of these historical examples *even remotely approximates* the effect of the bans at issue in this case: "protect[ing] children," *id.* at 38, by *stripping adults of their fundamental constitutional rights*. Indeed, if this strand of Defendants' argument had any validity, it would apparently justify a ban on the possession of firearms in *every home inhabited by children*. *See also* Everytown Br. 15 (arguing that "when a location frequently serves members of a vulnerable population—particularly children—guns may be prohibited in that location"). The absurdity of that conclusion shows that Defendants' argument cannot possibly be right.

2. Other unrelated firearm restrictions after the Founding cannot justify Illinois's bans.

Finally, Defendants argue that even if day-care and foster- homes "were not analogous to schools," its challenged bans are nonetheless "consistent with the longstanding historical tradition of enacting regulations to protect children by limiting their access to firearms." Appellees' Br. 33. Given what we have said

already we need spend little time on this backup argument, for none of the historical regulations cited by Defendants even come close to being "analogous enough to pass constitutional muster." *Bruen*, 142 S.Ct. at 2133.

The vague "historical tradition" invoked by Defendants is largely comprised of a handful of outlier regulations that fall into two categories: laws that "targeted the discharge of firearms by minors" and laws that restricted "minors' possession, purchase, or use of firearms." Appellees' Br. 33-34. The restrictions in the latter category generally date to the late nineteenth or early twentieth century and are thus too remote in time from the Second Amendment's ratification to have any meaningful weight. And in any event, none of these restrictions comes close to imposing "a comparable burden on the right of armed self-defense [that was] comparably justified," *Bruen*, 142 S.Ct. at 2133: (1) they applied to *minors*, not adults; and (2) none of them burdened in the slightest the right of law-abiding adults to keep "any firearm in the home operable for the purpose of immediate self-defense," *Heller*, 554 U.S. at 635. Picking out ten or twelve completely irrelevant historical restrictions and calling them a "historical tradition" does not fulfill the government's burden to "identify a well-established and representative historical analogue." *Bruen*, 142 S.Ct. at 2133 (emphasis omitted).

III. Plaintiffs' status as licensed foster-care providers does not justify Illinois's Foster Home Ban.

Unable to show that the Foster Home Ban is consistent with the Second Amendment's text or history, Illinois contends that its "broad powers over contractors who carry out governmental functions" allow it to simply *override* Plaintiffs' Second Amendment rights. Appellees' Br. 40. This second justification for the Foster Home Ban fails just like the first.

A. As an initial matter, this argument fails because Illinois fails to show that it has *any* support in the Second Amendment's text or history. *Bruen* could not have been clearer that "the standard for applying the Second Amendment" is that where the Constitution's "plain text covers an individual's conduct, … [t]he government *must* then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." 142 S.Ct. 2129-30 (emphasis added). The Court did not announce a "government contractor exception" to that rule, and this Court should not create one. Defendants make no attempt to show, on the basis of "the Nation's historical tradition of firearm regulation," *id.*, that it enjoys "broad powers" to limit the Second Amendment rights of government contractors, Appellees' Br. 40, and so that assertion must be rejected under *Bruen*'s square holding.

Instead, Defendants argue that the *Bruen* test *does not apply* to its argument, because its "wide latitude" over government contractors is apparently some sort of

super-constitutional rule—a "general principle" that applies to *every* constitutional right. *Id.* None of the cases they cite clearly establishes that proposition—as opposed to the more mundane conclusions that as a matter of the substance of First Amendment free speech law, *see Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006), procedural due process, *Coyne-Delany Co., Inc. v. Capital Dev. Bd.*, 616 F.2d 341, 343 (7th Cir. 1980), or the purported "constitutional right to informational privacy," *NASA v. Nelson*, 562 U.S. 134, 146 (2011), the analysis is different in certain ways if the plaintiff is a government employee or contractor.[3] The Government has not carried its burden of establishing any similar rule under the "the standard for applying the Second Amendment": whether such a rule "is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 142 S.Ct. at 2129-30.

B. Even if Defendants had established the existence of a "general principle that the government may impose conditions on contractors" that nullify their Second Amendment rights, Appellees' Br. 40, the "general principle[s]" that control

[3] Defendants point out that Plaintiffs did not raise this argument in our opening brief, but that is because that brief was filed before *Bruen* clarified the exclusive "standard for applying the Second Amendment." 142 S.Ct. at 2129. Plaintiffs could not have forfeited an argument about the scope of *Bruen* before that case was decided. In any event, "[t]o the extent this argument was forfeited, this court should excuse that forfeiture in these exceptional circumstances, where, as here, an intervening Supreme Court decision clarified the appropriate legal standard and where the forfeited argument 'is founded on concerns broader than those of the parties.' " Appellees' Br. 47 n.6 (*Bourgeois v. Watson*, 977 F.3d 620, 631 (7th Cir. 2020)).

government restrictions in this context in fact *refute* Defendants' claim. As pointed out in Plaintiffs' opening brief, the Supreme Court recently rejected the same argument in the context of the Free Exercise Clause in *Fulton v. City of Philadelphia*, 141 S.Ct. 1868 (2021). There, too, the government argued that it "should enjoy greater leeway under the [Constitution] when setting rules for contractors than when regulating the general public." *Id.* at 1878. The Court rejected that assertion, concluding instead that constitutional limits "still constrain the government in its capacity as manager." *Id.* The Court was unequivocal: "We have never suggested that the government may discriminate against religion"—the constitutional violation at issue in *Fulton*—"when acting in its managerial role." *Id.*

Defendants note that the Court found it unnecessary to determine *the standard* that applies in such cases—i.e., whether courts should "apply a more deferential approach in determining whether a policy is neutral and generally applicable in the contracting context." *Id.* But that does not detract from its repudiation of the *overarching principle* that constitutional limits do not "constrain the government in its capacity as manager." *Id.* And more generally, this repudiation is in accord with the longstanding rule, across a variety of contexts, that the State "may not impose conditions which require the relinquishment of constitutional rights." *Frost v. Railroad Comm'n of Cal.*, 271 U.S. 583, 594 (1926). While Defendants advance a series of ad-hoc distinctions in an attempt to distinguish the cases we cited for that

principle on their facts, *see* Appellees' Br. 44-46, they ultimately do not dispute the existence of this principle or that it applies in the Second Amendment context (at least to the same extent that Defendants' own "general principle that the government may impose conditions on contractors" does. *Id.* at 40; *see supra*, Part IV.A).

Instead, Defendants advance a number of arguments designed to make the unconstitutional conditions doctrine less protective. The principal one relies on dicta from this Court's decision in *Burgess v. Lowery* suggesting that "conditions … may include the surrender of a constitutional right" so long as they "are reasonable." 201 F.3d 942, 947 (7th Cir. 2000). We explained in our opening brief (at 36) why *Burgess*'s reference to conditions that are "reasonable" does not establish the standard that applies here, and Defendants do not respond to those arguments. And even setting those points aside, any "reasonableness" standard that existed before *Bruen* surely cannot apply in the Second Amendment context now, given that decision's *deliberate repudiation* of this type of approach. Indeed, Illinois's lengthy discussion of the social-science evidence purportedly showing that the challenged bans "reasonably" further its interest in "protec[ing] the safety of foster children," Appellees' Br. at 43; *see also id.* at 13-16, 30, 43-44, leaves no doubt that the State is attempting to resurrect the very "means-end scrutiny" approach that *Bruen* squarely rejected, 142 S.Ct. at 2129.

Switching gears, Defendants next articulate a second (similarly weak) interpretation of the unconstitutional-conditions doctrine, as requiring only that a government's demand that its contractors surrender their constitutional rights be "part and parcel" of some government program or benefit. Appellees' Br. 42. But as the cases Defendants cite make clear, this "part and parcel" inquiry is *not* the *test* for determining whether a government-imposed condition is unconstitutional; it is the test for determining whether the Government's decisions about how far to extend its spending programs should be assessed under the "unconstitutional conditions" doctrine or the "speech subsidy" line of cases. *See Camelot Banquet Rooms, Inc. v. United States Small Bus. Admin.*, 24 F.4th 640, 650 (7th Cir. 2022) (discussing how to "distinguish between permissible limits on spending programs and unconstitutional conditions"); *Daunt v. Benson*, 956 F.3d 396, 412 (6th Cir. 2020) (noting that the "part and parcel" inquiry arises from "the Supreme Court's government-funding cases"). This inquiry is inapposite in this case, which does not involve speech subsidies.

Illinois also invokes its status "as the legal guardian for children in the foster care system." Appellees' Br. 6; *see also id.* at 38, 39. This adds nothing but rhetorical flourish. No one questions the gravity of the State's interest in "protecting foster children and providing for their safety," *id.* at 39—just as no one denies the compelling nature of the State's interest in ensuring public safety generally. And it

bears emphasis that this case *does not* concern the limits that a State, acting as guardian, may place *on the children within its custody*. But when the State seeks to limit the freedom of *the adults it contracts with to provide foster care*, it must do so consistent with the Constitution's guarantees—including the principle that "what a government cannot compel, it should not be able to coerce," *Planned Parenthood of Indiana*, 699 F.3d at 986.

The short of the matter is this: under longstanding constitutional principles, just as a State cannot *mandate* that its law-abiding adult citizens refrain from keeping "any lawful firearm in the home operable for the purpose of immediate self-defense," *Heller*, 554 U.S. at 635, unless that directive is justified as consistent with the Second Amendment's text and "this Nation's historical tradition of firearm regulation," *Bruen*, 142 S.Ct. at 2126, it cannot *buy* that right away from its contractors unless it makes the same showing.

Defendants protest that this result allows its contractors and employees to "avoid" limits on a whole host of other "constitutional rights," including the freedom of speech and Fourth Amendment. Appellees' Br. 46. That is not so; nothing Plaintiffs have said calls into doubt the existing law interpreting these other constitutional provisions that, for example, allows the government to impose limits on the official speech of its employees under the First Amendment, *see Garcetti*, 547 U.S. at 423, or concludes that reasonable searches of foster homes are consistent

with the Fourth Amendment, *Van Dyke v. Fultz*, 2018 WL 1535141, at *4 (N.D. Ill. Mar. 29, 2018). But Defendants have failed to show that "this Nation's historical tradition of firearm regulation," *Bruen*, 142 S.Ct. at 2126, allows it to impose special limits on its contractors' Second Amendment rights.

C. Even if some sort of means-ends scrutiny did apply to the Foster Home Ban, the ban would not pass it, for the reasons given in our opening brief. Defendants protest (in a footnote) that the arguments and evidence showing that this is so were "not present[ed] to the district court," Appellees' Br. 30 n.5, but our arguments all depend on legislative facts that this Court may assess for itself on appeal. "Only adjudicative facts are determined in trials, and only legislative facts are relevant to the constitutionality of the Illinois [bans]." *Moore*, 702 F.3d at 942.

Illinois also argues that the Foster Home Ban must be sufficiently related to child safety because it is "consistent with national standards," including a 2019 model rule. Appellees' Br. 43. But the model standards they cite say nothing about foster parents carrying firearms securely on their person, *see* U.S. DHS, NATIONAL MODEL FOSTER FAMILY HOME LICENSING STANDARDS, https://bit.ly/3cA1Jvq, so in fact Illinois's rules appear to be *more* restrictive. And in any event, nothing in the model standards addresses, or answers, the myriad problems our opening brief identified with Defendants claim that its ban furthers its interest in protecting the safety of foster children. Appellants' Br. 38-50.

IV. Plaintiffs did not waive their Second Amendment rights.

Finally, Defendants seek to escape constitutional scrutiny altogether based on Plaintiffs' purported waiver of their Second Amendment rights. Defendants' waiver theory is based on various forms that the Plaintiffs signed when applying for foster and day-care licenses, including (1) a certification that they generally were "familiar with" the "standards for foster family homes" and agreed to be "subject to supervision in terms of conformance with" them, Doc. 56, ¶ 37; (2) a similar certification stating familiarity with the day-care home standards and an agreement to "comply with all requirements for licensure," *id.* ¶ 58; (3) a "Foster Faily Firearms Agreement" that contained "a restatement of the rule regarding firearms and ammunition in foster homes," *id.* ¶ 43; and (4) a similar "Firearms Agreement" that restated the Day Care Ban and "certified that [Plaintiffs were] in compliance with it," *id.* ¶¶ 62, 63. This collection of forms and certifications does not amount to a waiver foreclosing Plaintiffs' Second Amendment challenge for multiple reasons.

Most obviously, and as the district court explained, Defendants fail to distinguish between (1) an agreement to "abide by DCFS's firearms regulations so long as they remained in effect," and (2) an agreement foreclosing any "right to challenge the DCFS Rules" and thus invalidate their *continued* application. App.19, 22. At the absolute most, the various forms Plaintiffs signed amount to the former: they merely agree that Plaintiffs were aware of the existing rules and in compliance

with them. Plaintiffs have done nothing that is contrary to such an agreement. No one disputes that Plaintiffs are currently in compliance with both challenged rules, *see* Doc. 56, ¶¶ 53, 73; nor do Plaintiffs seek any relief for the application of these rules in the past. Instead, Plaintiffs seek to invalidate the bans, both facially and as applied to them, *prospectively*. Nothing in the forms Defendants point to even purports to constitute a "knowing and voluntary" "relinquishment or abandonment" of their Second Amendment rights for all time, or of their right to challenge Defendants' bans as inconsistent with them. *Domka v. Portage Cnty., Wis.*, 523 F.3d 776, 781 (7th Cir. 2008); *see* App.21-23.

Even if Plaintiffs *had* signed some sort of agreement clearly relinquishing their right to challenge the bans as inconsistent with the Second Amendment, such an agreement could not bar the present suit for reasons already canvassed. As explained in the previous section, the Second Amendment protects the right to keep and bear arms not only against "direct assault," but also against "the indirect, but no less effective, process of requiring a surrender." *Frost*, 271 U.S. at 593. The fact that the government requires its contractors to *put that surrender in writing* cannot change the analysis.

Finally, even if Illinois *could* and *did* require Plaintiffs to sign an agreement relinquishing their right to challenge the Foster and Day-Care Home Bans under the Second Amendment, the district court found in the alternative that "a genuine factual

dispute exists regarding whether any waiver of the Millers' Second Amendment rights" was knowing and voluntary. App.21-24. Defendants quibble with various parts of the district court's analysis, Appellees' Br. 51-53, but they fail to show that this conclusion was reversible error.

CONCLUSION

For the reasons given above and in Appellants' opening brief, this Court should reverse and remand with instructions to enter judgment in favor of Appellants.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Circuit Rule 32(c) because it contains 6,994 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f).

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