

PUBLIC HEALTH EMERGENCIES AND THE SECOND AMENDMENT

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ABSTRACT

For many decades, gun control advocates, hoping to shift the terms of the debate to more favorable terrain, have argued that gun violence should be viewed primarily through the lens of public health. In September 2023, New Mexico Governor Michelle Lujan Grisham and New Mexico Secretary of Health Patrick Allen pushed that rationale to its extreme and beyond. Under the auspices of the state's public health emergency laws, they issued an executive order and agency directive that effectively eliminated the right of ordinary citizens to bear arms in public in the state's most populous county. That attempt to circumvent the Second Amendment by wrapping itself in the flag of a public health emergency suffers from a host of statutory and constitutional defects.

In the ongoing battle to reframe gun violence as a public health emergency, the governor's order offers litigants and courts an important opportunity to start unveiling any new and hoped-for national tradition of restricting Second Amendment rights based on the declaration of a public emergency—health or otherwise. In the end, loose applications of *Bruen*'s history-based test might offer governments in times of acute crisis, widespread disorder, and violent crime a fair—but not unlimited—amount of authority to impose temporary albeit severe restrictions on core aspects of the right to bear arms in public. But whatever the outcome might be in other cases, not even these loose applications of historical analogues would be sufficient to save Governor Grisham's order and her secretary's directive from a Second Amendment challenge.

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INTRODUCTION

The Second Amendment to the Constitution of the United States guarantees that the right of the people to keep and bear arms shall not be infringed.¹ Until 2008, there was a longstanding debate over the proper

1. U.S. CONST. amend. II ("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.").

that guarantee's interpretation.² One side argued that the Second Amendment protected an individual right to obtain, own, and use a firearm for any lawful purpose—such as the defense of one's home, self, or family. The other side maintained that the Second Amendment was merely a recognition of each state's authority to equip and maintain a militia, which allowed the government to limit ownership and use of a firearm to service in this capacity. In 2008, the Supreme Court of the United States resolved that debate in *District of Columbia v. Heller*.³ The Court agreed with the broader historical interpretation of the Second Amendment, striking down a District of Columbia law that effectively banned the possession of a firearm in the home.⁴ The Court ruled that the Second Amendment guarantees every individual the right to own and use a firearm “for traditionally lawful purposes, such as self-defense within the home.”⁵

Since then, the Court has slowly built out its Second Amendment jurisprudential framework—expanding the scope of protections for the right of ordinary, law-abiding citizens to keep and bear firearms in the process.⁶ In 2010, the Supreme Court held in *McDonald v. City of Chicago*⁷ that the Second Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment.⁸ More recently, the Court decided in *New York State Rifle & Pistol Ass'n v. Bruen*⁹ that the federal and state governments may not generally prevent law-abiding citizens with ordinary self-defense needs from carrying firearms outside of the home because the Second Amendment entitles someone not only to “keep” but also to “bear”

2. See, e.g., Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 206–07 nn.10–15 (1983) (summarizing the positions of the two sides and offering examples of articles in defense of each one). See generally Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 461–96 nn.1–151 (1995) (same); Stephen P. Halbrook, *Congress Interprets the Second Amendment: Declarations by a Co-Equal Branch on the Individual Right to Keep and Bear Arms*, 62 TENN. L. REV. 597 (1995) (reviewing various times during the twentieth century where Congress articulated a view about the meaning of the Second Amendment); David B. Kopel, *The Great Gun Control War of the Twentieth Century—and Its Lessons for Gun Laws Today*, 39 FORDHAM URB. L.J. 1527 (2012) (analyzing over a century of competing views on the meaning of the Second Amendment and concluding that, by the time *Heller* was decided, the “battles had mostly been resolved” in favor of the individual rights view). Compare GEORGE D. NEWTON, JR. & FRANKLIN E. ZIMRING, NAT'L COMM'N ON THE CAUSES AND PREVENTION OF VIOLENCE, FIREARMS & VIOLENCE IN AMERICAN LIFE (1969) (analyzing the historical meaning of the Second Amendment), with S. COMM. ON THE JUDICIARY, 97TH CONG., THE RIGHT TO KEEP AND BEAR ARMS (Comm. Print 1982).

3. 554 U.S. 570 (2008).

4. *Id.* at 577.

5. *Id.*

6. The Supreme Court has made clear that the Second Amendment's application to citizens who are ordinary is distinct from its application to citizens who are law-abiding. The two qualifiers are not interchangeable. See *infra* Section III.B.I. New York argued in *Bruen* that only law-abiding and extraordinary citizens have a right to bear arms. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 12–13 (2022). The Court's holding expanded the scope of protection with respect to not just those who are law-abiding, but those who are both ordinary and law-abiding. *Rahimi*, meanwhile, saw the court for the first time delve into the question of what is meant by “law-abiding,” as opposed to “responsible” or “a risk of violence” despite not having yet been convicted of a violent crime. *United States v. Rahimi*, 602 U.S. 680, 701–02 (2024).

7. 561 U.S. 742 (2010).

8. *Id.* at 791.

9. 597 U.S. 1 (2022).

arms.¹⁰ In successive cases, the Supreme Court has progressively broadened the scope of the right it first recognized in *Heller*.¹¹

The New Mexico constitution similarly enshrines and protects a right of individual citizens to keep and bear arms “for security and defense, for lawful hunting and recreational use and for other lawful purposes.”¹² The state has always permitted the open carrying of firearms in public, subject only to a limited number of prohibitions on the possession of firearms in clearly defined, sensitive places or under certain well-defined conditions, such as when a person is intoxicated.¹³ While these provisions of the New Mexico constitution do not expressly apply to the carrying of concealed weapons, the New Mexico Concealed Handgun Carry Act grants a statutory public concealed-carry right, with specified exceptions (such as a prohibition on concealed carrying in schools, preschools, and courthouses) to residents to whom the state Department of Public Safety has issued a concealed carry license.¹⁴ The statute specifies that within thirty days of receiving a completed application, the department “shall” issue a permit to applicants who are U.S. citizens, residents of New Mexico, and meet

10. *Id.* at 70–71.

11. While *Heller* was the first case in which the United States Supreme Court definitively affirmed an individual right to keep and bear arms in a Second Amendment merits case, it was far from the first time the Court broadly—and individual Justices, specifically—issued opinions implicating the Second Amendment and recognizing its protection of an individual right. *See, e.g.,* David B. Kopel, *The Supreme Court’s Thirty-Five Other Gun Cases: What the Supreme Court Has Said About the Second Amendment*, 18 ST. LOUIS U. PUB. L. REV. 99, 99 (1999); *see also* Whether the Second Amendment Secures an Individual Right, 28 Op. O.L.C. 126, 203–29 (2004) (discussing early interpretations of the right to keep and bear arms by legal scholars and various state and federal courts); THE RIGHT TO KEEP AND BEAR ARMS, *supra* note 2 (same).

12. N.M. CONST. art. II, § 6.

13. *See id.*; N.M. STAT. ANN. § 30-7-1 to -4 (2024). The history of public carry regulations in New Mexico is worth reviewing here. Both as a territory and as a state, New Mexico law often heavily restricted the carrying of concealed weapons in public places, by most people, and under most circumstances. *See State ex rel. N.M. Voices for Child., Inc. v. Denko*, 90 P.3d 458 (N.M. 2004) (upholding the Concealed Carry Act of 2003 as permissible under the New Mexico Constitution and discussing the history of concealed carry regulations in the state); *see also* David B. Kopel, *The Licensing of Concealed Handguns for Lawful Protection: Support from Five State Supreme Courts*, 64 ALBANY L. REV. 101, 102–05 (2005) (discussing the state’s enactment of, and subsequent legal challenges to, shall-issue legislation in 2001 and 2003). At the same time, historical records show no evidence that the state has traditionally imposed broad restrictions on the right to openly carry firearms—handguns or long guns—in public places. *See Repository of Historical Gun Laws*, DUKE CTR. FOR FIREARMS L., <https://firearmslaw.duke.edu/repository-of-historical-gun-laws/advanced-search> (last visited July 15, 2024); Samantha Cherney, Andrew R. Morral, Terry L. Schell, Sierra Smucker, & Emily Hoch, *Development of the RAND State Firearm Law Database and Supporting Materials*, RAND CORP., <https://www.rand.org/pubs/tools/TLA243-2-v2.html> (last visited July 12, 2024). The state’s longest-standing statutes restricting open carry appear to be a prohibition on possessing loaded firearms in state game refuges (enacted in 1937), as well as prohibitions (all enacted by 1954) on possessing firearms in “an establishment licensed to dispense alcoholic beverages,” in a county or municipal jail, or while under the influence of an intoxicant or narcotic. *See* N.M. STAT. ANN. §§ 17-2-12, 30-7-3, 30-7-4, 30-22-14 (2024). By 1978, state law required local school boards to adopt disciplinary policies for students who brought weapons of any nature onto public school property, but no general prohibition on carrying weapons into public K-12 schools was enacted until 1987. That general prohibition did not extend to colleges and universities until 2003. Interestingly, state law does not explicitly prohibit the possession of firearms in state and county court houses, and published opinions by the New Mexico Attorney General imply that the authority of county courts to regulate weapons possession on county property has, even in recent years, been the source of some debate. *See* Prohibition of Weapons in Multi-Use Cnty.-Owned Bldg., Op. Att’y Gen., at *2 (N.M.A.G. 2022), 2022 WL 17479401.

14. N.M. STAT. ANN. §§ 29-19-4, -8 (2024).

certain qualifications, such as proving competency in the use of a handgun.¹⁵ A permit is valid for four years from the date of issuance and may be renewed an unlimited number of times by anyone who qualifies under state law.¹⁶

Over the last few decades, numerous other states have adopted “shall-issue” concealed carry licensing schemes similar to New Mexico’s.¹⁷ More than half of the states now authorize all adults who are not disqualified from legally possessing firearms to carry them concealed in public without the need to first obtain a special license.¹⁸ These laws have likely deterred some offenders from committing violent crimes and have greatly increased the practical ability of adult members of the public to defend themselves, their families, and third parties when victimized by a violent crime.¹⁹ And, contrary to what many gun control advocates feared,

15. *Id.* § 29-19-4 (“A. The department shall issue a concealed handgun license to an applicant who: (1) is a citizen of the United States; (2) is a resident of New Mexico or is a member of the armed forces whose permanent duty station is located in New Mexico or is a dependent of such a member; (3) is twenty-one years of age or older; (4) is not a fugitive from justice; (5) has not been convicted of a felony in New Mexico or any other state or pursuant to the laws of the United States or any other jurisdiction; (6) is not currently under indictment for a felony criminal offense in New Mexico or any other state or pursuant to the laws of the United States or any other jurisdiction; (7) is not otherwise prohibited by federal law or the law of any other jurisdiction from purchasing or possessing a firearm; (8) has not been adjudicated mentally incompetent or committed to a mental institution; (9) is not addicted to alcohol or controlled substances; and (10) has satisfactorily completed a firearms training course approved by the department for the category and the largest caliber of handgun that the applicant wants to be licensed to carry as a concealed handgun.”); *see also id.* § 29-19-5 (describing the application form); *id.* § 29-19-6 (describing the timing of issuance or denial); *id.* § 29-19-7 (directing the Department of Public Safety to adopt “minimum standards for approved firearms training courses”); *id.* § 29-19-8 (describing the limitations on a concealed carry license, such as schools and preschools); *id.* § 29-19-9 (requiring licensees to have the license in their possession when carrying a concealed handgun); *id.* § 29-19-10 (providing that a concealed carry license is not valid on tribal land); *id.* § 29-19-11 (providing that a concealed carry license is not valid in a courthouse or court facility); *id.* § 29-19-12 (directing the department to issue rules to implement the Concealed Handgun Carry Act); *id.* § 29-19-14 (excepting certain law enforcement officers from the application and renewal fees and firearms training course); *id.* § 29-19-15 (excepting certain military personnel).

16. *Id.* § 29-19-3 (describing the renewal authorization); *id.* § 29-19-6(F) (describing the renewal procedure).

17. A nationwide trend toward the loosening of restrictions on concealed carry began in the 1980s, when the majority of states either outright prohibited public carry or required applicants for concealed carry permits to demonstrate a special need for that permit. *See* Clayton E. Cramer & David B. Kopel, “Shall Issue”: *The New Wave of Concealed Handgun Permit Laws*, 62 TENN. L. REV. 679, 681 (1995). That trend rapidly accelerated throughout the 1990s and early 2000s. *See generally* Michael Siegel et al., *Firearm-Related Laws in All 50 States, 1991–2016*, 107 AM. J. PUB. HEALTH 1122 (2017); U.S. GOV’T ACCOUNTABILITY OFF., GAO-12-717, STATES’ LAWS AND REQUIREMENTS FOR CONCEALED CARRY PERMITS VARY ACROSS THE NATION (2012). Importantly, a review of the history of open carry laws reveals that, until the twentieth century, virtually no state imposed state-wide prohibitions on the open carrying of firearms in public. *See* Cherney, Morral, Schell, Smucker, & Hoch, *supra* note 13. Even today, a majority of states do not currently (and have never previously) prohibited public carry. *Open Carry*, U.S. CONCEALED CARRY ASS’N, <https://www.usconcealedcarry.com/resources/terminology/carry-types/open-carry/> (last visited July 19, 2024).

18. *Which States Allow Constitutional Carry?*, U.S. CONCEALED CARRY ASS’N (July 8, 2024), <https://www.usconcealedcarry.com/blog/constitutional-carry-in-states/>.

19. Evidence routinely confirms that most criminals are rational actors who are deterred by the prospect of facing armed resistance. *See, e.g.,* JAMES D. WRIGHT & PETER H. ROSSI, U.S. DEP’T OF JUST., *THE ARMED CRIMINAL IN AMERICA: A SURVEY OF INCARCERATED FELONS* 23–25 (1985), <https://www.ojp.gov/pdffiles1/Photocopy/97099NCJRS.pdf>; David B. Kopel, *Lawyers, Guns, and Burglars*, 43 ARIZ. L. REV. 345, 346–350 (2001); Alessandro Acquisti & Catherine Tucker, *Guns*,

the increasing prevalence of so-called “permitless” laws and the general loosening of public carry regulations has not coincided with a widespread or significant increase in criminal gun violence perpetrated by lawful gun owners.²⁰ By and large, the prevalence of open or concealed carry statutes demonstrates that the public finds them to be a valuable means of protecting life and limb.

Privacy, and Crime 13 (Nat’l Bureau of Econ. Rsch., Working Paper No. 29940, 2022), <https://www.nber.org/papers/w29940>; JOHN R. LOTT, JR., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS 17–19 (3d ed. 2010). Lawfully armed civilians have proven themselves effective when it comes to protecting themselves and others from violent crimes in public places. John R. Lott, *Massive Errors in FBI’s Active Shooting Reports from 2014–2023 Regarding Cases Where Civilians Stop Attacks*, CRIME PREVENTION RSCH. CTR. (July 30, 2024), <https://crimeresearch.org/2024/07/massive-errors-in-fbis-active-shooting-reports-from-2014-2023-regarding-cases-where-civilians-stop-attacks-instead-of-4-the-correct-number-is-at-least-35-excluding-gun-free-zones-it-avera/> (demonstrating that between 2014 and 2021, armed citizens successfully intervened to end 51% of active shootings that were carried out in public places where ordinary civilians were not otherwise prohibited from carrying firearms for self-defense, while inflicting no injuries on innocent bystanders); WILLIAM ENGLISH, GEO. McDONOUGH SCH. OF BUS., 2021 NATIONAL FIREARMS SURVEY: UPDATED ANALYSIS INCLUDING TYPES OF FIREARMS OWNED 1 (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4109494 (finding that, out of an estimated 1.6 million annual defensive gun uses in the United States, just over nine percent occurred in public spaces).

20. See WILLIAM ENGLISH, GEO. McDONOUGH SCH. OF BUS., THE RIGHT TO CARRY HAS NOT INCREASED VIOLENT CRIME: IMPROVING AN OLD DEBATE THROUGH BETTER DATA ON PERMIT GROWTH OVER TIME 2–4 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3887151; MELISSA W. BUREK & JULIA C. BELL, CTR. FOR JUST. RSCH., PRE- AND POST-OUTCOMES: OHIO’S PERMITLESS CARRY LAW 2, 10 (2024), <https://www.ohioattorneygeneral.gov/Files/Briefing-Room/News-Releases/2023-Pre-and-Post-Outcomes-Ohio%E2%80%99s-Permitless-Carry.aspx>; K. ALEXANDER ADAMS & YOUNGSUNG KIM, THE IMPACT OF LIBERALIZED CONCEALED CARRY LAWS ON HOMICIDE: AN ASSESSMENT 11–12 (2023), <https://ssrn.com/abstract=4368641>. Moreover, from a nationwide perspective, gun violence rates plummeted between the early 1990s and the late 2010s, even as the clear majority of states voluntarily shifted toward more permissive public carry frameworks. Compare Jens Manuel Krogstad, *Gun Homicides Steady After Decline in ‘90s; Suicide Rate Edges Up*, PEW RSCH. CTR. (Oct. 21, 2015), <https://www.pewresearch.org/fact-tank/2015/10/21/gun-homicides-steady-after-decline-in-90s-suicide-rate-edges-up/>, and JENNIFER L. TRUMAN & LYNN LANGTON, U.S. DEP’T OF JUST., NO. NCJ 247648, CRIMINAL VICTIMIZATION, 2013, (2014), <https://bjs.ojp.gov/content/pub/pdf/cv13.pdf>, with David Kopel, *Growth Chart of Right to Carry*, WASH. POST (Feb. 18, 2014), <https://www.washingtonpost.com/news/voikokh-conspiracy/wp/2014/02/17/growth-chart-of-right-to-carry/>. While other studies purport to show a connection between “shall-issue” laws and increases in firearm-related crimes, there is no causal mechanism that could explain how more permissive public carry laws could be responsible for the purported crime increases. Logically, the only crimes for which more permissive shall-issue laws could even ostensibly be blamed are those (1) carried out with firearms, (2) in public places, (3) by a concealed carry permit holder, (4) lawfully carrying a firearm, (5) who would not otherwise have been highly motivated to commit the same crime regardless of whether state laws prohibited him or her from carrying in public. This effectively limits the categories of firearm crimes potentially related to shall-issue carry to those opportunistic, spur-of-the-moment acts of violence—an insignificant subset of total criminal acts committed with firearms. Moreover, the consistent weight of the evidence is that concealed carry permit holders rarely commit *any* crimes, much less crimes that were facilitated by the permit holders’ ability to lawfully carry firearms in public places. See JOHN R. LOTT, JR., CARLISLE E. MOODY, & RUJUN WANG, CRIME PREVENTION RSCH. CTR., CONCEALED CARRY PERMIT HOLDERS ACROSS THE UNITED STATES: 2023, at 43–44 (2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4648999. Moreover, to the extent that permit holders sometimes do commit these types of crimes, it is equally true that they are sometimes stopped by other armed citizens whose ability to defend themselves and others is owed directly to the more permissive public carry framework. See, e.g., Jameson Cook, *Man Bound Over on Attempted Murder for Warren Police Mini-Station Shooting*, MACOMB DAILY, <https://www.macombdaily.com/2022/01/19/man-bound-over-on-attempted-murder-for-warren-police-mini-station-shooting/> (Jan. 19, 2022, 6:28 PM).

By contrast, gun control advocates decry this development. One strategy they have increasingly pursued is to enlist the support of the medical profession and individual physicians by framing gun violence as a public health issue.²¹ Various medical journal articles have treated firearms-related deaths as a public health crisis, arguing that this epidemic demands (among other things) greater public attention to the public health aspects of firearms ownership, greater research into the costs of handgun possession, and increased regulation of the purchase and ownership of firearms.²² These articles seek to take advantage of the favorable public perception of public health policy and the nimbus that the public sees surrounding

21. In 1968, an article appeared in the *Journal of Public Health* that might well constitute the beginning of this decades-long reenvisioning of gun violence. Its author devotes one paragraph out of twenty-three pages to a suggestion that “[v]iolence and its correlatives should be the joint concern of social scientists, criminologists, and health workers, especially epidemiologists. . . . Gun control laws may seem a far cry from public health, but if they offer hope for reducing violent deaths or serious injury they, too, deserve our active support.” Herman E. Hilleboe, *Public Health in the United States in the 1970’s*, 58 AM. J. PUB. HEALTH 1588, 1592–93 (1968). Such an argument appears to have been so novel at the time that, when President Richard Nixon convened the National Commission on the Causes and Prevention of Violence that same year, references to public health are nowhere to be found in the 268-page staff report compiled for the Commission by “[fifty] persons from the academic disciplines of sociology, psychology, psychiatry, political science, history, law, and biology.” NEWTON & ZIMRING, *supra* note 2, at vi. By the mid-1980s, however, a growing body of literature began describing gun violence through the lens of public health, often utilizing epidemiological terms and contextualizing gun control in light of vehicle and smoking regulations. See Charles H. Browning, *Handguns and Homicide: A Public Health Problem*, 236 J. AM. MED. ASS’N 2198, 2198–2200 (1976); Stephen P. Teret, *Litigating for the Public’s Health*, 76 AM. J. OF PUB. HEALTH 1027, 1028–29 (1986). By the mid-1990s, the reframing of gun violence as a public health emergency was firmly entrenched not just within academia, but amongst gun control advocates as a tactic for the promotion of additional gun control restrictions. See, e.g., *Violence as a Public Health Issue: Hearing Before the Hum. Res. and Intergovernmental Rels. Subcomm. of the Comm. on Gov’t Operations*, 103d Cong. 120, 122, 148 (1993). This strategy has continued to the present. See U.S. CONCEALED CARRY ASS’N, *supra* note 18.

22. See, e.g., OFF. OF THE SURGEON GEN., U.S. DEP’T OF HEALTH & HUM. SERVS., FIREARM VIOLENCE: A PUBLIC HEALTH CRISIS IN AMERICA: THE U.S. SURGEON GENERAL’S ADVISORY 23–30 (2024); Diedre M. Bowen, Ali Rowhani-Rahbar, Alexander McCourt, Marian Betz, & Frederick P. Rivara, *Variations in State Laws on Mental Health-Related Firearm Prohibition*, 183 J. AM. MED. ASS’N: INTERNAL MED. 1402, 1402–03 (2023); Carolina Díez et al., *State Intimate Partner Violence-Related Firearm Laws and Intimate Partner Homicide Rates in the United States, 1991 to 2015*, 167 ANNALS OF INTERNAL MED. 536, 541–42 (2017); David Hemenway, *Twenty-Five Years After Columbine—Firearms and Public Health in the United States*, 390 NEW ENG. J. MED. 1352, 1353 (2024); Allison Lind, Susan M. Mason, & Elizabeth Wrigley-Field, *Increasing Firearm-Related Deaths Among U.S. Black Rural Youths*, 390 NEW ENG. J. MED. 1932, 1932–33 (2024); Hannah S. Laqueur, Rose M. C. Kagawa, Christopher D. McCort, Rocco Pallin, & Garen Wintemute, *The Impact of Spikes in Handgun Acquisitions on Firearm-Related Harms*, 6 INJ. EPIDEMIOLOGY (2019), <https://injepijournal.biomedcentral.com/articles/10.1186/s40621-019-0212-0>; Peter T. Masiakos, Clementina M. Chéry, Rachele Gardner, & Eric Gordon, *Transforming Narratives of Gun Violence*, 391 NEW ENG. J. MED. 673, 673–75 (2024); Joshua M. Sharfstein & Lawrence O. Gostin, *The Public Good on the Docket—The Supreme Court’s Evolving Approach to Public Health*, 390 NEW ENG. J. MED. 1637, 1637–39 (2024); Elizabeth Tobin-Tyler, *Public Health, Firearms, and Domestic Violence in US v Rahimi*, JAMA HEALTH F. (Jan. 26, 2024), <https://jamanetwork.com/journals/jama-health-forum/fullarticle/2814358>; Garen J. Wintemute, Andrew Crawford, Sonia L. Robinson, Elizabeth A. Tomsich, Paul M. Reeping, Julia P. Schleimer, & Veronica A. Pear, *Firearm Ownership and Support for Political Violence in the United States*, JAMA NETWORK OPEN (Apr. 9, 2024), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2817319>; Garen J. Wintemute, Daniel Müller, & Kyle Bolstad, *Gun Violence in the United States*, THE NEW ENG. J. OF MED. (Oct. 5, 2022), https://www.nejm.org/doi/10.1056/NEJMp2209472?url_ver=Z39.88-2003&rft_id=ori:rid:cross-ref.org&rft_dat=cr_pub%20%20pubmed; Rosanna Smart & Terry L. Schell, *Geographic Disparities in Rising Rates of Firearm-Related Homicide*, 387 NEW ENG. J. MED. 189, 189–191 (2022).

physicians. As a matter of law, however, policy-based arguments drawing on public health concerns do not strengthen firearms opponents' arguments for two reasons. One is that the laws regulating firearms ownership and those addressing public health exist in entirely different orbits.²³ The other is that there is no federal constitutional right to public health²⁴ that is comparable to the Second Amendment's guarantee for individuals to own firearms and carry them in public for ordinary self-defense purposes.²⁵

In September 2023, however, New Mexico Governor Michelle Lujan Grisham issued an order invoking her authority under several state public health laws to justify limiting the right to carry firearms in public.²⁶ She did so even though the New Mexico legislature had created a licensing system to enable parties who receive a license to carry a firearm in public. Moreover, the governor acted in defiance of the Supreme Court's holding in *Bruen* that private parties have a general right to carry firearms outside the home for self-defense purposes.²⁷ Several parties challenged the order in federal and state court. Although these challenges are still in litigation, some parties successfully obtained injunctive relief barring the more intrusive features of the order.²⁸

The purpose of this Article is to discuss the legality of Governor Grisham's order as well as its implementing agency directives. This Article also analyzes the broader constitutional implications of reenvisioning gun control restrictions as responses to a public health emergency. Part I summarizes the governor's order and an implementing directive issued by the New Mexico Department of Health as well as the litigation that those directives spawned. Part II addresses the issue of whether the governor and secretary had the statutory authority to issue their firearms carry limitations and concludes that they did not. Part III explains how those commands violate the Second Amendment as the Supreme Court construed it in *Bruen*. Part IV preliminarily examines how and to what extent true public health emergencies—understood as being, in practice, synonymous with public safety crises—might constitute “extraordinary circumstances” justifying additional limitations on the right to keep and bear arms.

23. See *infra* Parts I–II.

24. *Harris v. McRae*, 448 U.S. 297, 312–18 (1980); *Maher v. Roe*, 432 U.S. 464, 469–77 (1977) (both ruling that there is no federal constitutional right to publicly provided health care).

25. U.S. CONST. amend. II; see *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

26. N.M. Exec. Order No. 2023-130 (Sept. 7, 2023), <https://www.governor.state.nm.us/wp-content/uploads/2023/09/Executive-Order-2023-130-1.pdf>; see Amy Swearer, *5 Things to Know About New Mexico Governor's Insanely Unconstitutional Gun Control Order*, HERITAGE FOUND. (Sept. 25, 2023), <https://www.heritage.org/second-amendment/commentary/5-things-know-about-new-mexico-governors-insanely-unconstitutional-gun>.

27. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 71 (2022).

28. See *infra* notes 52–56 and accompanying text.

I. THE FIREARMS ORDERS ISSUED BY GOVERNOR GRISHAM AND STATE SECRETARY OF HEALTH ALLEN

A. The Initial Orders

In response to an increase in the homicide rate in New Mexico²⁹—including the fatal shooting of three juveniles, one of whom was only five years old³⁰—Governor Grisham issued Executive Order (EO) 2023-0130 on September 7th.³¹ Seeking “to create a cooling-off period while we

29. See, e.g., Governor Michelle Lujan Grisham & Secretary Allen’s Response Brief at 5–6, *Amdor v. Grisham*, No. S-1-SC-40105 (N.M. Oct. 16, 2023) [hereinafter Lujan-Allen Response] (discussing firearms-related homicides in New Mexico).

30. The other two minors were eleven and fourteen years old. See, e.g., *infra* note 188; Lujan-Allen Response, *supra* note 29, at 1–2; Esteban Candelaria, *Governor Declares Public Health Emergency Over Gun Violence*, ALBUQUERQUE J., https://www.abqjournal.com/news/governor-declares-public-health-emergency-over-gun-violence/article_3aa8745e-4ddf-11ee-8cab-a76598fc8965.html (Oct. 12, 2024) (“In signing the executive order, which sets aside \$750,000 in emergency funds to protect public safety while also minimizing economic or physical harm, Lujan Grisham cited the shooting deaths of three teenagers or children since late July, including the 5-year-old girl killed while sleeping in a mobile home in mid-August.”); Colbi Edmonds, *New Mexico Governor Issues 30-Day Ban on Carrying Guns in Public in Albuquerque*, N.Y. TIMES (Sept. 9, 2023), <https://www.nytimes.com/2023/09/09/us/guns-ban-new-mexico-albuquerque.html?searchResultPosition=1> (“Gov. Michelle Lujan Grisham of New Mexico announced a 30-day ban on carrying firearms in public areas or state property in Albuquerque and its county, a move that she said was a necessary response to gun violence in the region but that critics denounced as unconstitutional. . . . At a news conference on Friday, she said that shootings have amounted to an epidemic and that the suspension allowed for a ‘cooling-off period’ for the state to figure out the best way to address gun violence and public safety. She said she expected the suspension to be challenged in court and could not guarantee it would stand. ‘I welcome the debate and the fight about making New Mexicans safer,’ she said.”); Editorial Board, *Governor Shouldn’t Break the Law Fighting Crime*, ALBUQUERQUE J. (Sept. 12, 2023), https://www.abqjournal.com/opinion/editorials/editorial-governor-shouldn-t-break-the-law-fighting-crime/article_aada92e2-518c-11ee-9168-27c2aba42395.html (“Indeed, the Duke City is dangerous. There were a record 120 homicides in Albuquerque last year, with 76 homicide victims this year as of Sept. 8. Random violent crime has gripped the city again after 11-year-old Froylan Villegas was killed and his aunt was critically injured when their vehicle was sprayed with 17 bullets in a road-rage shooting Sept. 7 as the family left an Isotopes baseball game. That tragedy, the fifth road-rage homicide in Albuquerque this year, followed the drive-by shooting of 5-year-old Galilea Samaniego on Aug. 13, who was shot and killed while sleeping in a motor home in Southwest Albuquerque. Five teenagers have been charged in the case, which police say was a result of an ongoing feud between groups of teenagers.”); Gino Gutierrez, *State Police to Send More Officers to Bernalillo County in Wake of Gov.’s Gun Order Getting Blocked*, ALBUQUERQUE J. (Sept. 14, 2023), https://www.abqjournal.com/news/state-police-to-send-more-officers-to-bernalillo-county-in-wake-of-gov-s-gun/article_75d1692e-5284-11ee-abbc-f76ac8d8c582.html (“The order, issued Friday, was in response to recent shootings in Albuquerque that took the lives of a 5-year-old girl sleeping in a trailer in Southwest Albuquerque last month and an 11-year-old boy who was killed in a road-rage shooting leaving Isotopes Park on Sept. 7.”); Colleen Heild & Olivier Uyttebrouck, *Flurry of Lawsuits Challenge Governor’s 30-Day Firearms Ban*, ALBUQUERQUE J. (Sept. 14, 2023), https://www.abqjournal.com/news/flurry-of-lawsuits-challenge-governor-s-30-day-firearms-ban/article_1d37262a-50de-11ee-b19b-2f266eae603.html.

31. See, e.g., Candelaria, *supra* note 30. The Governor also issued a companion order that declared a public health emergency, this one dealing with drug abuse—particularly illicit fentanyl. N.M. Exec. Order No. 2023-0132 (Sept. 8, 2023), <https://www.governor.state.nm.us/wp-content/uploads/2023/09/Executive-Order-2023-132.pdf>. Just as Governor Grisham later extended her firearms order, she also extended the drug abuse order. See *Executive Orders*, OFF. OF THE GOVERNOR: MICHELLE LUJAN GRISHAM, <https://www.governor.state.nm.us/about-the-governor/executive-orders/> (last visited Jan. 6, 2024) (showing Governor Lujan’s extensions of the drug abuse order through Executive Order No. 2023-0136 on Oct. 5, 2023; Executive Order No. 2023-0141 on November 3, 2023; Executive Order No. 2023-0145 on Dec. 1, 2023; Executive Order No. 2023-0147 on December 29, 2023; Executive Order No. 2024-002 on January 26, 2024; Executive Order No. 2024-005 on February

figure out how we can better address public safety and gun violence,”³² the governor declared that “a state of public emergency exists throughout the state due to gun violence.”³³ As she explained to the *New York Times*, “Gun violence is an epidemic. Therefore, it’s an emergency.”³⁴ The governor directed the New Mexico Departments of Health, Homeland Security and Emergency Management, and Public Safety to collaborate with her office “to provide an effective and coordinated response to this public health emergency.”³⁵ In addition, the order set aside \$750,000 in state funds to implement the order and protect the public health and safety³⁶ and

23, 2024; Executive Order No. 2024-009 on March 22, 2024; Executive Order No. 2024-013 on April 19, 2024; and Executive Order No. 2024-018 on May 17, 2024). We will not separately address the legality of the drug abuse executive orders because they do not independently limit the rights of New Mexico residents to carry a firearm in the state and because there is no constitutional right to use illicit drugs.

32. Martin Kaste, *The Governor Tried Banning Guns in Albuquerque. The Public Health Emergency Continues*, NPR, (Oct. 18, 2023, 5:00 AM) <https://www.npr.org/2023/10/18/1206494502/the-governor-tried-banning-guns-in-albuquerque-the-public-health-emergency-conti>.

33. N.M. Exec. Order No. 2023-0130 (Sept. 7, 2023), <https://www.governor.state.nm.us/wp-content/uploads/2023/09/Executive-Order-2023-130-1.pdf> (reprinted as Exhibit 2, Verified Petition for Extraordinary Writ and Request for Stay, *Amdor v. Grisham*, No. S-1-SC-40105 (N.M. Sept. 14, 2023)). See *We the Patriots, Inc. v. Grisham*, 697 F. Supp. 3d 1222, 1225–26 (D.N.M. 2023) (denying a preliminary injunction as to children’s playgrounds); *We the Patriots USA, Inc. v. Grisham*, No. 1:23-CV-00773-DHU-LF, 2023 WL 6377288 (D.N.M. Sept. 29, 2023) (denying a temporary restraining order as to children’s playgrounds); *Nat’l Ass’n for Gun Rights v. Grisham*, Nos. 1:23-CV-00771-DHU-LF, 1:23-CV-00772-DHU-LF, 1:23-CV-00773-DHU-LF, 1:23-CV-00774-DHU-LF, 1:23-CV-00778-DHU-LF, 2023 WL 5951940, at *1 (D.N.M. Sept. 13, 2023) (granting a temporary restraining order against enforcement of Grisham’s EO 2023-0130). The governor made the following findings in that regard:

WHEREAS, New Mexico consistently has some of the highest rates of gun violence in the nation;

WHEREAS, the rate of gun deaths in New Mexico increased 43% from 2009 to 2018, compared to an 18% increase over this same time period nationwide;

WHEREAS, guns are the leading cause of death among children and teens in New Mexico, and have led to the deaths of a thirteen-year-old girl on July 28, a five-year-old girl on August 14, and an eleven-year-old boy on September 6;

WHEREAS, New Mexico has recently experienced an increasing amount of mass shootings, including mass shootings in Farmington and Red River this year;

WHEREAS, these gun-related deaths and injuries have resulted in devastating physical and emotional consequences for individuals, families, and communities throughout the State;

WHEREAS, the impact of gun violence extends beyond physical injuries and fatalities—causing emotional trauma, economic burdens, and long-lasting consequences for those affected individuals and their families;

WHEREAS, the increasing number of gunshot victims strains our already over-burdened healthcare system and places undue pressure on medical professionals and resources;

WHEREAS, after consulting with the Secretary of the Department of Health, I have determined that the foregoing situation constitutes a statewide public health emergency of unknown duration, as defined by the Public Health Emergency Response Act; and

WHEREAS, the foregoing situation also constitutes a man-made disaster causing or threatening widespread physical or economic harm that is beyond local control and requiring the resources of the State pursuant to the All Hazard Emergency Management Act.

N.M. Exec. Order No. 2023-130 (Sept. 07, 2023), <https://www.governor.state.nm.us/wp-content/uploads/2023/09/Executive-Order-2023-130-1.pdf>.

34. See, e.g., Edmonds, *supra* note 30.

35. N.M. Exec. Order No. 2023-130 (Sept. 7, 2023), <https://www.governor.state.nm.us/wp-content/uploads/2023/09/Executive-Order-2023-130-1.pdf>.

36. *Id.*

commanded that “[a]ll political subdivisions of the State shall comply with and enforce all directives issued pursuant to this Order.”³⁷ Finally, EO 2023-130 “encouraged” New Mexico’s sheriffs, mayors, and local governing officials to request additional restrictions.³⁸

Per its terms, the order was scheduled to expire on October 6, 2023,³⁹ but Governor Grisham later (and repeatedly) renewed the order.⁴⁰ In her words, “I won’t rest until we don’t have to talk about (gun violence) as an epidemic and a public health emergency. That’s the goal—and if we turn the tide and it’s sustainable.”⁴¹ In none of those extensions, however, did the governor make any materially different findings regarding the circumstances in New Mexico that were not in her original September 7, 2023, order.⁴² The upshot of EO 2023-130 is this: None of its directives specifically prohibited the possession or carrying of firearms anywhere within

37. *Id.*

38. *Id.*

39. *Id.*

40. See *Executive Orders*, OFF. OF THE GOVERNOR: MICHELLE LUJAN GRISHAM, <https://www.governor.state.nm.us/about-the-governor/executive-orders/> (last visited Jan. 23, 2025) (demonstrating that the orders were renewed until October 13, 2024: Executive Order No. 2023-135 effective until Nov. 2, 2023; Executive Order No. 2023-140 effective until Dec. 1, 2023; Executive Order No. 2023-0144 effective until Dec. 29, 2023; Executive Order No. 2023-0146 effective until Jan. 26, 2024; Executive Order No. 2024-001 effective until Feb. 23, 2024; Executive Order No. 2024-004 effective until Mar. 22, 2024; Executive Order No. 2024-008 effective until Apr. 19, 2024; Executive Order No. 2024-012 effective until May 17, 2024; Executive Order No. 2024-017 effective until June 15, 2024; Executive Order No. 2024-030 effective until July 15, 2024; Executive Order No. 2024-112 effective until Aug. 14, 2024; Executive Order No. 2024-125 effective until Sept. 13, 2024; Executive Order No. 2024-141 effective until Oct. 13, 2024).

41. *New Mexico Governor Defends Approach to Attempted Gun Restrictions, Emergency Order on Gun Violence*, ASSOCIATED PRESS (Oct. 10, 2023, 8:05 PM), <https://apnews.com/article/new-mexico-governor-gun-violence-4d81fd32daa19cea5c27723575e9b85>.

42. There were some additions in more recent executive orders, but they did not materially add to the justification for the firearms restriction. For example, in her July 15, 2024, executive order, Governor Grisham added two new paragraphs to her earlier orders, placed at the outset of the preamble: “**WHEREAS**, the United States Surgeon General declared gun violence to be a public health crisis on June 25, 2024” and “**WHEREAS**, according to the United States Surgeon General, 54% of adults in America report that either they or a family member have been threatened with a firearm, killed by a firearm, witnessed someone being shot, shot someone in self-defense, or injured by a firearm. . . .” Interestingly, *none* of the claims in those paragraphs is specific to New Mexico, and all of the ones in the second paragraph justify the carrying of a firearm to defend oneself, a family member, a friend, or a third party. See N.M. Exec. Order No. 2024-112 (July 15, 2024), <https://www.governor.state.nm.us/wp-content/uploads/2024/07/Executive-Order-2024-112.pdf>. Furthermore, in those executive orders Governor Grisham acknowledged that some gun uses were in self-defense. See sources cited *supra* note 40. Accordingly, neither the Surgeon General’s June 25, 2024, statement nor the Governor’s recent executive orders prove that New Mexico suffers from *rampant and illegal* gun violence or that there is a justification for denying state residents to use a firearm for lawful self-defense purposes. See Press Release, U.S. Dep’t of Health and Hum. Servs., U.S. Surgeon General Issues Advisory on the Public Health Crisis of Firearm Violence in the United States (June 25, 2024), <https://www.hhs.gov/about/news/2024/06/25/statement-secretary-health-human-services-anniversary-bipartisan-safer-communities-act.html>; sources cited *supra* note 40. In addition, in her September 13, 2024, executive order, the governor mentioned some additional gun violence. See Exec. Order No. 2024-141, at 2–5 (Sept. 13, 2024). The governor did *not*, however, explain why the firearms restrictions would have prevented those offenses or why the lawful carry of firearms created or contributed to those offenses. See *infra* text accompanying notes 187–88. Nor did the governor mention the number of instances where a resident in possession of a firearm might have *deterred* a crime from occurring or *stopped* a crime in progress.

New Mexico.⁴³ The executive order and its successors, however, did find that firearms-related violence created a state of emergency that began on September 7, 2023, and has continued to the present unabated.⁴⁴

In response, neither the Department of Homeland Security nor the Department of Emergency Management issued any restraint on the carrying of firearms anywhere in New Mexico. By contrast, the Department of Health did act. It issued a ban and justified it on the ground that firearms-related violence created the public health emergency that the governor had declared.

On September 8, 2023, Patrick Allen, Secretary of the New Mexico Department of Health, issued an order that, unlike EO 2023-130, did specifically affect firearms possession.⁴⁵ That three-page order—entitled “Public Health Emergency Order Imposing Temporary Firearm Restrictions, Drug Monitoring and Other Public Safety Measures”⁴⁶—relied on the findings contained in the governor’s executive order that was issued the day before that “gun violence and drug abuse currently constitute statewide public health emergencies” as defined by the New Mexico Public Health Emergency Response Act (NMPHERA).⁴⁷ Secretary Allen also relied on several other sources of authority for his September 8 order: namely, the New Mexico Public Health Act (NMPHA),⁴⁸ the New Mexico Department of Health Act (NMDHA),⁴⁹ and the “inherent constitutional police powers of the New Mexico state government to preserve and promote public health and safety, to maintain and enforce rules for the control of a condition of public health importance.”⁵⁰ Secretary Allen prohibited

43. The governor’s order related to firearms in only two ways. It directed state regulators to inspect New Mexico firearms dealers monthly to learn if they complied with state sale and storage laws, and the order directed the Department of Health to collect demographic information on gunshot victims, as well as “information on the brand and caliber of the firearm involved, and general circumstances leading to the injury.” Edmonds, *supra* note 30.

44. See *supra* note 42 and accompanying text.

45. N.M. Dep’t of Health, Public Health Emergency Order Imposing Temporary Firearm Restrictions, Drug Monitoring and Other Public Safety Measures, at 1–2 (Sept. 8, 2023) [hereinafter Allen Public Health Order], <https://cv.nmhealth.org/wp-content/uploads/2023/09/090823-PHO-guns-and-drug-abuse.pdf> (reprinted as Exhibit 1, Verified Petition for Extraordinary Writ and Request for Stay, *Amador v. Grisham*, No. S-1-SC-40105 (N.M. Sept. 14, 2023)).

46. *Id.*

47. See N.M. STAT. ANN. §§ 12-10A-1 to 12-10-19 (2024); Allen Public Health Order, *supra* note 45.

48. See N.M. STAT. ANN. § 24-1-3 (2024).

49. See *id.* § 9-7-6.

50. Allen Public Health Order, *supra* note 45, at 1. In accordance with the Governor’s direction, Secretary Allen then issued a public health emergency order (“PHEO”) restricting the possession of firearms in most public places in cities and counties with high levels of gun violence (i.e., Bernalillo County and the City of Albuquerque), as well as all state properties, public schools, and public parks. The PHEO also directed: (1) the Regulation and Licensing Department to begin conducting monthly inspections of licensed firearms dealers to ensure compliance with all firearm sales and storage laws; (2) the Department of Health to compile a comprehensive report on gunshot victims presenting at hospitals in New Mexico; (3) the Department of Health and Environment Department to develop a program to conduct wastewater testing for illicit substances at public schools; and (4) the Children, Youth and Families Department to suspend the Juvenile Detention Alternatives Initiative and evaluate juvenile probation protocols. *Id.* at 2.

anyone other than “a law enforcement officer or licensed security officer” from possessing a firearm in Bernalillo County,⁵¹ with five specific exceptions.⁵² In response to a question about whether the secretary’s order was unconstitutional, Governor Grisham said the following:

Another potentially relevant state law, one that the secretary did not invoke, is the New Mexico All Hazard Emergency Management Act, N.M. STAT. ANN. §§ 12-10-1 to -10 (2024). The purpose of this law, as its text states, is to “confer upon the governor and upon the governing bodies of the state all hazard emergency management powers” and to “provide an emergency operations plan for the protection of life and property adequate to cope with disasters resulting from acts of war or sabotage or from natural or man-made causes other than acts of war . . .” *Id.* § 12-10-2(B)–(C). While the argument could be made that firearms-related violence is a “disaster” that is “man-made,” this interpretation of the Act is unpersuasive for several reasons. First, the Act makes the state director of homeland security and emergency management responsible for the law’s implementation, not the Secretary of Health. *Id.* § 12-10-3. Second, the broad interpretation noted above is unreasonable for the reasons discussed below in connection with the other acts cited by the secretary. And third, a broad reading of that act runs headlong into the New Mexico Concealed Handgun Carry Act, which recognizes that the concealed carry of a firearm is a *protection* against deadly violence.

51. Allen Public Health Order, *supra* note 45, at 1. Secretary Allen’s order did not identify Bernalillo County by name. Instead, he defined the geographic range of his order as being limited to

cities or counties averaging 1,000 or more violent crimes per 100,000 residents per year since 2021 according to Federal Bureau of Investigation’s Uniform Crime Reporting Program AND more than 90 firearm-related emergency department visits per 100,000 residents from July 2022 to June 2023 according to the New Mexico Department of Public Health.

See Edmonds, *supra* note 30 (“The executive order is statewide but affects only cities and counties that exceed certain levels of violent crime and gun-related emergency room visits, criteria that currently applies only to Bernalillo County, the seat of which is Albuquerque.”); Heild & Uyttebrouck, *supra* note 30 (“Under the order’s criteria, the right to carry publicly is suspended only in Bernalillo County.”); *cf.* Gomillion v. Lightfoot, 364 U.S. 339, 341, 347–48 (1960) (holding unconstitutional a state legislative redistricting measure drawing the boundaries of Tuskegee, Alabama, in a manner that excluded every Black person but four and no whites, reasoning that, “if the allegations are established, the inescapable human effect of this essay in geometry and geography is to despoil” the opportunity of virtually the entire Black population of Tuskegee to vote in municipal elections).

52. Allen Public Health Order, *supra* note 45, at 1–2; Heild & Uyttebrouck, *supra* note 30 (“Under the order’s criteria, the ban against carrying firearms openly or concealed in public spaces only applies to Albuquerque and Bernalillo County, and in addition, state property, public schools and public parks throughout New Mexico. Those wishing to carry guns while traveling must keep the firearms in locked containers or locked with a firearm safety device, like a trigger lock. Residents with gun permits can still have weapons on private property. Law enforcement and security guards would be exempt.”). The exceptions were the following:

- A. On private property owned or immediately controlled by the person;
- B. On private property that is not open to the public with the express permission of the person who owns or immediately controls such property;
- C. While on the premises of a licensed firearms dealer or gunsmith for the purpose of lawful transfer or repair of a firearm;
- D. While engaged in the legal use of a firearm at a properly licensed firing range or sport shooting competition venue; or
- E. While traveling to or from a location listed in Paragraphs (1) through (4) of this section; provided that the firearm is in a locked container or locked with a firearm safety device that renders the firearm inoperable, such as a trigger lock.

Allen Public Health Order, *supra* note 45, at 1–2 (stating additional firearms-related provisions in Secretary Allen’s order including: “(2) The New Mexico Regulation and Licensing Department shall conduct monthly inspections of licensed firearms dealers in the State to ensure compliance with all sales and storage laws. (3) The Department of Health shall, within 20 days, compile and issue a comprehensive report on gunshot victims presenting at hospitals in New Mexico, which shall include (if

With one exception, and that is if there's an emergency, and I've declared an emergency for a temporary amount of time, I can invoke additional powers. No constitutional right, in my view, including my oath, is intended to be absolute. There are restrictions on free speech. There are restrictions on my freedoms. In this emergency, this 11-year-old, and all these parents who have lost all these children, they deserve my attention. To have the debate about whether or not in an emergency we can create a safer environment. Because what about their constitutional rights? I took an oath to uphold those too. And if we ignore this growing problem, without being bold, I have said to every other New Mexican, 'Your rights are subjugated to theirs.' And they are not, in my view.⁵³

The two orders were quite controversial, both in New Mexico and elsewhere.⁵⁴ Every major state and local law enforcement official in New Mexico concluded that the orders were unconstitutional and therefore unenforceable.⁵⁵ In an unprecedented rebuke, the New Mexico attorney

available): demographic data of gunshot victims, including age, gender, race, and ethnicity; data on gunshot victim's healthcare outcomes; the brand and caliber of the firearm used; the general circumstances leading to the injury; the impact of gunshot victims on New Mexico's healthcare system; and any other pertinent information. (4) No person, other than a law enforcement officer or licensed security officer, shall possess a firearm on state property, public schools, and public parks." *Id.* at 2. A further order provided that every firearms owner was entitled to one free trigger lock. *Id.* at 3.

53. KOB 4, *New Mexico Gov. Lujan Grisham Holds News Conference on Gun Violence*, at 31:51–32:19, YOUTUBE (Sept. 8, 2023), <https://www.youtube.com/watch?v=S9oLoubipXc>.

54. See, e.g., Editorial Board, *supra* note 30 ("It's not often the ACLU of New Mexico and the Republican Party of New Mexico agree on something, albeit for different reasons. It's also not often that law enforcement leaders openly defy a governor. But Gov. Michelle Lujan Grisham has accomplished both, abusing the emergency public health powers granted to the governor's administration by state lawmakers in the wake of 9/11. And it's not going over so well, even among members of her own political party. Secretary Patrick M. Allen, whom the governor appointed cabinet secretary of the Department of Health in January, issued an executive order Friday banning citizens from carrying firearms on any state property for 30 days, openly or concealed. Further, under the shocking and unprecedented fiat that even targets law-abiding citizens who have gone through the arduous process of obtaining a concealed carry permit, the core constitutional right to carry a firearm is suspended at public spaces in Bernalillo County and Albuquerque for 30 days, with exceptions for police and licensed security guards. . . . [T]he gun ban overshadows everything else in the emergency public health order."); Colbi Edmonds, *Facing Pushback from Both Parties, New Mexico Governor Scales Back Firearms Order*, N.Y. TIMES, <https://www.nytimes.com/2023/09/17/us/new-mexico-governor-gun-ban.html?searchResultPosition=2> (Sept. 20, 2023) ("The governor's initial ban was swiftly met with pushback from Republicans and fellow Democrats alike. Two Republican state representatives, Stefani Lord and John Block, called on Sept. 9 for Ms. Lujan Grisham to be impeached, saying that she had violated her oath to New Mexico and the nation. And in a letter on Tuesday, New Mexico Attorney General Raúl Torrez, a Democrat, wrote a letter to the governor saying that he did not believe that the ban 'will have any meaningful impact on public safety' and that his office would not defend her in cases that challenged the order. 'I encourage you to engage in a more thoughtful and deliberative process with members of the New Mexico Legislature rather than taking unilateral action that infringes on the constitutional rights of law-abiding citizens,' Mr. Torrez wrote.").

55. See MON: *Bernalillo County Sheriff Calls Governor's Gun Ban Unconstitutional, + More*, KUNM (Sept. 11, 2023, 5:25AM), <https://www.kunm.org/2023-09-11/mon-no-clear-penalty-for-violating-n-m-public-health-order-on-guns-more> (Bernalillo County Sheriff John Allen vowed not to enforce it, calling it unconstitutional. "This ban does nothing to curb gun violence," Allen said at a news conference. Bernalillo County District Attorney Sam Bregman, who was appointed DA by Lujan Grisham in January, also said he would not enforce it. Neither Albuquerque Mayor Tim Keller nor APD Police Chief Harold Medina would enforce the ban.); Inyoung Choi, *New Mexico Attorney General Says He Won't Defend Governor's Gun Ban in Court*, NBC NEWS (Sept. 12, 2023, 9:09PM), <https://www.nbcnews.com/politics/politics-news/new-mexico-attorney-general-wont-defend>

general, the Bernalillo County district attorney and sheriff, the Albuquerque mayor, and the Albuquerque police chief all refused to enforce the orders despite the governor's call for a "debate" over the optimum public policy governing the public carry of firearms.⁵⁶

Not surprisingly, almost immediately more than fifty individuals and organizations filed lawsuits in federal and state court challenging the legality of the orders under federal and state law.⁵⁷ On September 13, 2023, a judge on the U.S. District Court for the District of New Mexico entered a temporary restraining order (TRO) against two sections of Secretary Allen's order: (1) Section 1, the principal feature of that order, which prohibited anyone other than law enforcement officers and licensed security guards from the concealed or open carry of a firearm in Bernalillo County;⁵⁸ and (2) Section 4 of the secretary's order, which prohibited the

governors-gun-ban-rcna104771 ("Attorney General Raúl Torrez in a letter Tuesday notified Lujan Grisham, a fellow Democrat, of his opposition to her 30-day ban on the right to carry open or concealed firearms in and around Albuquerque, the state's largest city. 'Simply put, I do not believe that the Emergency Order will have any meaningful impact on public safety but, more importantly, I do not believe it passes constitutional muster,' he wrote."); *infra* Parts III–V.

56. Morgan Lee, *Governor Wants New Mexico Legislators to Debate New Approach to Regulating Assault-Style Weapons*, ASSOCIATED PRESS, <https://apnews.com/article/new-mexico-assault-style-weapons-proposal-402508e193e2f9e4a7910aec596ef23f> (Dec. 11, 2023, 2:51PM). As the Supreme Court explained in *District of Columbia v. Heller*, 554 U.S. 570 (2008):

We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad. We would not apply an "interest-balancing" approach to the prohibition of a peaceful neo-Nazi march through Skokie. *See* *National Socialist Party of America v. Skokie*, 432 U.S. 43 (1977) (*per curiam*). The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong headed views. The Second Amendment is no different. Like the First, it is the very *product* of an interest balancing by the people—which Justice Breyer would now conduct for them anew. And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.

Id. at 634–35.

57. *See, e.g.*, Nat'l Ass'n for Gun Rts. v. Grisham, No. 1:23-CV-00771-DHU-LF, 2023 WL 5951940, at *1 (D.N.M. Sept. 13, 2023); Verified Petition for Extraordinary Writ and Request for Stay at 2–3, *Amador v. Grisham*, No. S-1-SC-40105 (N.M. Sept. 14, 2023) [hereinafter Extraordinary Writ Petition]; Edmonds, *supra* note 30.

58. The district court enjoined the following component of the Allen Public Health Order:

(1) No person, other than a law enforcement officer or licensed security officer, shall possess a firearm, as defined in NMSA 1978, Section 30-7-4.1, either openly or concealed, within cities or counties averaging 1,000 or more violent crimes per 100,000 residents per year since 2021 according to Federal Bureau of Investigation's Uniform Crime Reporting Program AND more than 90 firearm-related emergency department visits per 100,000 residents from July 2022 to June 2023 according to the New Mexico Department of Public Health, except:

A. On private property owned or immediately controlled by the person;

concealed or open carry of a firearm on or in “state property, public schools, and public parks,” with the same two exceptions.⁵⁹ The TRO effectively forced the governor and secretary to drastically cabin their orders shortly thereafter.⁶⁰

B. The Subsequent Revised Orders

On September 15, 2023, Secretary Allen issued a revised public health order, narrowing the geographic scope of his September 8 decree.⁶¹ The new order prohibited the open or concealed carry of a firearm in “public parks or playgrounds [within the City of Albuquerque or Bernalillo County],” with the same two exceptions found in his September 8 order.⁶² The secretary stated that the revised order would last for the duration of

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- B. On private property that is not open to the public with the express permission of the person who owns or immediately controls such property;
 - C. While on the premises of a licensed firearms dealer or gunsmith for the purpose of lawful transfer or repair of a firearm;
 - D. While engaged in the legal use of a firearm at a properly licensed firing range or sport shooting competition venue; or
 - E. While traveling to or from a location listed in Paragraphs (1) through (4) of this section; provided that the firearm is in a locked container or locked with a firearm safety device that renders the firearm inoperable, such as a trigger lock.

Grisham, 2023 WL 5951940, at *11–14.

59. *Id.* at *13.

60. Edmonds, *supra* note 54. Their decision to limit the breadth of the September 7th and 8th orders does not render moot the federal lawsuit challenging those actions. As the Supreme Court recently reminded us, “a defendant’s voluntary cessation of a challenged practice will moot a case only if the defendant can show that the practice cannot reasonably be expected to recur.” *FBI v. Fikre*, 601 U.S. 234, 241 (2024) (quotation marks omitted). Otherwise, “a defendant might suspend its challenged conduct after being sued, win dismissal, and later pick up where it left off; it might even repeat ‘this cycle’ as necessary until it achieves all of its allegedly ‘unlawful ends.’” *Id.* Governor and Secretary Allen cannot carry that “formidable burden” in this case. *Id.* (citations omitted). The governor has repeatedly renewed her September 7th emergency declarations, and the secretary has made it clear that his order will be in effect for as long as the governor’s executive orders are. *See* sources cited *supra* note 40; N.M. Dep’t of Health, Amended Public Health Emergency Order Imposing Temporary Firearm Restrictions, Drug Monitoring and Other Public Safety Measures, at 3 (Sept. 15, 2023) [hereinafter Allen September 15 Order], <https://cv.nmhealth.org/wp-content/uploads/2023/09/NMAC-EO-2023-130-132-Amended.pdf>.

In separate litigation, several private parties filed an original action in the New Mexico Supreme Court seeking a writ of mandamus prohibiting Governor Grisham and Secretary Allen from enforcing their September 7th and 8th orders. *See* Extraordinary Writ Petition, *supra* note 57, at 2–3. The New Mexico Supreme Court heard oral argument on the petition but has not yet issued a decision.

61. *See, e.g.,* Edmonds, *supra* note 54 (“Gov. Michelle Lujan Grisham of New Mexico on Friday scaled back a temporary public health order restricting the carrying of firearms in the Albuquerque metro area, limiting a ban to only parks and playgrounds. . . . The governor’s most recent executive order essentially replaces the blocked one.”); Meredith Deliso, *New Mexico Governor Amends Gun Order to Allow for Firearms in Most Public Places*, ABC NEWS (Sept. 15, 2023, 12:42 PM), <https://abcnews.go.com/US/new-mexico-governor-amends-gun-order/story?id=103227753>.

62. Allen September 15 Order, *supra* note 60 (“No person, other than a law enforcement officer or licensed security officer, or active duty military personnel shall possess a firearm . . . either openly or concealed in public parks or playgrounds” within the City of Albuquerque or Bernalillo County, except in the City of Albuquerque’s Shooting Range Park and areas designated as a state park within the state parks system owned or managed by the New Mexico Energy, Minerals and Natural Resources Department State Parks Division, or the State Land Office.).

any public health emergency order issued by the governor.⁶³ As a result, the revised order was carried forward.⁶⁴

In sum, the effect of the New Mexico firearms orders has changed over time. The first order flatly prohibited the possession of a firearm in public in Bernalillo County by anyone other than law enforcement officers and licensed security guards for a thirty-day period. The secretary issued that order despite the Supreme Court's ruling in *Bruen* that adults generally have a right to carry a firearm in public for self-defense and in direct contradiction to the New Mexico Concealed Handgun Carry Act, which authorizes licensed residents to carry a concealed handgun in most public areas throughout the state. Later orders, however, greatly limited the types of public spaces to which the ban applies. The ban on possession of a firearm by a member of the public now applies only to parks and playgrounds that are open to the public within Albuquerque and Bernalillo County.

II. GOVERNOR GRISHAM'S AND SECRETARY ALLEN'S AUTHORITY TO ISSUE THE FIREARM POSSESSION BANS

The threshold issue in any constitutional analysis of government conduct is whether the government had the authority to undertake the action. This is the appropriate analysis under federal law for challenges to the legality of a presidential executive order. As the Supreme Court made clear in *Youngstown Sheet & Tube Co. v. Sawyer*,⁶⁵ “[t]he President’s power, if any, to issue [an] order must stem either from an act of Congress or from the Constitution itself.”⁶⁶ This is true regardless of the need for the government to act, the importance of the goal that the government seeks to achieve, or the speed with which something must be done.⁶⁷

63. Allen September 15 Order, *supra* note 60, at 3.

64. N.M. Exec. Order No. 2024-141 (Sept. 13, 2024), <https://www.governor.state.nm.us/wp-content/uploads/2024/09/Executive-Order-2024-141.pdf> (renewing declaration until Oct. 13, 2024).

65. 343 U.S. 579 (1952).

66. *Id.* at 585. The Constitution creates the office of the President in Article II and vests him or her with certain, specified powers. U.S. CONST. art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”); *id.* art. II, § 2. Some of them are the President’s alone to exercise. *Id.* art. II, § 2, cl. 1–2 (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.”) (emphasis added). By contrast, the federal Constitution does not create or empower federal agencies. It contemplates that “executive Departments” will exist and that each one shall be headed by “a principal Officer,” with “inferior Officers” serving as lieutenants, *id.* art. II, § 2, cls. 1–3, but the Constitution neither creates such agencies nor empowers one to exercise any particular authority. Accordingly, if the President had issued the same executive order that Governor Grisham did, the first question to ask would be whether Congress or the Constitution granted the President such authority. Neither Congress nor Article II empowers the President to do what the New Mexico Governor and Secretary of Health did.

67. See *Ala. Ass’n of Realtors v. Dep’t of Health and Hum. Servs.*, 594 U.S. 758, 766 (2021) (“It is indisputable that the public has a strong interest in combating the spread of the COVID-19 Delta variant. But our system does not permit agencies to act unlawfully even in pursuit of desirable ends. *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582, 586–588 (1952) (concluding that

The same principle applies to directives issued by federal agencies. The federal Constitution does not create or empower agencies,⁶⁸ which means that they have no inherent constitutional authority and possess only the power that Congress has specifically vested in them by statute.⁶⁹ The Constitution envisions that Congress will create executive agencies,⁷⁰ but each one must stay in its prescribed lane.⁷¹ A federal agency that exceeds its statutory authority has acted unlawfully, and the federal courts must set that action aside.⁷² The same limitation applies against state executives and agencies.

A. The Need for the Executive to Possess Authority to Restrain Liberty

The need to establish governmental authority to infringe on a person's life, liberty, or property underpins the concepts of "due process of law" and "rule of law."⁷³ The former term traces its lineage to Clause 39

even the Government's belief that its action 'was necessary to avert a national catastrophe' could not overcome a lack of congressional authorization). It is up to Congress, not the CDC, to decide whether the public interest merits further action here.").

68. See discussion *supra* note 66.

69. See, e.g., *Biden v. Nebraska*, 600 U.S. 477, 494–506 (2023); *West Virginia v. EPA*, 597 U.S. 697, 723 (2022) ("Extraordinary grants of regulatory authority are rarely accomplished through modest words, vague terms, or subtle devices. Nor does Congress typically use oblique or elliptical language to empower an agency to make a radical or fundamental change to a statutory scheme. Agencies have only those powers given to them by Congress, and enabling legislation is generally not an open book to which the agency may add pages and change the plot line.") (citations and punctuation omitted); *FEC v. Cruz*, 596 U.S. 289, 301 (2022) ("An agency's regulation cannot operate independently of the statute that authorized it.") (citation and punctuation omitted); *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., OSHA*, 595 U.S. 109, 117 (2022) ("Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided."); *Ala. Ass'n of Realtors*, 594 U.S. at 766; *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014); *id.* at 325–26 ("An agency has no power to tailor legislation to bureaucratic policy goals by rewriting unambiguous statutory terms. Agencies exercise discretion only in the interstices created by statutory silence or ambiguity; they must always give effect to the unambiguously expressed intent of Congress.") (punctuation omitted); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) ("[I]n our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop.") (citations omitted); *Bowen v. Geo. Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."); *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it."); *Youngstown*, 343 U.S. at 585.

70. U.S. CONST. art. I, § 8, cl. 18 ("[The Congress shall have Power] . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."); *id.* art. II, § 2, cl. 1 (referring to "the principal Officer in each of the executive Departments"); *id.* § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to . . . nominate, and by and with the Advice and Consent of the Senate . . . appoint . . . Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.).

71. See, e.g., 5 U.S.C. § 706(2)(C) ("[T]he reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be . . . (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . ."); *Biden v. Nebraska*, 600 U.S. 477, 494–506 (2023).

72. See *Youngstown*, 343 U.S. at 585; *supra* note 71.

73. Paul J. Larkin, Jr., *The Lost Due Process Doctrines*, 66 CATH. U. L. REV. 293, 332 (2016) (quotation marks omitted) ("The rule of law therefore emerged as serving a dual role. It empowered a

of Magna Carta,⁷⁴ which is the source of the latter constitutional principle that no government official is above the law⁷⁵ and that, because they are subject to the rule of law, every official must legally justify his or her conduct.⁷⁶ The consequence is this: whether the actor is the English king, the President, or a governor, no government official may deprive someone of life, liberty, or property without legal authorization. Moreover, even if legal authorization does exist, the law creating it could well violate one or more provisions of the Constitution, rendering that law null and void.

king to govern a nation, while also limiting the power he could lawfully exercise. The law therefore served as a protection against anarchy and despotism, a formal authorization to protect the realm and an essential safeguard of personal liberty for those being governed. That broad, indeterminate yet vital doctrine of constitutionalism came to be as important to the legitimacy of a government as the principle of consent through representation.”).

74. The phrase “due process of law” traces its lineage to Chapter 39 of Magna Carta of 1215, signed by King John at Runnymede in 1215 to end a baronial rebellion, a document that rivals our own Constitution in the protections it affords against arbitrary federal or state conduct. *See, e.g.*, DAVID CARPENTER, *MAGNA CARTA*, at viii (2015); A.E. DICK HOWARD, *MAGNA CARTA: TEXT AND COMMENTARY* 15 (rev. ed. 1998); THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 23–25 (Liberty Fund, 5th ed. 2010) (1956); C.H. McIlwain, *Due Process of Law in Magna Carta*, 14 COLUM. L. REV. 27, 27–28 (1914). Chapter 39 provided that “[n]o free man is to be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgement of his peers or by the law of the land.” J. C. HOLT, *MAGNA CARTA* 389 (3d ed. 2015) (internal quotation marks omitted). Parliament later modified the phrase “law of the land” to refer to “due process of law” in a fourteenth-century Act, stating that “no Man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought in Answer by due Process of the Law.” Liberty of Subject Act, 28 Edw. 3, ch. 3 (1354); *see also* HOWARD, *supra* at 15 (“[A]s early as 1354 the words ‘due process’ were used in an English statute interpreting Magna Carta, and by the end of the fourteenth century ‘due process of law’ and ‘law of the land’ were interchangeable.”); Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 368 (1911); LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 4 (1999) (the English Petition of Right of 1628 reaffirmed the 1354 act and again used the term “due process of law,” instead of “the law of the land”); ELLIS SANDOZ, *THE ROOTS OF LIBERTY: MAGNA CARTA, ANCIENT CONSTITUTION, AND THE ANGLO-AMERICAN TRADITION OF RULE OF LAW* 25 (Ellis Sandoz ed., 1993) (Lord Edward Coke construed the term “due process of law” to mean “the law of the land” to refer to “the Common Law, Statute Law, or Custome of England”). More recently, Professors Nathan Chapman and Michael McConnell have explained that, “[f]undamentally, ‘due process’ meant that the government may not interfere with established rights without legal authorization and according to law, with ‘law’ meaning the common law as customarily applied by courts and retrospectively declared by Parliament, or as modified prospectively by general acts of Parliament.” Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1679 (2012).

75. Larkin, *supra* note 73, at 335 (“The value of the Charter . . . is more than the mere sum of the values of its terms or any or all of its provisions”; that value lies in the fact that the agreement “enunciated a definite body of law, claiming to be above the King’s will and admitted as such by John.” Magna Carta came to stand as proof that a written document could make notable revisions to the law, could fend off tyrannical government officials, could restrain executive power, and could grant rights to the entire community, not merely to specific favored individuals. In all those respects, Magna Carta foreshadowed our Constitution and Bill of Rights.” (footnotes omitted)).

76. *Id.* at 331–32 (“[L]aw was not just the property of all; it also was their sovereign. Even the Crown was subject to the law. According to Henry de Bracton, it was English law that authorized the Crown to rule, with the result being that the supreme authority in political society was not that of the ruler, but that of the law. The rule of law therefore emerged as serving a dual role. It empowered a king to govern a nation, while also limiting the power he could lawfully exercise. The law therefore served as a protection against anarchy and despotism, a formal authorization to protect the realm and an essential safeguard of personal liberty for those being governed. That broad, indeterminate yet vital doctrine of constitutionalism came to be as important to the legitimacy of a government as the principle of consent through representation.” (footnotes and punctuation omitted)).

The President lacks statutory or inherent authority to issue orders like those promulgated by Governor Grisham and Secretary Allen. No act of Congress empowers a President to ban the possession or carry of firearms outside of federal property. As executives at the state level, Governor Grisham and Secretary Allen likewise lacked such authority in this instance.

B. The New Mexico Governor's Inherent Constitutional Authority

One source of authority Secretary Allen identified to justify his firearms restriction order was the "inherent constitutional police powers of the New Mexico state government to preserve and promote public health and safety, to maintain and enforce rules for the control of a condition of public health importance."⁷⁷ Effectively, he sought to invoke whatever inherent authority Governor Grisham or he had by virtue of being elected and appointed, respectively, to their offices. That claim is also unpersuasive.

Like the federal Constitution, the New Mexico constitution creates a tripartite form of government.⁷⁸ Article 5 creates a chief executive, the governor, who is elected for a four-year term.⁷⁹ That article vests the governor with the "supreme executive power of the state,"⁸⁰ and it specifies that the governor, like the President, "shall take care that the laws be faithfully executed."⁸¹ Section 5 of Article 5 empowers the governor, with the state senate's approval, to appoint all state officers whose appointment or election is not otherwise specified in the state constitution.⁸² Various other Article 5 provisions round out the powers and responsibilities of the office of the governor.⁸³

77. Allen Public Health Order, *supra* note 45.

78. N.M. CONST. arts. 4 (legislative department), 5 (executive department), 6 (judicial department).

79. N.M. CONST. art. 5, § 1, cl. 1 ("The executive department shall consist of a governor, lieutenant governor, secretary of state, state auditor, state treasurer, attorney general and commissioner of public lands, who shall, unless otherwise provided in the constitution of New Mexico, be elected for terms of four years beginning on the first day of January next after their election. The governor and lieutenant governor shall be elected jointly by the casting by each voter of a single vote applicable to both offices.").

80. N.M. CONST. art. 5, § 4.

81. *Id.*; cf. U.S. CONST. art. II, § 3 ("The President . . . shall take Care that the Laws be faithfully executed . . ."). Article 4 of the New Mexico Constitution empowers the governor to veto bills passed by the legislature, which may thereafter override the governor's veto by a two-thirds vote of each house. N.M. CONST. art. 4, § 22. The governor may veto an appropriation bill in whole or in part—viz., he or she may exercise what is known as a "line-item veto," which the President cannot. *Id.*; *Clinton v. City of New York*, 524 U.S. 417, 448–49 (1998) (ruling that the Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 (1996), violates Article I of the federal Constitution). Article 5 Section 4 also makes the governor the "commander in chief of the military forces of the state" unless the President has called the state militia into federal service. N.M. CONST. art. 5, § 4 ("The . . . governor . . . shall be commander in chief of the military forces of the state, except when they are called into the service of the United States."); *id.* art. 18, § 1 ("The organized militia shall be called the 'national guard of New Mexico,' of which the governor shall be the commander in chief.").

82. N.M. CONST. art. 5, § 5.

83. *Id.* § 1 (regulating the successive terms of office a person may hold as governor); *id.* § 2 (regulating the counting of votes for governor); *id.* § 3 (defining the requirements to hold the office of governor); *id.* § 7 (governing the succession to the office of governor in the case of his or her death); *id.* § 11 (requiring the governor to sign all state commissions); *id.* § 12 (fixing the governor's

Two features of those provisions stand out. One is that none of them purports to empower the governor to regulate the open or concealed carry of firearms. The other is that no provision purports to grant the governor the authority to disregard any acts of the New Mexico legislature, much less federal constitutional law. Nor could they.⁸⁴ Just as President Harry Truman could not seize the steel mills to halt a strike during a time of war because it was not authorized by the federal labor laws or the Constitution,⁸⁵ Governor Grisham cannot disregard state and federal law by claiming that doing so was necessary because of an “emergency.” Whatever inherent authority the New Mexico state constitution grants to the governor, it does not include a right to violate other state laws or any federal law.

C. The New Mexico Public Health Laws

In our constitutional system, positive law performs two complementary functions. One is to authorize the government to advance the overall public welfare by restraining the freedom of private parties to enjoy their individual “life, liberty, and property” as each one sees fit. The other is to “guard the guardians”⁸⁶ by cabinining the government’s authority to the precise limits that positive law defines. In so doing, the law enables the government to protect the interests of private parties as part of the social contract while enabling the public to decide how best to advance their individual interests.

Here, the New Mexico public health laws seek to protect the public by empowering the government to fend off attacks by various pathogens. These laws, however, do not address the nonpathogenic threats that individuals can pose by the commission of violent crimes. This is the province of the state’s criminal laws, as well as the federal and state constitutional and statutory laws entitling adult private parties to possess and use firearms in self-defense under *Heller* and *Bruen*. The failure to acknowledge that difference led Governor Grisham and Secretary Allen to adopt a remedy that worsened the ability of individuals to protect themselves and their families from violent crime.

compensation); *id.* § 16 (authorizing the governor, with the consent of the state senate, to appoint a lieutenant governor in the case of a vacancy); *id.* § 17 (empowering the governor to appoint one member of the State Ethics Commission).

84. See U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”); *Am. Tradition P’ship, Inc. v. Bullock*, 567 U.S. 516, 516–17 (2012); *Cooper v. Aaron*, 358 U.S. 1, 4 (1958).

85. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585–89 (1952).

86. This quotation refers to a Latin phrase from Juvenal, “quis custodiet ipsos custodes,” which means, “who will guard the guards themselves?” *Quis custodiet ipsos custodes?*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/quis%20custodiet%20ipsos%20custodes%3F> (last visited Jan. 12, 2025).

1. The New Mexico Public Health Emergency Response Act (NMPHERA)

The NMPHERA has nothing to do with the commission of crimes involving firearms. Instead, it focuses on the prevention of the spread of communicable diseases, like COVID-19, among the population and the treatment of individuals who are already infected with a pathogen. The text of the law makes this conclusion pellucid.

The text of the NMPHERA identifies its three-fold purpose: to (1) “provide the state of New Mexico with the ability to manage public health emergencies in a manner that protects civil rights and the liberties of individual persons;” (2) “prepare for a public health emergency;” and (3) “provide access to appropriate care, if needed, for an indefinite number of infected, exposed or endangered people in the event of a public health emergency.”⁸⁷ The NMPHERA empowers the New Mexico governor, after consultation with the state secretary of health, to declare “[a] state of public health emergency . . . upon the occurrence of a public health emergency.”⁸⁸ The Act defines the term “public health emergency” as “the occurrence or imminent threat of exposure to an extremely dangerous condition or a highly infectious or toxic agent, including a threatening communicable disease, that poses an imminent threat of substantial harm to the population of New Mexico or any portion thereof.”⁸⁹ Upon such a declaration, the governor may authorize the state Secretaries of Health and of Public Safety, as well as the State Director of Homeland Security and Emergency Management, to prepare an appropriate response.⁹⁰

The NMPHERA also specifies the types of actions that the state Secretary of Health can take in response to a public health emergency. Among them are the following: the state Secretary of Health (in coordination with the Public Safety Secretary and Director) may “utilize, secure or evacuate health care facilities for public use;” “inspect, regulate or ration health care supplies”; in case of “a statewide or regional shortage,” “control, restrict and regulate the allocation, sale, dispensing or distribution of health care supplies”; see to the vaccination of parties by “a qualified person”; and “implement and enforce measures to provide for the safe disposal of

87. N.M. STAT. ANN. § 12-10A-2 (2024).

88. *Id.* § 12-10A-5.

89. *Id.* § 12-10A-3(G). The closely related term “threatening communicable disease” is defined to mean (with one exception) “a disease that causes death or great bodily harm that passes from one person to another and for which there are no means by which the public can reasonably avoid the risk of contracting the disease.” *Id.* § 12-10A-3(L). The exception is for “acquired immune deficiency syndrome or other infections caused by the human immunodeficiency virus.” *Id.*

90. *Id.* § 12-10A-3(C) (defining “director” or “state director” as the “state director of homeland security and emergency management”); *id.* § 12-10A-5 (authorizing the governor to declare a public health emergency). Any argument that the phrase “an extremely dangerous condition” includes the risk of being shot ignores the other components of the NMPHERA, which, as discussed below, all refer to a traditional public health emergency, such as an epidemic caused by a pathogen, like the bacterium that finds its way into a water supply and causes cholera. See *infra* notes 92–98 and accompanying text.

human remains.”⁹¹ The NMPHERA also empowers the Secretary of Health to see to the isolation or quarantining of infected parties to prevent the spread of a pathogen.⁹² To do so, the Secretary of Health would obtain a court order to that effect, unless someone is isolated or quarantined only for a temporary period.⁹³ In either case, a person so confined may challenge the legality of that restriction in state court, at which time the Secretary of Health must “offer clear and convincing evidence that the isolation or quarantine is warranted to respond to a public health emergency.”⁹⁴ Each action must be done “by the least restrictive means necessary to protect against the spread of a threatening communicable disease or a potentially threatening communicable disease to others and may include confinement to a private home or other private or public premises.”⁹⁵ The Secretary of Health must ensure that “the health status of an isolated or quarantined person is monitored regularly to determine if he requires continued isolation or quarantine”; that a person so confined is provided “adequate food, clothing, shelter, sanitation” and, if resources are available, “appropriate medication and treatment, medical care and mental health care”; and that “the premises used for isolation or quarantine are maintained in a safe and hygienic manner and are designed to minimize the likelihood of further transmission of infection or other injury to other persons who are isolated or quarantined.”⁹⁶ An isolated or quarantined person may refuse “medical treatment, testing, physical or mental examination, vaccination, specimen collections and preventive treatment programs” and a “household or family member” may “choose to enter [into the] isolation or quarantine area.”⁹⁷

91. *Id.* §§ 12-10A-6(A)–(C), 12-10A-13.

92. *Id.* §§ 12-10A-7, 12-10A-8. The secretary also may “isolate or quarantine a person whose refusal of medical examination or testing results in uncertainty regarding whether the person has been exposed to or is infected with a threatening communicable disease or otherwise reasonably poses a danger to public health,” as well as a person who refuses a vaccination. *Id.* §§ 12-10A-12(B), 12-10A-13(B).

93. *Id.* §§ 12-10A-7, 12-10A-9.

94. *Id.* § 12-10A-10(A). A person in isolation or under quarantine also may challenge the conditions or his detention in state court. *Id.* § 12-10A-11.

95. *Id.* § 12-10A-8(B)(1).

96. *Id.* § 12-10A-8(B)–(C) (“A person isolated or quarantined pursuant to the provisions of the Public Health Emergency Response Act has the right to refuse medical treatment, testing, physical or mental examination, vaccination, specimen collections and preventive treatment programs. A person who has been directed by the secretary of health to submit to medical procedures and protocols because the person is infected with, reasonably believed to be infected with, or exposed to a threatening communicable disease and who refuses to submit to the procedures and protocols may be subject to continued isolation or quarantine pursuant to the provisions of the Public Health Emergency Response Act.”).

97. *Id.* § 12-10A-8(C), (E) (“A person isolated or quarantined pursuant to the provisions of the Public Health Emergency Response Act has the right to refuse medical treatment, testing, physical or mental examination, vaccination, specimen collections and preventive treatment programs. A person who has been directed by the secretary of health to submit to medical procedures and protocols because the person is infected with, reasonably believed to be infected with, or exposed to a threatening communicable disease and who refuses to submit to the procedures and protocols may be subject to continued isolation or quarantine pursuant to the provisions of the Public Health Emergency Response Act.”). The NMPHERA also contains several other provisions that do not bear on the issues raised by

The provisions of the NMPHERA are precisely what one would expect to find when looking for the legal authority that an agency must have when a state is beset with a dangerous communicable disease. The law addresses the problems that arise when a large amount of the population is either already suffering from a dangerous communicable disease or at risk of becoming infected. The definition of a “public health emergency” as “the occurrence or imminent threat of exposure to an extremely dangerous condition or a highly infectious or toxic agent, including a threatening communicable disease, that poses an imminent threat of substantial harm to the population”⁹⁸ focuses the Department of Health on stopping or halting a pathogen—viz., a bacterium, virus, or other disease-causing micro-organism—that is causing or might cause an epidemic like the Spanish flu of 1918 or COVID-19. The NMPHERA does not, however, reach so far as to encompass everything—such as any type of firearms-related crime—that colloquially or metaphorically can be called an “epidemic” or an “emergency,” whether the phenomenon is an upsurge in the number of firearms-related fatalities, armed robberies, or other firearms-related crimes.

To be sure, members of the public—such as journalists, crime-fiction authors, and some public health researchers—have used the term “epidemic” in each of those instances to catch a reader’s or viewer’s eyes.⁹⁹ The repetitive use of that colloquialism has accustomed us to hearing and using the term “epidemic” as a label for any massive, increasingly large occurrence of anything unfortunate, even just a run of bad luck.¹⁰⁰ But the

the governor’s and secretary’s orders. *See id.* § 12-10A-14 (granting state officials immunity against tort actions); *id.* § 12-10A-15 (directing the payment of compensation to the owners of health care facilities or supplies taken by New Mexico officials for purposes of the public health emergency); *id.* § 12-10A-16 (providing job protection for parties isolated or quarantined); *id.* § 12-10A-17 (authorizing the Secretary of Health and others to engage in rulemaking); *id.* § 12-10A-18 (authorizing the Secretary of Health to enter into a memorandum of understanding with New Mexico Pueblo or tribal entities); *id.* § 12-10A-19 (providing for civil penalties).

98. *Id.* § 12-10A-3.

99. *The Public Health Approach to Prevent Gun Violence*, JOHNS HOPKINS, BLOOMBERG SCH. OF PUB. HEALTH, <https://publichealth.jhu.edu/center-for-gun-violence-solutions/research-reports/the-public-health-approach-to-prevent-gun-violence> (last visited Sept. 17, 2024) (“Public health is the science of reducing and preventing injury, disease, and death and promoting the health and well-being of populations through the use of data, research, and effective policies and practices. A public health approach to prevent gun violence is a population level approach that addresses both firearm access and the factors that contribute to and protect from gun violence. . . . Gun violence is a public health epidemic that affects the well-being and public safety of all Americans.”).

100. *See, e.g.*, Mary Kate Carr, *Bad Luck Is an Epidemic in the New Apple TV Plus Animated Feature Luck*, A.V. CLUB (July 7, 2022, 2:07 PM), <https://www.avclub.com/apple-tv-plus-trailer-animated-feature-luck-1849151829> (stating that “bad luck is an epidemic” in a TV show series); Neil Shaw, *Drinkers ‘Disgusted’ By Pub Trend That’s Become an ‘Epidemic,’* MANCHESTER EVENING NEWS (Sept. 24, 2024, 1:52 PM), <https://www.manchestereveningnews.co.uk/news/uk-news/drinkers-disgusted-pub-trend-thats-29997999> (referring to an annoying British pub trend of forming single-file lines as an “epidemic”); Staff, *Addressing The Drink-Spiking Epidemic At Penn State*, ONWARD STATE (Sept. 20, 2024, 4:00 AM), <https://onwardstate.com/2024/09/20/addressing-the-drink-spiking-epidemic-at-penn-state/> (referring to an increase of drink-spiking incidents at a college campus as an “epidemic”); Kevin Sherrington, *Texas Rangers, Houston Astros Hit Hard by MLB’s Pitcher Injury Epidemic. Is There a Fix?*, THE DALLAS MORNING NEWS (Apr. 8, 2024, 10:24 PM), <https://www.dallasnews.com/sports/rangers/2024/04/08/texas-rangers-houston-astros-hit-hard-by-mlbs-pitcher->

NMPHERA was not written by the media, a novelist, or a researcher for public entertainment or discussion; it is a law passed by the state legislature. Nor was that law designed to address firearms-caused injuries. New Mexico law defines the term “public health emergency.” This definition is controlling, and it was designed to deal with pathogens—bacteria, viruses, fungi, and the like. They cause medical problems that can be communicated from one person to another, sickening an entire community. Bullet wounds, by contrast, cannot be transmitted interpersonally or by mere proximity. Finally, if there were any doubt on this point, because statutes should be read to accommodate—not conflict with¹⁰¹—each other, then the NMPHERA should not be read to empower the governor or Secretary of Health to repeal the provisions of the New Mexico Concealed Handgun Carry Act. Yet that is precisely what Governor Grisham’s and Secretary Allen’s orders did.

2. The New Mexico Public Health Act (NMPHA)

The NMPHA is also not a firearms regulation law. It empowers the Department of Health to take a variety of steps to promote the medical health of the state’s residents, such as “supervis[ing] the health and hygiene of the people of the state,” “investigat[ing], control[ing] and abat[ing] the causes of disease, especially epidemics, sources of mortality and other conditions of public health,” and “establish[ing], maintain[ing], and enforc[ing]” the isolation and quarantine of infected parties.¹⁰² That

injury-epidemic-is-there-a-fix/ (referring to a string of injuries amongst MLB pitchers as an “epidemic”); Tim Wigmore, *In Cricket, Fixing Concerns Rise as Bets and Matches Multiply*, N.Y. TIMES (Dec. 7, 2017), <https://www.nytimes.com/2017/12/07/sports/cricket/cricket-match-fixing.html> (referring to an “epidemic” of match fixing in cricket).

101. See, e.g., *Morton v. Mancari*, 417 U.S. 535, 549 (1974) (“[R]epeals by implication are not favored.”) (citations omitted); *State v. Off. of the Pub. Def. ex rel. Muqqddin*, 285 P.3d 622, 626 (N.M. 2012) (“We must take care to avoid adoption of a construction that would . . . lead to . . . contradiction.”).

102. See N.M. STAT. ANN. § 24-1-3 (2024) (“The department has authority to: A. receive such grants, subsidies, donations, allotments or bequests as may be offered to the state by the federal government or any department thereof or by any public or private foundation or individuals; B. supervise the health and hygiene of the people of the state and identify ways to evaluate and address community health problems; C. investigate, control and abate the causes of disease, especially epidemics, sources of mortality and other conditions of public health; D. establish, maintain and enforce isolation and quarantine; E. close any public place and forbid gatherings of people when necessary for the protection of the public health; F. respond to public health emergencies and assist communities in recovery; G. establish programs and adopt rules to prevent infant mortality, birth defects and morbidity; H. prescribe the duties of public health nurses and school nurses; I. provide educational programs and disseminate information on public health; J. maintain and enforce rules for the licensure of health facilities; K. ensure the quality and accessibility of health care services and the provision of health care when health care is otherwise unavailable; L. ensure a competent public health workforce; M. bring action in court for the enforcement of health laws and rules and orders issued by the department; N. enter into agreements with other states to carry out the powers and duties of the department; O. cooperate and enter into contracts or agreements with the federal government or any other person to carry out the powers and duties of the department; P. cooperate and enter into contracts or agreements with Native American nations, tribes and pueblos and off-reservation groups to coordinate the provision of essential public health services and functions; Q. maintain and enforce rules for the control of conditions of public health importance; R. maintain and enforce rules for immunization against conditions of public health importance; S. maintain and enforce such rules as may be necessary to carry out the

authority, and the other powers described in the NMPHA,¹⁰³ are components of the standard Department of Health mission to address

provisions of the Public Health Act and to publish the rules; T. supervise state public health activities, operate a dental public health program and operate state laboratories for the investigation of public health matters; U. sue and, with the consent of the legislature, be sued; V. regulate the practice of midwifery; W. administer legislation enacted pursuant to Title 6 of the Public Health Service Act, as amended and supplemented; X. inspect such premises or vehicles as necessary to ascertain the existence or nonexistence of conditions dangerous to public health or safety; Y. request and inspect, while maintaining federal and state confidentiality requirements, copies of: (1) medical and clinical records reasonably required for the department's quality assurance and quality improvement activities; and (2) all medical and clinical records pertaining to the individual whose death is the subject of inquiry by the department's mortality review activities; and Z. do all other things necessary to carry out its duties." (paragraph formatting omitted)).

103. See, e.g., N.M. STAT. ANN. §§ 24-1-5 (authorizing the Department of Health to license (and delicense), inspect, investigate, and regulate health facilities), 24-1-5.2 (authorizing the Department of Health to penalize noncompliant facilities), 24-1-5.6 (authorizing the Department of Health to establish a substance abuse pilot project), 24A-1-12 (authorizing the Department of Health to establish and regulate methadone clinics), 24A-1-7 (authorizing the Department of Health to license "an acute-care or general hospital or a limited services hospital" if certain conditions are met), 24A-1-8 (authorizing the Department of Health to determine whether "[a] hospital, a long-term care facility or a primary care clinic" is financially viable, sustainable, and has a "potential impact on health care access"), 24-1-5.11 (directing the Department of Health to administer the "medication-assisted treatment for the incarcerated program fund"), 24A-1-10 (directing the Department of Health to adopt rules establishing "a rural emergency hospital license that enables certain hospitals to apply to receive federal health care reimbursement as rural emergency hospitals" if certain conditions are satisfied); 24-1-6 (directing the Department of Health to adopt newborn infant screening tests to detect congenital diseases), 24-1-6.1 (directing the Department of Health to adopt rules governing hearing tests for newborn children before discharge from a hospital), 24-1-7(A) (directing the Department of Health to adopt a list of sexually transmitted infections), 24-1-10 (directing the Department of Health to establish a standard serological test for syphilis), 24-1-13.2 (directing the Department of Health to adopt rules to offer training and education to prevent shaken baby syndrome), 24-1-15(A), (P)(6) (authorizing the Secretary of Health to petition a court for an order to isolate or quarantine a person reasonably suspected of being infected with a threatening communicable disease until he or she no longer is a threat to the public health or voluntarily complies with treatment and contagion precautions; defining a "threatening communicable disease" as "a disease that causes death or great bodily harm, passes from one person to another and for which there is no means by which the public reasonably can avoid the risk of contracting the disease"), 24-1-15.1 (directing the Secretary of Health to prescribe a treatment plan for infections of tuberculosis), 24-1-15.2 (directing the Secretary of Health to establish "a list of reportable conditions of public health importance"), 24-1-15.3 (directing the Secretary of Health to establish "testing and screening procedures to identify conditions of public health importance among individuals or among the general population of the state"), 24-1-15.4 (limiting the Department of Health's use of individually identifiable information), 24-1-20 (making files possessed by the Department of Health "giving identifying information about individuals who have received or are receiving from the department treatment, diagnostic services or preventive care for diseases, disabilities or physical injuries" confidential), 24-1-22 (authorizing the Department of Health's scientific laboratory division to "promulgate and approve satisfactory techniques or methods to test persons believed to be operating a motor vehicle or a motorboat under the influence of drugs or alcohol and to issue certification for test operators and their instructors"), 24-1-25 (directing the secretary to administer the "Holly Gonzales experimental treatment fund"), 24-1-32 (directing the Secretary of Health to issue rules for the award of funds from a "save our children's sight" fund), 24-1-33 (requiring health care providers to provide information regarding reconstructive surgery to patients that are recommended for breast cancer surgery), 24A-1-15 (directing the Department of Health to certify an acute care hospital as "a primary stroke center, comprehensive stroke center or acute stroke capable center if that hospital has been accredited by the joint commission or any other nationally recognized accrediting body as a primary stroke center, comprehensive stroke center or acute stroke capable center"), 24A-1-16 (recognizing that the Department of Health licenses assisted living facilities), 24-1-36 (directing the Department of Health to establish a statewide community-based adult fall risk awareness and prevention program), 24-1-40 (directing the Department of Health to collaborate with the New Mexico board of dental health care and provide the legislature certain reports), 24-1-43 (recognizing that the Department of Health must issue rules to implement the End-of-Life Options Act), 24-1-44 (2024) (directing the Department of Health to fund, assist, oversee, and support school-based health centers).

“condition[s] of public health importance”—which, as defined by New Mexico law, means “an infection, a disease, a syndrome, a symptom, an injury or other threat that is identifiable on an individual or community level and can reasonably be expected to lead to adverse health effects in the community.”¹⁰⁴ Nothing in the NMPHA purports to grant the state Secretary of Health the power to limit the public carry of a handgun or to modify the provisions of the New Mexico Concealed Handgun Carry Act.

3. The New Mexico Department of Health Act (NMDHA)

Like the NMPHERA and the NMPHA, the NMDHA does not purport to regulate the possession or carry of firearms in New Mexico. Instead, it creates a state Department of Health, headed by a Secretary of Health, who is empowered to carry out the department’s mission.¹⁰⁵ The NMDHA defines that mission as the following: “to establish a single, unified department to administer the laws and exercise the functions relating to health formerly administered and exercised by various organizational units of state government,” such as “the state health agency, the scientific laboratory system and an appropriate allocation of administrative support services of the health and social services department and the hospital and institutions department.”¹⁰⁶ The NMDHA specifically directs the Department of Health to (a) “develop a state health improvement plan that meets accreditation standards of the public health accreditation board” or any “successor,” (b) to conduct “state health assessments” to aid in developing that plan, (c) to integrate the views of New Mexico officials and the public into that plan, and (d) to make the plan public at least every five years.¹⁰⁷ The NMDHA also specifies the duties and powers of the Secretary of Health, which, not surprisingly, involve “manag[ing] all operations of the department” and “administer[ing] and enforc[ing] the laws with which the secretary or the department is charged.”¹⁰⁸ That authority includes “every power expressly enumerated in the laws, whether granted to the secretary or the department or any division of the department,” except for any authority that is “conferred upon any division” and “is explicitly exempted from the secretary’s authority by statute.”¹⁰⁹

The NMPHA also does not authorize the state Secretary of Health to regulate the possession or carry of firearms anywhere in the state. To begin with, none of the specific powers granted to the Secretary of Health under

104. N.M. STAT. ANN. § 24-1-2(A) (2024).

105. *Id.* §§ 9-7-2, 9-7-4 to -5.

106. *Id.* § 9-7-3 (“All public health and scientific laboratory functions formerly performed by the health and environment department shall be performed by the department. Behavioral health services, including mental health and substance abuse services, provided by or through the department shall be subject to the direction of the secretary and the provisions of Section 9-7-6.4 NMSA 1978.”).

107. *Id.* § 9-7-4.1(A)–(D).

108. *Id.* § 9-7-6(A).

109. *Id.* § 9-7-6(B). The remaining provisions of the NMDHA also do not involve firearms. *See, e.g., id.* §§ 9-7-11 (advisory committees), 9-7-11.2 (New Mexico Health Policy Commission), 9-7-11.5 (Native American Suicide Prevention Advisory Council), 9-7-18 (drug testing of health care providers).

the public health laws involves the regulation of firearms in any way. Moreover, New Mexico law grants the Department of Public Safety, not the Department of Health, the authority to implement the New Mexico Concealed Handgun Carry Act.¹¹⁰ As a result, even if the secretary sought to invoke a provision in the NMPHA as a basis for firearms regulatory authority, any exercise of this power would be exempted from his bailiwick by the express terms of the NMPHA *and* the New Mexico Concealed Handgun Carry Act.

4. The New Mexico Emergency Powers Code

The text of the New Mexico Riot Control Act,¹¹¹ a component of the New Mexico Emergency Powers Code,¹¹² provides additional confirmation that the governor's order exceeded her authority under state law. Section 12-10-17 empowers the governor, "[u]pon request" of certain identified local officials, to "proclaim a state of emergency in the area affected" by "a public disorder, disaster or emergency."¹¹³ One of the restrictions that the governor may impose is to "prohibit . . . the possession of firearms or any other deadly weapon by a person in any place other than his place of residence or business, except for peace officers."¹¹⁴ This would appear

110. See *supra* notes 16–18 and accompanying text.

111. N.M. STAT. ANN. §§ 12-10-16 to 12-10-21 (2024).

112. *Id.* §§ 12-10-1 to 12-10-21.

113. *Id.* § 12-10-17 ("Upon request of the mayor of a municipality or the sheriff of a county or a majority of the members of the governing body of the municipality or county having jurisdiction and after finding that a public disorder, disaster or emergency which affects life or property exists in the state, the governor may proclaim a state of emergency in the area affected. The proclamation becomes effective immediately upon its signing by the governor, but the governor shall give public notice of its contents through the public press and other news media.").

114. *Id.* § 12-10-18:

A. During the existence of a state of emergency, the governor may, by proclamation, prohibit:

- (1) any person being on the public streets, in the public parks or at any other public place during the hours proclaimed by the governor to be a period of curfew;
- (2) any designated number of persons from assembling or gathering on the public streets, public parks or other open areas, either public or private, or in any public building;
- (3) the manufacture, transfer, use, possession or transportation of any device or object designed to explode or produce uncontained combustion;
- (4) the transportation, possession or use of combustible, flammable or explosive materials in a glass or uncapped container of any kind except in connection with the normal operation of motor vehicles, normal home use or legitimate commercial use;
- (5) the possession of firearms or any other deadly weapon by a person in any place other than his place of residence or business, except for peace officers;
- (6) the sale, purchase or dispensing of alcoholic beverages or other commodities or goods designated by the governor;
- (7) the use of certain streets or highways by the public; and
- (8) other activities the governor reasonably believes should be prohibited to help maintain life, property or the public peace.

B. Any proclamation issued under this section becomes effective immediately upon its signing by the governor, but the governor shall give public notice of its contents through the public press and other news media. The restrictions may be imposed during times, upon conditions, with exceptions and in areas of the state designated by proclamation of the governor from time to time.

to authorize the governor to issue firearms carry orders like the ones promulgated on September 7th and 8th. But the New Mexico legislature expressly limited the length of any such firearms ban to a period of *three days*,¹¹⁵ in stark contrast to the *thirty-day* period specified in the original directives. The New Mexico Riot Control Act also does *not* empower the governor to repeatedly renew any such order, let alone to do so for *thirteen consecutive months*.¹¹⁶ To be sure, the authority that the Riot Control Act grants to the governor sits atop the authority that she otherwise possesses under New Mexico law.¹¹⁷ But, as explained above, none of the other statutes that Governor Grisham and Secretary Allen cited authorize the orders that they issued on September 7th and 8th.

D. The Federal Major Questions Doctrine

The statutes discussed above do not empower Governor Grisham or Secretary Allen to restrain the rights granted to licensees under the New Mexico Concealed Handgun Carry Act. Governor Grisham and Secretary Allen exceeded their authority by restraining licensees from exercising the rights that they enjoy under state law. But there might be yet another hurdle that the governor and Secretary of Health would need to overcome to justify the restriction in their orders.

Over the past two decades, the Supreme Court of the United States has resolved numerous cases raising issues of federal administrative law. Some of those cases have involved constitutional issues,¹¹⁸ such as the restraints that Article II imposes on Congress when it seeks to limit the President's ability to remove federal officials.¹¹⁹ Most of those decisions, however, have involved the proper interpretation of federal statutes granting agencies the authority to promulgate rules to implement a congressional

115. *Id.* § 12-10-19 (“Any state of emergency proclaimed under the Riot Control Act, along with any restrictions imposed for control of that emergency, terminates automatically at noon on the third day after it becomes effective unless sooner terminated by proclamation of the governor.”).

116. *See* N.M. Exec. Order No. 2024-112, *supra* note 42. N.M. STAT. ANN. § 12-10-19 (2024) (“Any state of emergency proclaimed under the Riot Control Act, along with any restrictions imposed for control of that emergency, terminates automatically at noon on the third day after it becomes effective unless sooner terminated by proclamation of the governor.”).

117. N.M. STAT. ANN. § 12-10-21 (2024) (“The Riot Control Act does not limit any other power to maintain the public peace and safety which is vested in the governor.”).

118. *See, e.g., SEC v. Jarkesy*, 603 U.S. 109, 140–41 (2024) (ruling that private parties have a Seventh Amendment right to a civil jury trial when the SEC claims that a party committed fraud); *Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass’n of Am.*, 601 U.S. 416, 424 (2024) (ruling that the CFPB funding mechanism does not violate the Appropriations Clause).

119. *See Collins v. Yellen*, 594 U.S. 220, 250–56 (2021) (holding the “for cause” restriction on the President’s power to remove the Director of the Federal Housing Finance Agency unconstitutional); *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 213–32 (2020) (holding the “for-cause” restriction on the President’s power to remove the CFPB’s single Director unconstitutional); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 495–508 (2010) (holding that *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935) does not allow Congress to impose multiple levels of for-cause removal insulation between the President and an official).

program.¹²⁰ Through its decisions in those cases, the Court has developed what has come to be known as the Major Questions Doctrine.¹²¹

This doctrine is ultimately a rule of statutory interpretation grounded in separation of powers principles. It is settled law that federal agencies have only the specific authority that Congress has granted them because the Constitution does not establish a “fourth branch” of government.¹²² Yet it is not uncommon for an agency to engage in “empire building” by claiming authority beyond what its governing statutes, fairly read, grant it. Among other reasons, agencies do so either to solve a problem that Congress has not resolved or to persuade Congress to expand its appropriations by generating favorable outcomes to the agency or public.¹²³ Similarly, presidential administrations who find themselves stymied in their efforts to persuade Congress to adopt their policy preferences into law will construe broadly phrased terms in existing statutes as—miraculously—authorizing an agency to engage in the precise conduct that the President was unable to persuade Congress to authorize it to do. The Supreme Court has seen several of these attempts over just the past few years.¹²⁴

The two best examples of that phenomenon occurred during the COVID-19 pandemic. The Centers for Disease Control and Prevention of the Department of Health and Human Services claimed to possess the authority to impose a moratorium on residential evictions to prevent the transmission of the COVID-19 virus.¹²⁵ During the same period, the

120. See, e.g., Roland M. Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded*, 112 CALIF. L. REV. 899, 901 (2024).

121. See, e.g., *West Virginia v. EPA*, 597 U.S. 697, 699–700 (2022). The doctrine has spurred a considerable amount of scholarly discussion. See generally Thomas B. Griffith & Haley N. Proctor, *Deference, Delegation, and Divination: Justice Breyer and the Future of the Major Questions Doctrine*, 132 YALE L.J.F. 693 (2022).

122. See sources cited *supra* note 69 (collecting Supreme Court decisions so ruling).

123. Compare, e.g., WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* 36–42 (1971) (arguing in favor of the theory of agency empire building), with Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1292–96 (2006); Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 932–34 (2005) (arguing that the empire building model is unlikely to occur in practice).

124. See, e.g., *Biden v. Nebraska*, 600 U.S. 477, 506–07 (2023); *West Virginia v. EPA*, 597 U.S. 697, 735 (2022); 5 U.S.C. § 706(2)(C) (“The reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be . . . (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . .”); see *infra* notes 126–32 and accompanying text.

125. As authority for its eviction moratorium, the CDC relied on § 361(a) of the Public Health Service Act, which provides as follows:

The Surgeon General, with the approval of the [Secretary of Health and Human Services], is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession. For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary.

42 U.S.C. § 264(a).

Department of Labor's Occupational Safety and Health Administration posited that its authority to regulate workplace safety empowered it to mandate vaccinations for most of the nation's workforce.¹²⁶ Both efforts, however, ultimately failed. The Supreme Court concluded in *Alabama Ass'n of Realtors v. Department of Health and Human Services*¹²⁷ and *National Federation of Independent Business v. Department of Labor (NFIB)*,¹²⁸ respectively, that neither agency had the statutory authority to enter such remarkable orders.¹²⁹ The Court rejected the agencies' claims despite the federal government's argument that the agencies' claimed authority was critical to fighting a disease that had claimed thousands of lives and threatened to decimate the population.¹³⁰ As the Court explained in *Alabama Realtors*, "[i]t is indisputable that the public has a strong interest in combating the spread of the COVID-19 Delta variant. But our system does not permit agencies to act unlawfully even in pursuit of desirable ends."¹³¹

The Major Questions Doctrine would arise if the governor or secretary sought to invoke the "spirit" or "general purpose" of the state's public health laws as a justification for regulating firearms rather than pathogens by arguing that each one can lead to death. If the governor or secretary were to make this argument, then the *Alabama Realtors* and *NFIB* cases and others would be directly on point, and the New Mexico courts would need to consider whether to endorse the Major Questions Doctrine that the U.S. Supreme Court has repeatedly applied. This is a question of state law, however, and the New Mexico courts have the final word on that subject.¹³² The issue does not appear to have been litigated in connection with

126. The Occupational Safety and Health Act of 1970 (codified at 29 U.S.C. §§ 651–678), created the Occupational Safety and Health Administration (OSHA), a division within the U.S. Department of Labor, to help promote *occupational* safety—viz., “safe and healthful working conditions.” 29 U.S.C. § 651(b). OSHA does so by enforcing occupational safety and health standards promulgated by the Secretary of Labor. *Id.* § 655(b). Those standards must be “reasonably necessary or appropriate to provide safe or healthful *employment*,” *id.* § 652(8) (emphasis added), that can be promulgated only after following a rigorous process that includes notice, comment, and an opportunity for a public hearing. *Id.* § 655(b); *Nat’l Fed’n of Indep. Bus. (NFIB) v. Dep’t of Lab., OSHA*, 595 U.S. 109, 114 (2022). The act allows for an exception to those procedures for “emergency temporary standard[s].” 29 U.S.C. § 655(c)(1). Emergency Temporary Standards may “take immediate effect upon publication in the Federal Register,” *id.*, but they are permissible only in the narrowest of circumstances: the Secretary must show (1) “that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards,” and (2) that the “emergency standard is necessary to protect employees from such danger.” *Id.*; *NFIB*, 595 U.S. at 114.

127. 594 U.S. 758 (2021).

128. 595 U.S. 109 (2022).

129. *Alabama Realtors*, 594 U.S. at 763–66; *NFIB*, 595 U.S. at 117–21.

130. *Alabama Realtors*, 594 U.S. at 766; *NFIB*, 595 U.S. at 117–20 (“It is not our role to weigh such tradeoffs [between compliance costs and protecting the public health]. In our system of government, that is the responsibility of those chosen by the people through democratic processes. Although Congress has indisputably given OSHA the power to regulate occupational dangers, it has not given that agency the power to regulate public health more broadly. Requiring the vaccination of 84 million Americans, selected simply because they work for employers with more than 100 employees, certainly falls in the latter category.”).

131. *Alabama Realtors*, 594 U.S. at 766.

132. See, e.g., *Moore v. Harper*, 600 U.S. 1, 36 (2023); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935).

the secretary's September 8th directive or his later ones,¹³³ but it might arise in these cases or in future litigation. If it does, the New Mexico courts might look favorably on a doctrine that is designed to reinforce the state legislature's ultimate regulatory power by cabining state agencies to only a reasonably limited interpretation of their statutory authority.

* * * * *

The bottom line is this: None of the statutes that Governor Grisham or Secretary Allen cited in their September 7th and 8th directives granted them authority to restrain for thirty days—let alone indefinitely—the right to carry a concealed firearm in New Mexico under a license issued by the Department of Public Safety pursuant to the New Mexico Concealed Handgun Carry Act. The public health statutes that they invoked all involve traditional public health issues, such as containing the spread of a dangerous pathogen. A legislature could grant the governor or a state agency secretary the authority to limit public carrying of firearms in times of an emergency (as long as that power does not violate any federal or state constitutional provisions), and New Mexico has done that in its Riot Control Act. But the state legislature did not include any such open-ended provision in that law, in the New Mexico Concealed Handgun Carry Act, or in any of the public health laws that Governor Grisham and Secretary Allen cited in their September 7th and 8th directives. Only the New Mexico Concealed Handgun Carry Act regulates the public carrying of firearms, and only the New Mexico Riot Control Act empowers the governor to prevent the public carrying of a firearm during a declared emergency—but for only three days, not thirty. Moreover, neither of those acts grants the Secretary of Health—or the Secretary of Public Safety, who is responsible for administering the New Mexico Concealed Handgun Carry Act, or even the governor, the state's chief executive officer—the power to rescind or limit a validly issued license because of a public emergency, health-related or otherwise. The statutory schemes discussed above should be read to complement each other, not to conflict with or oust each other.¹³⁴ Accordingly, neither the New Mexico governor nor the Secretary of Health had authority under New Mexico law for the firearms restrictions adopted on September 7th and 8th and reaffirmed afterwards.

III. THE SECOND AMENDMENT LIMITATIONS ON THE GOVERNOR'S ORDER

A. The Current State of Second Amendment Jurisprudence

In *Heller* and *McDonald*, the Supreme Court dealt successive and devastating blows to most twentieth-century academic models of the Second Amendment, which had limited its status to no more than a collective

133. A July 10, 2024, Westlaw search of New Mexico state cases revealed no references to the "Major Questions Doctrine" and no citation to *West Virginia v. EPA*, 597 U.S. 697 (2022).

134. See Larkin, *supra* note 73, at 331–32.

right to keep and bear arms that individual citizens possessed only in connection with their formal service in a state militia.¹³⁵ In both cases, the Court struck down as unconstitutional bans on the civilian possession of operable handguns inside the home.¹³⁶ Taken together, *Heller* and *McDonald* affirmed that the Second Amendment protects a right that is individual in nature, fundamental to the nation's scheme of ordered liberty, and applicable against the states through the Fourteenth Amendment's Due Process Clause.¹³⁷ These cases also centered the right to keep and bear arms on the underlying natural right of personal self-defense.¹³⁸

Twelve years later, in *Bruen*, the Court held that a New York statute violated the Second Amendment by requiring applicants for public carry permits to demonstrate a special, individual need for self-defense distinguishable from that of the general community.¹³⁹ The Court affirmed that the Second Amendment protects the right of law-abiding citizens with ordinary self-defense needs to keep and bear arms in public for self-defense.¹⁴⁰ The Court declined to adopt use of the two-step jurisprudential test developed by lower courts for analyzing Second Amendment challenges,¹⁴¹ expressly rejecting it as incorporating the very type of means-end interest balancing that was castigated by *Heller*.¹⁴² The Court instead turned back towards *Heller*'s emphasis on text, history, and tradition, adopting a test expressed in the following terms:

When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The

135. See sources cited *supra* note 2 (discussion of a militia-centric model).

136. See *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008); *McDonald v. City of Chicago*, 561 U.S. 742, 749–50, 791 (2010).

137. See *Heller*, 554 U.S. at 635; *McDonald*, 561 U.S. at 791.

138. See *Heller*, 554 U.S. at 629; *McDonald*, 561 U.S. at 767.

139. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 70–71 (2022).

140. *Heller* and *McDonald* affirmed that the right to keep and bear arms was individual in nature and protected, at a minimum, the right to possess handguns inside the home. Those cases did not address the scope of the right to bear arms outside of the home, leading some lower courts to conclude that no such right existed, in the first place. See, e.g., *Peruta v. Cnty. of San Diego*, 824 F.3d 919, 942 (9th Cir. 2016) (en banc) (holding that the Second Amendment does not protect a right to carry concealed weapons in public, even when the government simultaneously prohibits the open carrying of firearms in public); *Young v. Hawaii*, 992 F.3d 765, 813 (9th Cir. 2021) (en banc) (holding that the Second Amendment does not guarantee an “unfettered,” general right to openly carry arms in public for individual self-defense, even when the state in practice does not issue concealed carry permits); *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 84 (2d Cir. 2012) (reasoning that public carry falls outside the “core” Second Amendment protections identified in *Heller*).

141. The two-step test first emerged in *United States v. Marzzarella*, 614 F.3d 85, 100–01 (3d Cir. 2010), just one month after the Supreme Court released its opinion in *McDonald*, and by the time of *Bruen* had been fully adopted by every federal circuit save for the Eighth, which still treated it favorably. At the first step, courts determined whether the burdened conduct fell within the scope of the Second Amendment's protections. If the court determined that the answer was “yes,” it would proceed to the second step, where it applied some form of heightened scrutiny in determining whether the restriction passed constitutional muster. For an in-depth discussion of the two-step test and its application across various circuits, see generally David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 ST. LOUIS U. L.J. 193 (2017); Michael Rogers, *The Bear Necessities: Good Cause Statutes and “Step Zero” of Second Amendment Analyses*, 80 OHIO ST. L.J. 159 (2019).

142. *Bruen*, 597 U.S. at 22–24.

government must then justify its regulation by demonstrating 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."¹⁴³

The *Bruen* majority recognized that when a challenged modern law is designed to address a persistent and general societal problem that was well-known at the time of constitutional ratification, the inquiry into history might be quite straightforward.¹⁴⁴ In those cases, probative evidence might include "the lack of a distinctly similar historical regulation addressing that problem," proposed analogous regulations that were rejected as unconstitutional, and evidence that earlier generations addressed the problem through materially different means.¹⁴⁵

At the same time, the Second Amendment's meaning must nevertheless apply beyond those circumstances and technologies specifically known or anticipated by the Founders.¹⁴⁶ On the one hand, the Second Amendment right is not limited to the possession and carry of flintlocks. On the other hand, cases that implicate "unprecedented societal concerns or dramatic technological changes" may require a "more nuanced approach" in which courts must engage in analogical reasoning to determine whether the modern regulation is "relevantly similar" to historical regulations.¹⁴⁷ In these cases, the government need not produce a historical twin or "dead ringer" for the challenged modern regulation; however, the reason-by-analogy test is not a "regulatory blank check" under which courts should uphold modern laws based merely upon some remote resemblance to the historical analogue.¹⁴⁸ Instead, *Bruen* highlights two metrics that form the "'central' considerations" for courts assessing the relative similarity between historical and modern regulations: *why* the regulations burden the right to keep and bear arms and *how* the regulations impose that burden.¹⁴⁹

New York's proper-cause requirement was a broadly applicable restriction on the right to bear arms because it prevented "law-abiding citizens with ordinary self-defense needs" from exercising their right to keep and bear arms in public for that purpose, a restraint that was unsupported by evidence of a deep national historical tradition.¹⁵⁰ The Court considered that New York's proper-cause requirement was designed to address the

143. *Id.* at 24.

144. *Id.* at 26–27.

145. *Id.*

146. *Id.* at 27–28; *see also* *United States v. Jones*, 565 U.S. 400, 404–05 (2012) (holding that installation of a tracking device was "a physical intrusion [that] would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted").

147. *Bruen*, 597 U.S. at 27–29.

148. *Id.* at 30.

149. *Id.* at 3 ("first, whether modern and historical regulations impose a comparable burden on the right of armed self-defense, and second, whether that regulatory burden is comparably justified"); *United States v. Rahimi*, 602 U.S. 680, 692 (2024).

150. *Bruen*, 597 U.S. at 60, 71.

societal problem of “‘handgun violence,’ primarily in ‘urban area[s],’” thus making “the historical analogies . . . relatively simple to draw” if any existed.¹⁵¹ While historical evidence demonstrates a longstanding tradition of imposing some reasonable regulations on the public-carry of firearms, none of the historical analogues New York proposed to justify its proper-cause requirement similarly operated to generally prohibit the public carrying of arms by peaceable citizens.

In conducting its review of the historical record of public carry regulations and engaging in analogical reasoning, the *Bruen* majority declined to resolve major methodological questions about “the manner and circumstances in which post-ratification practice may bear on the original meaning of the Constitution.”¹⁵² The extent to which courts may rely on Reconstruction-era gun regulations—which are far more plentiful in the historical record than are regulations imposed within the decades after the Second Amendment was ratified—as evidence of “historical practice” was chief among these questions.¹⁵³ The Court did, however, surmise that New York’s appeal to “a few late [nineteenth-]century outlier jurisdictions” was insufficient to prove a broad historical tradition of states imposing relevantly similar restrictions.¹⁵⁴ The Court also declined to place significant weight on a handful of nineteenth-century territorial statutes offered by New York as evidence of a historical tradition analogous to its own modern regulation of public carry, noting both that “the bare existence of these localized restrictions” affecting a fraction of a percent of the total population “cannot overcome the overwhelming evidence of an otherwise enduring American tradition permitting public carry” and that these territorial laws “were rarely subject to judicial scrutiny” and thus provide little insight into “the basis of their perceived legality.”¹⁵⁵

The Supreme Court’s first application of the *Bruen* test came in 2024 with *United States v. Rahimi*,¹⁵⁶ which involved a facial challenge to § 922(g)(8) of Title 18, a federal statute that prohibits the possession of a firearm by individuals subject to domestic violence restraining orders that meet specific criteria.¹⁵⁷ *Rahimi* involved an indisputably reasonable judicial finding that Rahimi posed a credible threat to the physical safety of an

151. *Id.* at 27 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008)).

152. *Id.* at 81 (Barrett, J., concurring).

153. *Id.* at 37–38 (majority opinion); see also *id.* at 82–83 (Barrett, J., concurring) (highlighting the *Bruen* majority’s failure to resolve these methodological debates, warning that this “should not be understood to endorse freewheeling reliance on historical practice from the mid-to-late nineteenth century to establish the original meaning of the Bill of Rights,” and underscoring the majority’s caution “against giving postenactment history more weight than it can rightly bear”).

154. *Id.* at 70 (majority opinion).

155. *Id.* at 67–68.

156. 602 U.S. 680 (2024).

157. *Id.* at 684.

intimate partner.¹⁵⁸ In upholding that statute over a facial challenge,¹⁵⁹ the Court reasoned that, applied to the facts of *Rahimi*'s case, the prohibition "fit[] comfortably" within a national tradition of gun laws "preventing individuals who threaten physical harm to others from misusing firearms."¹⁶⁰ The *Rahimi* majority relied on three distinct elements of similarity between § 922(g)(8) and its historical analogues: (1) the restrictions on the right to keep and bear arms are temporary, (2) the restrictions are imposed after an individualized judicial determination that a person poses a credible threat of interpersonal violence, and (3) violations of the restrictions may be punished with imprisonment.¹⁶¹ The Court reiterated, however, that while these narrow historical restrictions may support similarly narrow modern laws that burden the rights of individuals who are found by a court to pose a credible threat of physical safety to others, they are not appropriate historical analogues for modern regulations that—as New York's proper-cause requirement did in *Bruen*—broadly restrict the use of firearms by ordinary, law-abiding citizens.¹⁶²

B. Assessment of Potentially Permissible Regulations on the Right to Keep and Bear Arms After Rahimi

Rahimi did very little to expand the Court's Second Amendment jurisprudence or flesh out the relatively barebones framework presented in *Bruen*. Moreover, given the recent nature of the decision, lower courts have had relatively few opportunities to engage with and apply the *Bruen* test as informed by *Rahimi*. However sparse the current state of post-*Rahimi* jurisprudence, the opinion at a minimum provides a rough outline for assessing potential categories of permissible regulation, which

158. *Rahimi*'s restraining order was issued based on an affidavit submitted by the victim—*Rahimi*'s then-girlfriend and the mother of his child—stating that he had physically assaulted her on numerous occasions, including a recent incident in a public parking lot during which he brandished a gun and fired it in her direction as she fled. *Id.* at 686. He later called her and threatened to shoot her if she reported the parking lot assault to police. *Id.* *Rahimi* did not contest the victim's testimony. *Id.* Any question as to the reasonable nature of the court's finding that he posed a credible threat of violence was extinguished when, just months later and while still subject to that restraining order, *Rahimi* was charged with aggravated assault with a deadly weapon for threatening a different woman with a firearm and identified as the suspect in a least five additional shootings. *Id.* at 687.

159. The majority only upheld the constitutionality of the restriction on its face because it was capable of lawful application in *some* cases, even if not in all. *Id.* at 693 ("Rahimi challenges Section 922(g)(8) on its face. This is the most difficult challenge to mount successfully, because it requires a defendant to establish that no set of circumstances exists under which the Act would be valid.") (quotation marks omitted), *id.* at 700 ("In short, we have no trouble concluding that Section 922(g)(8) survives *Rahimi*'s facial challenge."). The majority also acknowledged, however, that other parties might be able to mount a successful challenge to such a restraint as applied to their circumstances. *See id.* at 693–94.

160. *Id.* at 690.

161. *Id.* at 698–99.

162. *Id.* at 701–02 ("Finally, in holding that Section 922(g)(8) is constitutional as applied to *Rahimi*, we reject the Government's contention that *Rahimi* may be disarmed simply because he is not 'responsible.' 'Responsible' is a vague term. It is unclear what such a rule would entail. Nor does such a line derive from our case law. In *Heller* and *Bruen*, we used the term 'responsible' to describe the class of ordinary citizens who undoubtedly enjoy the Second Amendment right. But those decisions did not define the term and said nothing about the status of citizens who were not 'responsible.' The question was simply not presented.") (citations omitted)).

are relevant to any analysis of the utility of a public health framing in defending gun control measures against legal challenges.

1. Categories of General Prohibitions

First, the Court's Second Amendment jurisprudence envisions a category of people who may be disarmed, though the precise boundary lines for that category remain unclear. In *Heller* and *McDonald*, the Court referred to categorical restrictions on the Second Amendment rights of "felons and the mentally ill" as "longstanding" and "presumptively lawful."¹⁶³ Yet after *Bruen*, there is a strong argument that this presumption of lawfulness is rebuttable in the case of nonviolent felons due to limited evidence of a historical tradition of disarmament of nonviolent felons before the mid-twentieth century.¹⁶⁴ This argument is further buttressed by the Court's explanation in *Rahimi* that "our Nation's tradition of firearm regulation distinguishes citizens who have been found to pose a credible threat to the physical safety of others from those who have not."¹⁶⁵ At the same time, the Court in *Rahimi* unanimously rejected the federal government's theory that it may disarm an individual by merely contending that he or she is not *responsible*.¹⁶⁶

Additionally, there are categories of weapons that appear to fall outside the scope of Second Amendment protections, meaning the government may impose broad restrictions for not just public carry but civilian possession more broadly. The Court has centered this discussion of protected arms around the concept of "common use," at various times framing the appropriate questions as whether the weapon is "dangerous and unusual,"¹⁶⁷ whether it is of a type "typically possessed by law-abiding citizens for lawful purposes,"¹⁶⁸ and whether it is "of the kind in common use at the time [the Second Amendment was drafted and ratified]."¹⁶⁹ Nuclear weapons, intercontinental ballistic missiles, and the like have never been in "common use" by law-abiding civilians and would seemingly fall beyond the Second Amendment's protections. Moreover, there might be strong textual arguments that certain types of weapons are "ordnance" or

163. *District of Columbia v. Heller*, 554 U.S. 570, 626–27, 627 n.26 (2008); *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010).

164. See C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 698–728 (2009). Indeed, some lower courts have already begun striking down federal felon disarmament laws as applied to those convicted of non-violent offenses. See *Range v. Attorney General*, 69 F.4th 96, 106 (3d Cir. 2023).

165. *Rahimi*, 602 U.S. at 700.

166. *Id.* at 701–02; *id.* at 773 (Thomas, J., dissenting).

167. *Caetano v. Massachusetts*, 577 U.S. 411, 411–12 (2016) (per curiam); *id.* at 414 (Alito, J., concurring).

168. *Heller*, 554 U.S. at 625.

169. *United States v. Miller*, 307 U.S. 174, 179 (1939).

some other category of weaponry not constituting a “bearable arm[]” protected by the Second Amendment.¹⁷⁰

2. Regulation of the Manner of Public Carry

Ordinary, law-abiding citizens have a right to keep and bear arms in public for self-defense, and no historical tradition requires them to show an atypical or unique need for self-protection. *Bruen* expressly held that the government cannot require such proof.¹⁷¹ *Bruen* nonetheless acknowledged evidence that the right to keep and bear arms in public has traditionally been subjected to “well-defined restrictions governing the intent for which one could carry arms, the manner of carry, or the exceptional circumstances under which one could not carry arms.”¹⁷² This would seem, at minimum, to include limitations on carrying firearms in public in a reckless, irresponsible, or threatening manner (known as “brandishing”). The Court also did not question the constitutionality of laws that generally require a permit or license as a condition for public-carry, as long as those laws do not require applicants to show an atypical need for armed self-defense, use “narrow, objective, and definite standards” in granting or denying applications, and do not operate in practice to prevent ordinary, law-abiding citizens from exercising their right to armed self-defense in public.¹⁷³

3. Locational Limitations on Public Carry

By its own admission, the Court in *Bruen* did not undertake an exhaustive analysis of the “sensitive places” doctrine first adumbrated in *Heller*. In *Heller*’s dicta, the majority referred to “laws forbidding the carrying of firearms in sensitive places such as schools and government buildings” as one of three categories of presumptively lawful regulations.¹⁷⁴ Nonetheless, *Bruen* offered some guideposts that further delineate the doctrine, if only minimally. The majority “assume[d] it settled” that legislative assemblies, polling places, and courthouses constituted “‘sensitive places’ where arms carrying could be prohibited consistent with the Second Amendment” because it was “aware of no disputes regarding the

170. See, e.g., Kenneth A. Klukowski, *Making Second Amendment Law with First Amendment Rules: The Five-Tier Free Speech Framework and Public Forum Doctrine in Second Amendment Jurisprudence*, 93 NEB. L. REV. 429, 461 (2014) (reasoning that “[i]n 1789, exploding weapons were ordinance, in contradistinction to arms”); David B. Kopel & Clayton Cramer, *State Court Standards of Review for the Right to Keep and Bear Arms*, 50 SANTA CLARA L. REV. 1113, 1198–99 (2010) (discussing *State v. Kessler*, 614 P.2d 94 (Or. 1980), and its implications for understanding categories of weaponry that fall outside the scope of the Second Amendment).

171. N.Y. State Rifle & Pistol Ass’n v. Bruen, 597 U.S. 1, 11 (2022); see also *id.* at 38 n.9 (distinguishing between licensing regimes that require applicants to demonstrate an atypical need for armed self-defense and are therefore implicated by the decision, and regimes that “do not necessarily prevent ‘law-abiding, responsible citizens’ from exercising their Second Amendment right to public carry”).

172. *Id.* at 38.

173. *Id.* at 38 n.9; *id.* at 79–80 (Kavanaugh, J., concurring).

174. *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008).

lawfulness of such prohibitions.”¹⁷⁵ Schools were conspicuously absent from that list, despite recognition in *Heller* and *McDonald* as places in which regulations forbidding the carrying of arms were longstanding and presumptively lawful.¹⁷⁶

Bruen’s list of presumptively settled sensitive places agrees with a clear historical tradition of regulating the firearm possession in places where core government operations take place and where private disarmament for the sake of “[p]rotecting government deliberation from violent interference” was counterbalanced by powerful government-backed provision of safety.¹⁷⁷ This would seem to permit, by way of analogy, prohibitions on public carry in other similarly situated government buildings where core government functions take place, including the White House, the U.S. Capitol, legislative offices, and within the boundaries of military bases and other secure government facilities.¹⁷⁸ There is no wide agreement on a historical tradition of total arms prohibitions outside of this narrow list of places; the only other truly clear line is at the opposite extreme—whatever the “sensitive places” doctrine entails, it cannot be a means by which the government eviscerates the general right of ordinary citizens to bear arms in public for self-defense.¹⁷⁹ The state does not have the authority to declare any public location a “sensitive place” for any reason it deems justified.¹⁸⁰ And a sensitive place must also constitute

175. *Bruen*, 597 U.S. at 30. While it would go too far to read the *Bruen* majority’s failure to include schools in this list of “assume[d] settled” sensitive places as a definitive exclusion of schools from any list of sensitive places, it is nonetheless instructive with respect to the Court’s view of the available historical record of weapons prohibitions at schools—namely, that upon a more in-depth review, the record of these prohibitions at schools is distinguishable from that of prohibitions at government buildings. This could be because weapons prohibitions at schools are a far more recent development because they were premised on a fundamentally different underlying justification, the “how” of the restrictions themselves were in some way different, or a combination thereof. See, e.g., Plaintiffs’ Consolidated Reply Memorandum in Support of Motion for Preliminary Injunction and Memorandum in Opposition to Defendants’ Motion to Dismiss at pt. 2, *Novotny v. Moore*, Case No. 1:23-CV-01295 (D. Md. 2023), <https://storage.courtlistener.com/recap/gov.uscourts.mdd.536814/gov.uscourts.mdd.536814.38.0.pdf> (discussing the historical record of weapons prohibitions at educational facilities).

176. See *Heller*, 554 U.S. at 626; *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010).

177. David B. Kopel & Joseph G.S. Greenlee, *The “Sensitive Places” Doctrine: Locational Limits on the Right to Bear Arms*, 13 CHARLESTON L. REV. 205, 207 (2018); see also Brief for The Independent Inst. as Amicus Curiae Supporting Petitioners, *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1 (2022) (No. 20-843), https://www.independent.org/pdf/legalbriefs/2021_07_22_amicus_brief.pdf.

178. Worth noting, however, is the lack of weapons restrictions that were implemented at the U.S. Capitol building during the relevant historical periods. As historian Joanne B. Freeman details at length in *FIELD OF BLOOD: VIOLENCE IN CONGRESS AND THE ROAD TO CIVIL WAR* (2018), throughout the political turbulence of the nineteenth century, the halls of Congress were no stranger to weapons and armed violence. The consensus on how to address that violence was not, it seems, to impose restrictions on the bearing of arms, which might interfere with one’s ability to act in justified self-defense—indeed, in the years leading up to the Civil War, “[m]any congressmen strapped on knives and guns each morning as they headed off to Congress, and their number was growing.” *Id.* at 249, 256–59. Instead, much more significant attention was historically paid to regulating and restricting the possession and drinking of “spiritous liquors” within the Capitol’s grounds, with drunkenness apparently (and, it seems, reasonably) viewed as a primary issue facilitating the violence. *Id.* at 37–39 (including discussion in the footnotes).

179. *Bruen*, 597 U.S. at 31.

180. *Id.* at 30–31.

something more specific than any location “where people typically congregate and where law enforcement and other public safety professionals are presumptively available.”¹⁸¹

C. Analysis of the Governor’s and Secretary of Health’s Orders

An analysis of Governor Grisham’s and Secretary Allen’s orders from a Second Amendment perspective is as straightforward as the Supreme Court’s analysis in *Heller* and *Bruen*. Despite the governor’s insistence that the orders are a lawful exercise of her emergency powers to address a public health crisis, the restrictions are clearly designed to address the same societal problem as New York in *Bruen* and the District of Columbia in *Heller*: generic, run-of-the-mill, gun violence. As the Court presumed in *Heller* and *Bruen*, gun violence—whether characterized by longstanding factional feuds, simmering racial tensions, sudden interpersonal disputes, or crimes of opportunity against strangers—is simply not a new phenomenon.¹⁸² In fact, it is not even “new” in New Mexico specifically.¹⁸³

Historically, governments have responded to increases in violent crime with efforts to expand the capabilities of law enforcement and prosecute violent offenders.¹⁸⁴ Under *Bruen* and *Rahimi*, New Mexico

181. *Id.*

182. For an in-depth overview of the histories of various types of violent crime in America, see generally BARRY LATZER, *THE RISE AND FALL OF VIOLENT CRIME IN AMERICA* (2016); BARRY LATZER, *THE ROOTS OF VIOLENT CRIME IN AMERICA: FROM THE GILDED AGE THROUGH THE GREAT DEPRESSION* (2020); RICHARD MAXWELL BROWN, *STRAIN OF VIOLENCE: HISTORICAL STUDIES OF AMERICAN VIOLENCE AND VIGILANTISM* (1975); 1 *VIOLENCE IN AMERICA: THE HISTORY OF CRIME* (Ted Robert Gurr ed., 1989); 2 *VIOLENCE IN AMERICA: PROTEST, REBELLION, REFORM* (Ted Robert Gurr ed., 1989); JACK TAGER, *BOSTON RIOTS: THREE CENTURIES OF SOCIAL VIOLENCE* (2001).

183. New Mexico’s familiarity with significant patterns of gun violence not only predates its admission to the Union but arguably played meaningful roles in that admission. Joseph Hall-Patton, “Great Excitement”: Violent Incorporations of the American Southwest (May 13, 2023) (Ph.D. dissertation, University of New Mexico), https://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=1351&context=hist_etds; 1 *HISTORY OF NEW MEXICO: ITS RESOURCES AND PEOPLE* 221–44 (1907). Since becoming a state, New Mexico has (consistent with the national reality) experienced substantial variations in violent crime trends over time, and endured periods where homicide rates were significantly higher than those seen today. See, e.g., RANDOLPH ROTH, *AMERICAN HOMICIDE SUPPLEMENTAL VOLUME: AMERICAN HOMICIDES TWENTIETH CENTURY* fig. 6a (2009). Per capita rates of both violent crime generally and homicide specifically have for many decades been consistently higher than the national average, even as their variations over time roughly mirror national trends. See *New Mexico Crime Rate 1979–2018*, MACROTRENDS, <https://www.macrotrends.net/global-metrics/states/new-mexico/crime-rate-statistics> (last visited Nov. 9, 2024) (graphing of compiled data from FBI statistics).

184. Consider, for example, the reaction of state and local governments to significant outbreaks of violence and disorder in certain Missouri counties taken over by factions of armed vigilante groups in the late 1880s. That spate of violence resulted in—and was ultimately quelled by—a combination of local legal crackdowns and federal intervention. See generally Matthew James Hernando, *The Bald Knobbers of Southwest Missouri, 1885–1889: A Study of Vigilante Justice in the Ozarks* (May 2011) (Ph.D. dissertation, Louisiana State University), https://repository.lsu.edu/cgi/viewcontent.cgi?article=4883&context=gradschool_dissertations. The history of policing in America—specifically its development from militia-centric and nightwatchman systems into modern departments of organized, professional civilian peace officers—is one of repeated cycles of public fear over crime and disorder leading primarily to efforts to increase the power and efficacy of local law enforcement. See generally SAM MITRANI, *THE RISE OF THE CHICAGO POLICE DEPARTMENT: CLASS AND CONFLICT, 1850–1894*

certainly could (and, in fact, already does) regulate the conditions under which a person may carry a handgun in public, impose criminal sanctions on those who go armed in public with the intent to commit criminal acts, and implement court proceedings to temporarily disarm specific individuals who pose credible threats of violence towards others.¹⁸⁵ But what New Mexico cannot do, either statutorily or through executive fiat, is eliminate the right of ordinary peaceable citizens to bear arms in public for self-defense on a wholesale basis merely because *other people* have committed acts of gun violence in public.

The governor does not even attempt to argue that concealed carry permit holders are significantly responsible for the rise in shootings in public places, thus warranting the effective suspension of all concealed carry permits. Even if she had made that argument, it would be a hard sell under the Court's jurisprudence. On the contrary, she admitted during a briefing that "[r]esponsible gun owners are certainly not our problem, have never been our problem."¹⁸⁶ The governor was correct—individuals licensed to carry concealed firearms are less likely to commit crimes, including gun-related crimes, than the average person.¹⁸⁷ Moreover, none of the specific examples she initially cited as justification for her order involved criminal actions perpetrated by a concealed carry permit holder, nor were they otherwise facilitated by a suspect's ability to lawfully carry a firearm in public.¹⁸⁸

(2013); TAGER, *supra* note 182, at 96–99 (detailing, among other examples, the repeated use of “truckmen” as police contractors to quell antebellum riots, and how these antebellum riots ushered in “[a] new era of strong police and military action” against civil unrest in Boston); WALTER PRESCOTT WEBB, *THE TEXAS RANGERS: A CENTURY OF FRONTIER DEFENSE*, at xv (1935) (detailing the development, expansion, and changing focus of the Texas Rangers, from a small militia-supplement concerned with threats by Native Americans to a large police force tasked with combating “white outlaws, thieves, feudists, highwaymen, murderers, and mobsters” based on the changing dynamics of threats faced by Texas residents).

185. See, e.g., N.M. CODE R. § 10.8.2.16 (imposing a number of terms and conditions on concealed carry permit holders, including prohibitions on: carrying more than one concealed handgun at a time; carrying a concealed handgun while consuming alcohol or while “impaired” by any substance; and carrying a concealed handgun on various premises, such as child-care facilities, schools, universities, and licensed liquor establishments); N.M. STAT. ANN. §§ 40-17-1 to -13 (2024) (detailing the state's Extreme Risk Firearm Protection Order Act framework and establishing a legal process for temporarily disarming an individual found by a court to pose a significant danger of causing imminent personal injury to self or others by possessing firearms); *id.* §§ 30-3-1 to -2 (prohibiting, when read together, any unlawful act, threat or menacing conduct with a firearm (or any other weapon) which causes another person to reasonably believe that he is in danger of receiving an immediate battery); *id.* § 30-7-2(A)(2) (limiting the reasons for which a person not possessing a valid concealed handgun license may carry a firearm in a private automobile to “lawful protection of the person's or another's person or property”).

186. Bill Hutchinson, *New Mexico Governor's Temporary Ban on Carrying Guns in Public Meets Resistance*, ABC NEWS (Sept. 11, 2023, 11:16 AM), <https://abcnews.go.com/US/new-mexico-governors-temporary-ban-carrying-guns-public/story?id=103067888>.

187. See LOTT, MOODY, & WANG, *supra* note 20, at 43–48, 66–68.

188. Two of the three suspects arrested for fatally shooting 11-year-old Froylan Villegas were wanted fugitives with extensive criminal histories that rendered them prohibited persons, while the third—who authorities ultimately determined had not played an active role in the shooting—had previously faced four criminal charges. Faith Egbuonu, *Albuquerque Murder Suspect Released from Jail Pending Trial*, KOAT ABC 7, <https://www.koat.com/article/froylan-villegas-murder-suspect->

To the extent that the revised order prohibiting the carry of firearms in public parks is perhaps, constitutional (at least with respect to the Second Amendment), it is not because the public health framing strengthened the government's justification for that restriction. As with the original order, the prohibitions on carrying firearms in parks and at playgrounds are premised on addressing longstanding societal problems that were understood by the Founding generation.¹⁸⁹ Indeed, despite the governor's public-facing comments justifying these measures as a necessary and proper

isotopes-park/45448832 (Oct. 4, 2023, 7:17 PM); T.J. Wilham, *Suspects in Killing of 11-year-old Were Wanted*, KOAT ABC 7, <https://www.koat.com/article/suspects-killing-11-year-old-were-wanted/45365455> (Sept. 29, 2023, 9:54 AM). The unnamed 13-year-old girl fatally shot in Questa, New Mexico, was shot by a 14-year-old friend inside of a private home, with a firearm obtained from inside that home. Laila Freeman, *14-year-old, Father Charged in Connection to Girl's Death in Questa*, KRQE NEWS 13, <https://www.krqe.com/news/new-mexico/14-year-old-father-charged-in-connection-to-girls-death-in-questa/> (July 31, 2023, 8:57 AM). Four of the five suspects arrested for the drive-by shooting (carried out in stolen vehicles, no less) that ultimately killed 5-year-old Galilea Samaniego were teens under the legal minimum age for public carry in any manner, while the fifth suspect—a 19-year-old who plausibly could engage in lawful open carry—denied handling the firearm. Press Release, City of Albuquerque, *Fifth Teen Arrested for Drive-By Shooting Death of 5-Year-Old Girl* (Aug. 25, 2023), <https://www.cabq.gov/police/news/fifth-teen-arrested-for-drive-by-shooting-death-of-5-year-old-girl/>; Audrey Claire Davis, *Five Teens Arraigned in Court for Shooting Death of 5-Year-Old Girl*, KRQE NEWS 13, <https://www.krqe.com/news/crime/five-teens-arraigned-in-court-for-shooting-death-of-5-year-old-girl/> (Sept. 11, 2023, 12:47 PM). Moreover, the shooting was carried out with a rifle and not remotely related to lawful public carry by concealed carry permit holders. Jason Kandel, *'She Was Only 5 Years Old': Rifle Bullet Intended for Teen Hits 5-Year-Old Girl in the Head, Killing Her, While She Slept: Police*, LAW & CRIME (Aug. 26, 2023, 5:23 PM), <https://lawandcrime.com/crime/she-was-only-5-years-old-rifle-bullet-intended-for-teen-hits-5-year-old-girl-in-the-head-killing-her-while-she-slept-police/>. State law also expressly prohibits the carrying of loaded firearms in private vehicles for any purpose other than "lawful protection of the person's or another's person or property." N.M. STAT. ANN. § 30-7-2(A)(2) (2024). Similarly, one of the two mass shootings cited by Governor Grisham was perpetrated by an 18-year-old who used a rifle in an intentional, preplanned act of mass public violence that, due to the perpetrator's age, could not plausibly have been facilitated by the state's handgun public carry regulations, which even for open carry apply only for persons at least 19 years of age. Melissa Chan, *New Mexico Teen Who Gunned Down 3 Women Struggled After Leaving Wrestling Team, Family and Team Members Say*, NBC NEWS (May 19, 2023, 5:42 PM), <https://www.nbcnews.com/news/us-news/beau-wilson-teen-killed-three-women-mental-health-issues-rcna84884>; N.M. STAT. ANN. § 30-7-2.2(C)(1) (2024). The second mass shooting ironically involved one suspect who was charged with the unlawful carrying of a firearm, and a second suspect who had his murder charges dropped due to claims he acted in justified self-defense. Audrey Claire Davis, *Murder Charge Dropped Against Suspect in Red River Shooting*, KRQE NEWS 13, <https://www.krqe.com/news/crime/murder-charge-dropped-against-suspect-in-red-river-shooting/> (June 13, 2023, 5:45 PM).

189. The history of public parks in the United States stretches back to at least the early nineteenth century, so these places hardly constitute a modern phenomenon. *See generally* Thomas R. Cox, *From Hot Springs to Gateway: The Evolving Concept of Public Parks, 1832–1976*, 5 ENV'T REV. 14 (1981). By the 1830s, the movement for increased public green space was so significant that the city of Chicago had adopted the motto "*Urbs in hoto*," or "City in a Garden." *See History of Chicago's Parks*, CHI. PARK DIST., <https://www.chicagoparkdistrict.com/about-us/history-chicagos-parks> (last visited July 9, 2024). The idea of the public gardens, public grounds, and pleasure gardens stretches back even further. *See* Therese O'Malley, *History of Early American Landscape Design: Public Garden/Public Ground*, NAT'L GALLERY OF ART, https://heald.nga.gov/mediawiki/index.php/Public_garden/Public_ground (last visited July 10, 2024); Anne L. Helmreich, *History of Early American Landscape Design: Pleasure Ground/Pleasure Garden*, NAT'L GALLERY OF ART, https://heald.nga.gov/mediawiki/index.php/Pleasure_ground/Pleasure_garden (last visited July 10, 2024). Even looking more narrowly at formal public playgrounds, specifically, the history of these children-centric parks in the United States dates back to at least the earliest years of the twentieth century, with the 1906 formation of the Playground Association of America. Kaitlin O'Shea, *How We Came to Play: The History of Playgrounds*, NAT'L TR. FOR HISTORIC PRES. (Aug. 15, 2013), <https://savingplaces.org/stories/how-we-came-to-play-the-history-of-playgrounds>.

use of her extraordinary powers to combat a public health emergency, the legal arguments that were actually presented to the courts have been, to a significant extent, attempts to prove (consistent with *Bruen*'s test) the existence of some historical tradition of generally prohibiting ordinary, law-abiding citizens from bearing arms in public parks for the purpose of curtailing criminal gun violence.¹⁹⁰ On the merits, even that is an uphill battle. As challengers to other modern proscriptions on carrying firearms in public parks have pointed out,¹⁹¹ whatever factors may account for the "why" underlying historical "sensitive places," it simply cannot be—as New Mexico suggests—that the government may prohibit the carrying of arms by all persons in any place where children tend to be present. It is not just that the historical record is devoid of evidence that "sensitive places" were deemed as such based on the anticipated congregation of children in these locations. Indeed, none of the three historical sensitive places listed in *Bruen* (legislative assemblies, polling places, and courthouses) are particularly suited for the presence of children, much less uniquely known as places in which children gather. More fundamentally, this argument is logically incompatible with *Heller*, which guarantees a right to possess firearms in the home for "defense of self, family, and property," despite private homes being one of many places where one might reasonably expect to find children present.¹⁹²

IV. PUBLIC HEALTH EMERGENCIES VERSUS PUBLIC SAFETY EMERGENCIES: "EXTRAORDINARY CIRCUMSTANCES" JUSTIFYING LIMITATIONS ON THE RIGHT TO KEEP AND BEAR ARMS

A. There Is No "Public Health Emergency" Exception to the Second Amendment

The governor's and secretary's respective orders suffer from multiple insurmountable legal problems, both with respect to their authority under state law to issue them and the unconstitutional burdens the orders place on the right of ordinary, peaceable citizens to bear arms in public for self-defense. Because these orders are one of the first and most obvious attempts to justify gun control measures under theories of a public health emergency—not just from a political and public relations standpoint but from a constitutional one as well—it is important to consider whether labeling firearms-related crimes as a "public health emergency" strengthens the government's case for any amount of additional gun control under any circumstances.

From a constitutional standpoint, there is no obvious advantage of framing this issue in that manner because it is merely a new label pasted

190. See Corrected Brief of Defendants-Appellees at 8, 25–26, *We the Patriots, Inc. v. Grisham*, 119 F.4th 1253 (10th Cir. 2024) (No. 23-2166); Lujan Allen Response, *supra* note 29, at 39–40.

191. See Plaintiffs' Consolidated Reply Memorandum, *supra* note 175, at 7–22; Appellee's Response Brief at 19–24, *Carralero v. Bonta*, No. 23-4354 (9th Cir. Feb. 16, 2024).

192. *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008).

over the traditional arguments for extending the government's regulatory authority that the Supreme Court already rejected in *Heller*, *McDonald*, and *Bruen*.¹⁹³ Even under pre-*Bruen* interest-balancing approaches in which courts routinely parsed through academic literature in a game of competing studies, the use of epidemiological language would not necessarily have been more persuasive or effective than the use of criminological language or general appeals to data and experts, however those sources may have been framed.¹⁹⁴ In the wake of *Bruen*, reenvisioning gun violence as a public health emergency and gun control measures as a response to the emergency does not change the jurisprudential test under which any restrictions on the right to keep and bear arms must be justified. The government—during a public health emergency or otherwise—still must show either that the regulated conduct is not covered by the Second Amendment's plain text or that the restriction is consistent with a settled historical tradition of firearms regulation. Moreover, reframing gun violence as a public health emergency also does not help to simultaneously reframe the underlying societal problem as one implicating “unprecedented societal concerns or dramatic technological changes” that might open the door for additional means of regulation via a broad appeal to historical analogues.¹⁹⁵

There is no evidence that, before the mid-twentieth century, Americans understood gun violence as a public health issue similar to a communicable disease rather than as a public safety issue that implicated

193. See discussion *supra* Section III.A.

194. Typically, those appeals were rooted in the courts' application of intermediate scrutiny under the two-step test commonly used before *Bruen*, and in the second step of which courts routinely adopted wholesale the government's rationale for why the restriction furthered a substantial government interest in promoting public safety. See, e.g., *Heller v. District of Columbia*, 698 F. Supp. 2d 179, 193–95 (D.D.C. 2010) (upholding the District of Columbia's ban on certain types of semi-automatic rifles, despite determining that the rifles are in common use by law-abiding citizens, based almost entirely on the government's presentation of “expert opinions” asserting that the rifles are not useful for self-defense and are uniquely dangerous in the hands of criminals); *Silvester v. Harris*, 843 F.3d 816, 828–29 (9th Cir. 2016) (upholding California's 10-day waiting period for gun purchases as substantially related to the government's interest in reducing firearms death based on studies (which the district court found unpersuasive) purporting to show that “cooling-off” periods “may prevent or reduce impulsive acts of gun violence or self harm”); *Kanter v. Barr*, 919 F.3d 437, 449–50 (7th Cir. 2019) (upholding the federal ban on gun possession for felons, as applied to a non-violent felon, because the government presentation studies purported to show some connection between nonviolent offenders and a risk of future violent crime).

195. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 27 (2022). Not that this has necessarily mattered¹⁹ because courts have been more than happy to uphold all manner of gun control restrictions under the *Bruen* test by simply utilizing very broad applications of its historical analogue test. See, e.g., *State v. Wilson*, 543 P.3d 440, 459 (Haw. 2024) (upholding Hawaii's general prohibition on carrying a firearm in public without a license, under a de facto “no issue” framework that was far more restrictive than the framework that was struck down as unconstitutional by the *Bruen* majority, with a single paragraph citing *Heller*'s assertion that the right to keep and bear arms is not unlimited); *Bevis v. City of Naperville*, 85 F.4th 1175, 1199, 1202–04 (7th Cir. 2023) (upholding Illinois' restrictions on the possession and sale of magazines capable of holding more than ten rounds and certain semi-automatic firearms deemed “assault weapons,” broadly applying *Bruen*'s historical analogy and concluding that there is a national historical tradition of regulating civilian ownership of “especially dangerous weapons”).

constitutional and natural rights.¹⁹⁶ There is, moreover, no evidence that previous generations—particularly the generations that drafted and ratified either the Second or Fourteenth Amendments—sought to address the problem of generic gun violence through measures that were materially similar to ones then imposed for addressing other public health issues, such as epidemics of communicable disease. With the exception of several state laws regulating machine guns in the early twentieth century¹⁹⁷—regulations that were nominally premised on the threat machine guns posed to “the public health and safety”—“public health crises” were virtually never the underlying impetus for gun control. To the extent that gun violence presented “public health” concerns, the concern was the physical harm imposed on victims of *unlawful* gun violence.

But is that really any different from the modern public health framing? Here, ironically, lies the crux of any potential usefulness of the public health emergency framing. A “public health emergency,” as used by policymakers defending gun control restrictions, is in practice synonymous with a public *safety* emergency. While the governor’s orders were premised on generic urban gun violence, it is plausible that circumstances might arise more reasonably resembling a true “crisis” of violence. It would then be necessary to look to history to see what, if any, national tradition exists of regulating the possession or use of firearms during times of acute crisis, civil unrest, or any other historically analogous framing of violence as a public safety emergency.

B. A History of Gun Restrictions Imposed During Public Safety Crises

While there is no historical tradition of imposing broad restrictions on the right of ordinary law-abiding citizens to keep and bear arms simply because criminal gun violence exists, there is some national historical tradition of allowing for the additional regulation of firearms during times of true crises that acutely and imminently threaten public safety. In fact, this should come as little surprise given the general permissibility of restrictions on constitutional rights during times of crisis, even when those restrictions would be clearly unconstitutional as a means of general crime control under ordinary circumstances.¹⁹⁸

196. Compare Richard H. Shryock, *The Origins and Significance of the Public Health Movement in the United States*, 1 ANNALS MED. HIST. 645, 648, 650, 652 (1929), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7945825/pdf/annmedhist148545-0036.pdf> (1924 review of the “Public Health” movement in the United States), with Jeffrey S. Adler, *Shoot to Kill: The Use of Deadly Force by the Chicago Police, 1875–1920*, 38 J. INTERDISC. HIST. 233, 243 (2007) (showing how Chicagoans largely blamed increases in violence on the inefficiency of the police department). See also Gary Potter, *The History of Policing in the United States*, 2013 E. KY. U. SCH. JUST. STUD. 1, 2 (2013) (demonstrating how modern policing rose as a response to increasing urbanization and simultaneous “disorder”).

197. See discussion *infra* Section IV.B.5.

198. See, e.g., *Moyer v. Peabody*, 212 U.S. 78, 85 (1909) (“When it comes to a decision by the head of the state upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment.”); *Stotland v. Pennsylvania*, 398 U.S. 916, 920 (1970)

Every state authorizes its governor to declare a state of emergency under certain conditions—most often in times of war, insurrection, riots, or comparable civil disorders or some other extraordinary condition constituting a widespread and serious threat to public safety.¹⁹⁹ Congress, too, has passed legislation formalizing the President's emergency powers and granting special powers to the President during times of crisis.²⁰⁰ A cursory review of these historical exercises of emergency powers reveals two broad categories of circumstances under which emergency-based, temporary gun regulations were enacted, both of which are generally consistent with the types of disasters and extreme emergencies that were envisioned by emergency powers statutes: (1) times of widespread violence due to insurrection or active rebellion that threatens national security or the existence of the state itself, and (2) acute outbreaks of mob violence or urban rioting that effectively eclipse civil authority and the rule of law.

1. Insurrection or Rebellion

The idea that violent political crises may justify the disarmament of opponents predates the Founding of the nation itself. As historian Stephen Halbrook notes, during the American Revolution, supporters of independence engaged in “the basic phenomenon of war,” confiscating firearms from Loyalists even as they themselves fought a war for independence that in many respects was ignited by British attempts to first disarm *them*.²⁰¹ In 1775, the Continental Congress recommended that the individual colonies begin disarming those “notoriously disaffected to the cause of America,” and the various colonial assemblies and Committees of Safety soon passed

(Douglas, J., dissenting) (dissenting from the dismissal of an appeal for lack of a substantial federal question but noting that “[c]ontrol of civil disorders that may threaten the very existence of the State is certainly within the police power of government”). *But see* Roman Cath. Diocese of Brooklyn v. Cuomo, 592 U.S. 14, 19–22 (2020) (enjoining New York governor's executive order—issued during declared state of emergency over COVID-19 epidemic—that effectively barred most residents from attending religious service while allowing a lengthy list of similarly situated “essential” businesses to operate without admission restrictions, and reasoning that “even in a pandemic, the Constitution cannot be put away and forgotten”); *Bateman v. Perdue*, 881 F. Supp. 2d 709, 711, 716 (E.D.N.C. 2012) (declaring invalid as applied to plaintiffs, under pre-*Bruen* use of strict scrutiny, a North Carolina statute making it a Class 1 misdemeanor “‘for any person to transport or possess off his own premises any dangerous weapon or substance in any area’ in which a state of emergency has been declared” and authorizing state and local government officials to impose additional restrictions on “the possession, transportation, sale, purchase, storage, and use of dangerous weapons” during a state of emergency).

199. For a general starting point on state-level executive emergency powers, see *Legislative Oversight of Emergency Executive Powers*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/about-state-legislatures/legislative-oversight-of-emergency-executive-powers> (Sept. 22, 2023).

200. See generally ELIZABETH M. WEBSTER, CONG. RSCH. SERV., RL 98-505, NATIONAL EMERGENCY POWERS (2021), <https://crsreports.congress.gov/product/pdf/RL/98-505>.

201. STEPHEN P. HALBROOK, THE FOUNDERS' SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS 116 (2012); Rene J. Silva, Pennsylvania's Loyalists and Disaffected in the Age of Revolution: Defining the Terrain of Reintegration, 1765–1800 (Ph.D. dissertation, Florida International University 2018), <https://digitalcommons.fiu.edu/cgi/viewcontent.cgi?article=4844&context=etd>.

acts for that purpose.²⁰² These disarmaments were carried out not through trials affording due process but as bills of attainder enforced by the local militia.²⁰³ Distinctions were sometimes made between individuals who were actively disloyal to the American cause (and who might therefore pose an actual national security threat) and those who for religious reasons passively declined to take up arms against Britain.²⁰⁴ In some cases, the wartime acts required that those disarmed under their provisions be given a receipt for confiscated arms, though the degree to which those confiscated arms were ever returned is unknown.²⁰⁵

Obviously, these wartime disarmament measures occurred before the peacetime drafting and December 15, 1791, ratification of both the Second Amendment and its various state counterparts.²⁰⁶ But even postratification, there is ample evidence for the practice of disarming those who posed violent threats to national security during times of rebellion or insurrection. During the Whiskey Rebellion of 1791–1794, President Washington’s instructions to militia commander General Harry Lee, who was tasked with suppressing the fledgling nation’s first instance of armed insurrection, included the following directive: “Of these persons in arms, if any, whom you may make prisoners: Leaders, including all persons in command, are to be delivered to the civil magistrates; the rest to be disarmed, admonished, and sent home (except such as may have been particularly violent and also influential).”²⁰⁷ Roughly six decades later, violent insurrectionist forces were disarmed again when federal forces were deployed to quell sectional violence in antebellum Kansas, then still a territory.²⁰⁸ In one instance, for example, two companies of federal troops worked in tandem with a U.S. Marshal to arrest and disarm a “large band of marauders” who had formed an unauthorized free-stater militia.²⁰⁹ As federal troops increasingly “struggled to distinguish genuine emigrants, often coming armed, from the guerilla bands” that actively pursued violent clashes,

202. 4 JOURNALS OF THE CONTINENTAL CONGRESS 205 (Mar. 14, 1776); Act of March 14, 1776, ch. 7, 1775–1776 Mass. Act at 31–32, 35; 7 RECORDS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS IN NEW ENGLAND, 1776 R.I. GEN. LAWS 556 (A. Crawford Greene 1862) (“An Act empowering the members of the upper and lower houses of Assembly, to tender to such of the inhabitants as are hereinafter mentioned, a declaration, or test, for subscription.”); An Ordinance Respecting the Arms of Non-Associators, 1776 Pa. Laws 11, ch. 719, § 1; Act of May 5, 1777, ch. 3, 9 Hening’s Statutes at Large 281, 281–82 (1821).

203. HALBROOK, *supra* note 201, at 117.

204. *See, e.g.*, Act of March 14, 1776, ch. 7, 1775–1776 Mass. Act at 31–32, 35 (qualifying that Quakers—who are traditionally staunch pacifists based on religious grounds—were not to be disarmed for merely refusing to take up arms against the British, as long as they did not also refuse to sign a declaration of allegiance).

205. An Ordinance Respecting the Arms of Non-Associators, 1776 Pa. Laws 11, ch. 719, § 1 (requiring that “non-associators” who are disarmed be given receipts for the arms confiscated from their possession).

206. HALBROOK, *supra* note 201, at 120–21.

207. ROBERT W. COAKLEY, *THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDER, 1789–1878*, at 54–55 (1988); *see also id.* at 170 (describing other instances of disarmament).

208. *See generally* NICOLE ETCHESON, *BLEEDING KANSAS: CONTESTED LIBERTY IN THE CIVIL WAR ERA* (2004) (describing in detail the widespread and violent nature of sectional clashes in Kansas and Missouri in the prelude to the Civil War).

209. COAKLEY, *supra* note 207, at 168.

general disarmament measures became so prevalent that free-staters lamented it as an “outrage.”²¹⁰ Steamboats of arriving emigrants were repeatedly searched for firearms, which, according to some accounts, were confiscated even over protests by their owners that these weapons were purely for their own self-defense.²¹¹ Finally, in the immediate aftermath of John Brown’s 1859 raid on the federal arsenal at Harper’s Ferry, West Virginia, Col. Robert E. Lee—tasked by the federal government with quashing Brown’s revolt and retaking the arsenal—ordered Maryland militia units to conduct a “mop[[]-up” operation that included searching for and seizing any remaining arms and ammunition stockpiles left by Brown’s raiders.²¹² He also sent a unit of Marines to search for and seize any weapons hidden at a farm previously rented by Brown.²¹³

At various times during the Civil War, military leaders imposed temporary restrictions on the sale, possession, and public carrying of firearms by civilians, most often via military order. In the spring of 1863, for example, Union General Ambrose Burnside rescinded a previously issued general order that had categorically prohibited the sale of firearms and ammunition.²¹⁴ Burnside’s new order still warned that anyone caught selling guns or ammunition “to disloyal persons, or with a knowledge that they are to go into the hands of disloyal persons” would be charged, effectively, with treason.²¹⁵ In the fall of 1864, Union General Samuel Heintzelman issued an order prohibiting the sale of firearms, powder, or ammunition within Illinois, Indiana, Ohio, and Michigan for sixty days, as well as prohibiting railroad or delivery companies from delivering them into those states unless the dealer or company obtained a permit to do so from military headquarters.²¹⁶ General Heintzelman issued the order as an attempt to combat “traitorous combinations” operating within those states, and it appears to have been rescinded well before the original sixty-day length.²¹⁷

A few common themes emerge from this first type of crisis-based, ad hoc gun regulation. These restrictions were all imposed during times of actual insurrection or rebellion, in which large numbers of otherwise ordinary citizens engaged in armed, organized, and violent uprisings against legitimate exercises of government authority. The circumstances necessitated the deployment of military forces—not as temporary peacekeepers to maintain order but as combatants operating under declarations of martial law or as a de facto occupying force. When governmental authorities pursued disarmament, it was focused only on those for whom there was

210. ETCHESON, *supra* note 208, at 119; *see also id.* at 102–05 (describing a successful effort by civilian authorities to disarm residents of Lawrence, Kansas, when they initially resisted the carrying out of grand jury orders).

211. *Id.* at 119.

212. COAKLEY, *supra* note 207, at 192–93.

213. *Id.* at 192.

214. A. Thompson, *The News*, DEL. GAZETTE, May 22, 1863.

215. *Id.*

216. John Mahin, *Doings of the Copperheads at Chicago.*, MUSCATINE WKLY. J., Sept. 2, 1864.

217. E. M. Haines, *Miscellaneous Paragraphs*, WOOD CNTY. REP., Oct. 13, 1864.

some reasonable belief of participation in or active support for the rebellion or insurrection.²¹⁸

2. Riots, Armed Mobs, and Anarchy

The second historical category of ad hoc, crisis-based gun restrictions are those imposed during times where civil authorities were overwhelmed by armed mobs either actively engaged in violent rioting or imminently threatening violent actions. These “anarchic rioting” crisis-based gun restrictions were seen occasionally throughout the mid- and late- nineteenth century, but reached a high point in the early twentieth century. They were most often imposed during acute, localized outbreaks of violence that were the result of either long-simmering racial tensions or labor-related disputes.

As with arms restrictions imposed during times of rebellion or insurrection, arms restrictions during periods of sudden mob violence often involved emergency orders to temporarily suspend gun sales. For example, during the 1863 New York City Draft Riots, Mayor George Opdyke issued an order shutting down gun stores and prohibiting the sale of firearms within the city.²¹⁹ There is some historical evidence that in the summer of 1877, city officials in Chicago communicated to local merchants that they should take guns and ammunition off their shelves during violent clashes between thousands of striking railroad workers and local police—though whether this was an informal warning or an official order is not clear.²²⁰ Alabama Governor Thomas Goode Jones issued similar orders during the 1894 Birmingham Mine Riots, prohibiting the sale of guns, ammunition, and alcohol throughout Jefferson County and closing all stores engaged in those sales.²²¹ Six years later, during similar mine worker-related riots in Pennsylvania, the town council of Shenandoah employed an almost identical tactic, passing resolutions that shuttered saloons and prohibited the sale of “firearms and ammunition, etc.,” effective “until peace was

218. This standard is apparent in many instances of disarmament during the Kansas troubles. For example, a certain Captain Cooke and his federal troops confiscated “an excess of muskets, bayonets, powder kegs, and lead” from a “fortified house” along a trail well-known for travel by armed bands. Two days later, it is noted that he stopped a party of emigrants whose intentions it appears were suspect given that the group was comprised of 240 men but “only five women of marriageable age,” and they were heavily armed while carrying “very little of the equipment” ordinarily expected of emigrants. COAKLEY, *supra* note 207, at 170.

219. Isaac M. Kebler, *The Democracy at Work in New York.*, FREMONT J., July 17, 1863; Edgar Snowden, *The Riot in New York*, THE ALEXANDRIA GAZETTE, July 15, 1863. Additionally, in the immediate aftermath of the riot and presumably after the emergency order regarding gun sales had been lifted, Mayor Opdyke personally wrote to a gun store owner known to sell hand grenades to limit such sales only to people who could produce a recommendation from his office. ADRIAN COOK, *THE ARMIES OF THE STREETS: THE NEW YORK CITY DRAFT RIOTS OF 1863*, at 171 (1974).

220. See MITRANI, *supra* note 184, at 129 (detailing how one Chicago storekeeper “had already removed his weapons at the request of the authorities” before rioters broke in “and demanded arms and ammunition”).

221. Governor Jones: *Explains the Situation to the Citizens*, BIRMINGHAM AGE-HERALD, July 11, 1894, at 1.

restored.”²²² And during the 1906 Atlanta Race Riots, Mayor James Woodward issued orders “prohibiting the sale of firearms and ammunition without the written order of the military authorities.”²²³

By the early twentieth century, ad hoc, crisis-based restrictions increasingly targeted lawful public carry or required the total disarmament of certain groups. In 1913, for example, when Colorado Governor Elias Ammons called up the Colorado National Guard to intervene during deadly clashes between striking miners and mine guards, 700 guardsmen forcibly disarmed “troublemakers” on both sides.²²⁴ Federal troops enforced similar disarmament orders in the spring of 1914 in Colorado after dozens were killed in labor clashes.²²⁵ This time, Secretary of War Lindley Garrison authorized federal troops tasked with keeping the peace over more than 400 square miles of affected mining territory to disarm anyone openly carrying weapons, though he explicitly denied requests by military leaders to permit soldiers to search private homes for suspected arms caches.²²⁶ During the height of the race riots in 1919, federal troops were deployed to Elaine, Arkansas, to quell chaos in a town they found “in [a] great state of excitement,” and the Colonel commanding that force ordered “that anyone carrying a weapon, either black or white, be immediately disarmed.”²²⁷ Military officials in charge of restoring peace in Omaha during race riots that same year issued similar proclamations, effectively banning civilian arms-carrying and warning that those found carrying weapons in public would be not just disarmed but arrested.²²⁸

The restrictions imposed during times of widespread anarchic unrest all have common themes with respect to the *why* and *how* of the burdens they place on the right to keep and bear arms. With respect to the *why* of the burden, these restrictions were not spurred by incremental increases in the prevalence of generic criminal threats to public safety. Rather, they were imposed after sudden, acute outbreaks of uncontrollable mob violence caused a breakdown of civil authority that simultaneously threatened large swaths of the public. The 1863 New York City Draft Riot, for example, involved crowds of thousands of people who, after setting the draft office on fire, spread out in a campaign of destruction, looting, and violence that quickly overwhelmed local police and militia units, leaving more than 100 people dead and hundreds more injured.²²⁹ Similarly, the 1906 Atlanta riot broke out when an estimated 10,000 people gathered

222. *First Blood of the Strike: Sheriff's Posse Fires on a Mob at Shenandoah*, MONTGOMERY AM., Sept. 27, 1900.

223. *Negroes Fighting Back: Atlanta Policemen Attacked Near Colored University*, THE JERSEY CITY NEWS, Sept. 25, 1906.

224. CLAYTON D. LAURIE & RONALD H. COLE, *THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1877-1945*, at 206 (1997).

225. *Id.* at 210-11.

226. *Id.* at 211-13.

227. *Id.* at 293-94.

228. *Id.* at 288.

229. COOK, *supra* note 219, at 63, 70, 213-32.

downtown and whipped into a frenzy over unsubstantiated allegations of Black men assaulting white women.²³⁰ Over the next four days, thousands of white residents roamed the streets, particularly in Black neighborhoods, destroying Black-owned businesses, burning more than 1,000 Black-owned homes, and ultimately killing as many as 25 Black residents.²³¹ The 1896 Birmingham Mine Riot, meanwhile, involved an initial crowd of at least 100 striking mine workers, though some reports estimated several times that.²³² Significantly, each of those restrictions appear to have been imposed only *after* complete control of the situation had been lost to mob-induced violence, not as a preemptive method to avert violence in circumstances that might foreseeably lead to its outbreak.²³³ Also relevant to the *why* is the fact that these examples of mob-induced violence specifically involved the widespread use of *firearms* in furtherance of that violence. Accounts of the 1863 draft riot, for example, include numerous reports of gunshot wounds—several of them fatal—that were clearly inflicted by rioters against police officers, militia members, and civilian victims.²³⁴

Notably, in each of these cases, the bulk of the violence was not committed by the same types of offenders who are today disproportionately responsible for “everyday” criminal gun violence or what we now think of as “street crime”—rapes, muggings, robberies, and the like. Rather, these instances of violence involved large numbers of ordinary and otherwise law-abiding, peaceable citizens who had been seized by rage and who, acting in concert, were actively seeking to acquire firearms not for defense against criminals or any other lawful purpose but to further fan the flames of violence and thwart the government’s attempts to restore order.²³⁵ This is significant because it further distinguishes the type of violence at issue in these crises from the type of violence characteristic of either generic urban crime or the factional feuding prevalent in the Reconstruction-era South and West. These types of violence, then and now, are

230. See DAVID FORT GODSHALK, *VEILED VISIONS: THE 1906 ATLANTA RACE RIOT AND THE RESHAPING OF AMERICAN RACE RELATIONS* 88 (2005).

231. *Atlanta Race Riot of 1906*, BRITANNICA (Feb. 9, 2024), <https://www.britannica.com/event/Atlanta-Riot-of-1906>.

232. James D. Nunez, *The Hot Birmingham Summer of 1894: How A Mine Strike Shaped Alabama’s Racist Political Destiny for More Than Six Decades*, 20 VULCAN HIST. REV. 32, 40–41 (2016).

233. For example, newspapers covering the 1863 New York City Draft Riots do not mention Mayor Opdyke’s gun store closure order until dispatches received at 6 p.m. on the second day of unrest—more than twenty-four hours after earlier dispatches recounted local police losing control to violent and destructive armed mobs. Kebler, *supra* note 219. Mayor Woodward’s attempt to limit gun sales during the 1906 Atlanta Race Riots came so far past the point of violent escalation and reactive gun buying sprees that the state militia had already been deployed and one newspaper report quipped that gun stores’ stocks of firearms “were practically exhausted,” with one store having made \$16,000 worth of sales. *Negroes Fighting Back*, *supra* note 223. The precise timing of the Shenandoah city council’s decision to close saloons and gun stores is unclear, though both the wording of the order and the contemporaneous newspaper accounts imply that fatal violence had already broken out. *First Blood of the Strike*, *supra* note 222.

234. COOK, *supra* note 219, apps. 1–2.

235. See *id.* at 93, 104, 117; GODSHALK, *supra* note 230, at 95 (describing how crowds of white rioters broke into a “hardware store and stripped the business of its guns, knives, bullets, and hammers”).

overwhelmingly committed by a small subset of repeat violent offenders who are well-known to law enforcement and rather easily distinguished from the broader mass of ordinary, peaceable citizens.²³⁶

With respect to the *how* of the burdens imposed on possessing and carrying firearms in instances of riots and mob violence, those historical restrictions were temporary, limited in duration to only those periods where the violence was most acute and uncontrolled—much like the three-day period allowed under the New Mexico Riot Control Act.²³⁷ The historical restrictions were also limited geographically to the specific area of unrest.²³⁸ And, as with insurrection-related gun restrictions, there is some evidence that authorities intended to ultimately return weapons seized during times of rioting to their owners.²³⁹

By temporarily banning gun sales during times of acute crisis, the earliest of the temporary, crisis-based historical firearm restrictions imposed a more substantial burden on the right to keep and bear arms than modern limitations on public carry. While the closures of gun stores and prohibitions on gun sales were time-limited, they effectively created an insurmountable barrier to the exercise of a constitutional right for individuals who did not already possess a firearm. On one hand, where and when the government may temporarily end gun sales and thereby quash the right in full for those not yet in possession, it may at the same time and for the same reasons choose only to temporarily foreclose the right of public carry.²⁴⁰ On the other hand, it is not at all clear whether and to what extent the historical time-limited restrictions on new firearm purchases were perceived as or limited the otherwise lawful carrying of firearms in public for

236. This trend holds true across a diverse array of major U.S. cities, irrespective of geography, demographics, and local politics. See NAT'L INST. FOR CRIM. JUST. REFORM, GUN VIOLENCE PROBLEM ANALYSIS SUMMARY REPORT: WASHINGTON, D.C. 9 (2021), https://cjcc.dc.gov/sites/default/files/dc/sites/cjcc/release_content/attachments/DC%20Gun%20Violence%20Problem%20Analysis%20Summary%20Report.pdf; PHILA. CITY COUNCIL COMM. ON PUB. SAFETY, 100 SHOOTING REVIEW COMMITTEE REPORT 34 (2022), <https://phlcouncil.com/wp-content/uploads/2022/01/100-Shooting-Review-complete.pdf>; PORTLAND POLICE BUREAU & CAL. P'SHIP FOR SAFE CMTYS., PORTLAND HOMICIDE PROBLEM ANALYSIS 2019–2021, at 21–26 (2022), <https://www.portland.gov/sites/default/files/2022/2022-pdx-problem-analysis-public-version.pdf>; NAT'L INST. FOR CRIM. JUST. REFORM, INDIANAPOLIS, IND., GUN VIOLENCE PROBLEM ANALYSIS: SUMMARY REPORT MARCH 2018–FEBRUARY 2020, at 5 (2021), <https://www.wishtv.com/wp-content/uploads/2021/08/Indianapolis-Gun-Violence-Problem-Analysis-Summary-Narrative.pdf>; LISA BARAO, CHRISTOPHER MASTROIANNI, & THOMAS ABT, KNOXVILLE GUN VIOLENCE PROBLEM ANALYSIS: 2019–2021, at 9, 23–24, 32 (2022), https://cdn5-hosted.civiclive.com/UserFiles/Servers/Server_109478/File/CommunitySafety/KPD_GVPA_Public.pdf.

237. See *supra* notes 111–16 and accompanying text.

238. See *supra* note 113 and accompanying text.

239. The fact that the apparent willingness to return weapons after the cessation of disorder occurred during labor riots largely involving white citizens on both sides is important because it shows what the standard was perceived to be when dealing with situations unclouded by racial animus. LAURIE & COLE, *supra* note 224, at 212.

240. See *Caetano v. Massachusetts*, 577 U.S. 411, 417–19 (2016) (Alito, J., concurring) (using similar reasoning with respect to stun guns, concluding that they cannot be banned on the ground that they are dangerous and unusual because firearms constituting a higher degree of force are not dangerous per se, because the test for “unusual” arms is not cabined to eighteenth-century weapons, and because stun guns are widely used for lawful purposes today).

those who already possessed them. Many contemporaneous accounts of these crises provide evidence that these crisis-based restrictions were not necessarily understood as either undermining the self-protective rationale of the Second Amendment or categorically criminalizing the use of firearms for that purpose by those already possessed them—including by carrying them in public for self-defense. For example, when it became clear during the New York City Draft Riots that anti-draft rioters would likely single out the city's Republican newspapers for destruction, owners of two of those papers—the *Evening Post* and the *New York Daily-Times*—armed staff members with rifles to man the barricades hastily erected for defending their buildings.²⁴¹ Sensing how serious the situation had become, *Times* editor Henry J. Raymond also secured three Gatling guns from the army, which were mounted in tactical positions around the building.²⁴² Later that day, Raymond also sent sixteen rifle-wielding *Times* employees to assist in the defense of a third Republican paper, the *Tribune*, whose pacifist owner initially forbade employees from bringing arms into the building.²⁴³ These were not the only private employers in the city who quickly sought to pull together an armed defense of their livelihoods during the height of the riot-induced anarchy.²⁴⁴ In another instance, armed citizens held off a band of rioters who menaced wounded Union soldiers as they convalesced in a local hospital, while others protected their homes by keeping armed watch from the rooftops.²⁴⁵

These examples of armed self-defenders being left largely free to openly carry firearms in the face of riotous violence despite the imposition of temporary gun restrictions are hardly unique to the 1863 draft riots.²⁴⁶ To whatever extent the temporary bans on gun sales were understood to simultaneously prohibit public carry or otherwise interfere with the exercise of the right to keep and bear arms for those already in possession of firearms, they appear to have been paired with selective nonenforcement of the restrictions against armed individuals who clearly were not participating in the riotous violence. The extent to which government officials attempted to disarm objectively and unlawfully violent offenders without burdening the rights of those ordinary citizens who might be victims of that violence is an important distinction between Governor Grisham's and Secretary Allen's public safety emergency-based orders and historical

241. See COOK, *supra* note 219, at 87.

242. *Id.* at 87–88.

243. *Id.* at 88, 90.

244. And while some portion of these defensive arms were likely part of the pre-riot civilian stockpile, so many were acquired directly from government armories that one could make a plausible argument that the shutting of private gun stores was less of an attempt to deprive all private citizens of the ability to procure firearms, and more of a rough attempt to grant temporary government oversight of such procurements and thereby better ensure any new guns added to the equation were not added on the side of rioters. *Id.* at 108.

245. *Id.* at 121, 133.

246. In Atlanta, for example, a mob attempted to stop an ambulance once it discovered the emergency vehicle carried an injured Black patient, but a revolver-wielding doctor successfully fended off the assault. *Negroes Fighting Back*, *supra* note 223.

analogues of firearms restrictions in instances of insurrections and mob violence.

Finally, the primary consideration for historical efforts to temporarily prohibit additional gun acquisitions during riots may have been that otherwise ordinary, rational, peaceable citizens had effectively lost their minds and must be stopped from engaging in unthinking, irrational, reflexive, spur-of-the-moment decisions to procure arms for entirely unlawful purposes. In this sense, the historical regulations seem more akin to a temporary imposition of modern waiting periods than to a temporary ban on public carry.²⁴⁷ Some of these historical analogues also involved either the distribution of military arms to civilians for self-defense or granted military authorities the discretion to approve gun sales.²⁴⁸ These allowances indicate that the point may not have been to completely prevent civilians from acquiring arms, but to better ensure that the arms went only to those intending to use them for lawful purposes—a purpose far more resembling the rationale behind modern background check and general public carry license requirements than complete foreclosures on the right to public carry.

3. Warning: Evidence of Abusive Ad Hoc Restrictions

One cannot recount the history of ad hoc, crisis-based gun restrictions without an investigation into how these restrictions have been implemented to the detriment of vulnerable victims of violent unrest, depriving them of the ability to protect themselves against violence by using, displaying, or possessing firearms. In fact, when analyzing the limits of the historical tradition of ad hoc gun restrictions during insurrections, riots, or mob-induced threats to public safety, the same problem the Supreme Court recognized in *Heller*, *McDonald*, and *Bruen* appears—namely, that many historical examples of these restrictions arise from unambiguous efforts to systematically undermine the rights of Black citizens in ways that would today render the restrictions clearly unconstitutional. Using those abusive and discriminatory restrictions as evidence that any modern ad hoc

247. Modern gun control advocacy organizations roundly advocate for the imposition of waiting periods between a person's purchase of a firearm and the time at which he or she may take possession of it. Typically, the primary argument proffered in support of this policy is that the waiting period creates a time buffer that enables any emotion-driven or temporary impulses toward violence to subside. See, e.g., *Gun Sales: Waiting Periods*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://giffords.org/lawcenter/gun-laws/policy-areas/gun-sales/waiting-periods/> (last visited Sept. 20, 2024).

248. See, e.g., COOK, *supra* note 219, at 108 (describing how, during the 1863 New York City Draft Riot, “[o]ne hundred employees of Lord and Taylor’s marched to the arsenal to pick up arms and ammunition and then went back to fortify the store”); DAVID F. KRUGLER, 1919, THE YEAR OF RACIAL VIOLENCE: HOW AFRICAN AMERICANS FOUGHT BACK 115 (2015) (describing how, Black veterans in Chicago retrieved weapons from their regiment’s armory); *Negroes Fighting Back*, *supra* note 223 (prohibiting only sales of guns or ammunition that were not authorized by military authorities).

emergency gun restriction “is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms” is problematic.²⁴⁹

Almost immediately after the Fourteenth Amendment secured the right to keep and bear arms for newly freed Black Americans, ex-Confederates, “[w]hether as police forces, private militias, or terrorist night riders . . . pursued a ruthless campaign of political violence to disarm and disenfranchise [B]lack [individuals].”²⁵⁰ Often, the disarmament campaigns were conducted under the auspices of official government-sanctioned attempts to quell political unrest that was widely blamed on Black citizens but often instigated (and certainly escalated) by white individuals.²⁵¹ Tennessee and Kentucky supply two examples of this.

In April 1866, Memphis was hurled into disorder by clashes between white police officers and Black soldiers formerly stationed at Fort Pickering and celebrating their discharge from military service.²⁵² More than 2,000 white members of a sheriff’s posse streamed into the city’s Black neighborhoods, conducting searches of homes under the pretext of searching for arms before setting the homes on fire and killing dozens.²⁵³ Despite this, Major General George Stoneman, the military commander for the Department of Tennessee, ordered the commanding officer of Fort Pickering to disarm the Black military discharges and keep them inside the fort throughout the next day.²⁵⁴ While this was ostensibly for their own protection, it prevented them from offering armed resistance while their families, friends, and neighbors were systematically victimized.²⁵⁵ Similarly, in 1892, after racial tensions in Memphis erupted into a wave of violence that culminated in the lynching of three Black residents, noted journalist and activist Ida B. Wells condemned attempts by city officials not only to systematically disarm Black residents but to ban sales of guns to them as well.²⁵⁶ That same year, the Kentucky governor deployed the state militia to Paducah after armed Black residents successfully fended off a white mob intent on lynching a Black man accused of “peeking into windows at white women.”²⁵⁷ The incident resulted in the death of one white assailant and prompted local newspapers to warn of an impending race war.²⁵⁸ The state militia, together with local police and hastily deputized white residents, conducted searches of Black homes and confiscated more than 200 firearms.²⁵⁹ Four years later, in Mayfield, Kentucky, local authorities used similar tactics to effectively disarm the town’s Black population after the

249. N.Y. State Rifle & Pistol Ass’n v. Bruen, 597 U.S. 1, 19 (2022).

250. NICHOLAS JOHNSON, NEGROES AND THE GUN: THE BLACK TRADITION OF ARMS 94 (2014).

251. *Id.* at 94–100.

252. COAKLEY, *supra* note 207, at 275–77.

253. *Id.* at 276.

254. *Id.* at 276–77.

255. *Id.* at 276–78.

256. JOHNSON, *supra* note 250, at 106–07.

257. *Id.* at 111.

258. *Id.*

259. *Id.*

lynching of a Black man spurred several perceived acts of retaliation by members of Black community.²⁶⁰

Accounts of the 1906 Atlanta riots also offer insights into the discriminatory imposition of ad hoc, crisis-based firearms restrictions. In the months leading up to the riot and well before the mayor's order prohibiting gun sales, the city's Black residents were unable to purchase firearms, while gun stores continued selling large quantities of firearms to white residents.²⁶¹ It is unclear whether this arms embargo was part of an official government decree or merely a de facto policy informally imposed by local gun stores, but it had the effect of leading some Black residents to believe their acquisition of firearms was illegal.²⁶² There is also some evidence that the Atlanta mayor directed law enforcement to search Black homes for firearms to confiscate before an order of the Georgia governor rescinded that directive.²⁶³ On the evening the riot began, "county police undertook to disarm [Black individuals] in the Brownsville area near Clark University,"²⁶⁴ leading frightened residents to kill a deputy sheriff. In response, militia units returned the next day, disarmed the entire population of the Black neighborhood, murdered four people, and placed 300 residents under what appears to have been military arrest.²⁶⁵

During the 1919 race riots, the city council of Newport News, Virginia, imposed an emergency measure requiring would-be gun buyers to first obtain a purchase permit from a city official.²⁶⁶ Despite this emergency measure, the city experienced an increase in gun sales—but only to white buyers, indicating that officials granted purchase permits on a racially restrictive basis.²⁶⁷ At the same time, local law enforcement reportedly, either through informal pressure on gun stores or by official declaration, prohibited the sale of firearms to Black individuals.²⁶⁸ Around this time, government officials selectively enforced similar "emergency measures" against Black populations in Washington, D.C., Chicago, and various counties in Texas.²⁶⁹ When questioned about its role in racially discriminatory disarmaments, the U.S. War Department gave assurances that federal troops authorized to disarm citizens during riots made "no differentiation on the basis of race," but contemporaneous evidence suggests that "[B]lack residents bore the brunt of disarmament."²⁷⁰ In one instance, soldiers deployed to quell violence in Omaha, Nebraska, detained and

260. *Id.* at 113.

261. See Nicholas J. Johnson, *Firearms and Protest: Lessons from the Black Tradition of Arms*, 54 CONN. L. REV. 953, 959 n.36 (2022).

262. *Id.*

263. *Id.* at 961 n.65.

264. Dominic J. Capeci Jr. & Jack C. Knight, *Reckoning with Violence: W. E. B. Du Bois and the 1906 Atlanta Race Riot*, 62 J. S. HIST. 727, 740–41 (1996).

265. *Id.* at 741.

266. KRUGLER, *supra* note 248, at 206.

267. See *id.*

268. *Id.*

269. *Id.* at 206–07.

270. *Id.* at 160, 210.

disarmed twenty-five Black men despite protestations that the city's police commissioner had sworn them in as special police officers—assertions corroborated by the special police badges they wore.²⁷¹ In another instance, in Knoxville, Tennessee, military authorities claimed that soldiers tasked with searching Black passengers as they disembarked from trains confiscated more than 100 firearms.²⁷²

To a significant extent, discriminatory enforcement of gun laws is not unique to ad hoc emergency restrictions; rather, it has long been a systemic problem with respect to all public carry regulations.²⁷³ This includes selective enforcement of public carry regulations during times of acute violent crisis to undermine the ability of disfavored parties to defend themselves. During the 1894 Birmingham Mine Riot, for example, a Black labor agent was arrested for carrying a concealed handgun in public just days after unknown assailants had fired a shotgun into his home.²⁷⁴ During the 1919 race riots, Black residents in cities around the country engaged in numerous—and often successful—acts of self-defense.²⁷⁵ At the same time, laws requiring special authorization for public carry often enabled law enforcement to treat acts of self-defense—and even mere preparations to engage in armed self-defense if it became necessary—as serious criminal offenses.²⁷⁶ Victims of this broad enforcement included a Black Omaha taxi driver jailed for carrying a concealed weapon to defend himself during the height of that city's unrest²⁷⁷ and an Indiana Harbor cement truck driver who was disarmed and arrested after shooting his revolver at strikers who pelted him and his fellow employee with bricks.²⁷⁸ Of the fifty-two men charged with illegally carrying concealed weapons during the unrest that year in Washington, D.C., forty-six were Black.²⁷⁹ And during the Chicago riots, officers not only quickly released white men arrested for carrying concealed weapons during the unrest but also returned their confiscated firearms, commenting, “[Y]ou’ll probably need [these]”—treatment that would almost certainly would not have been given to non-

271. *Id.* at 160.

272. *Id.* at 141. While that claim was disputed and may have, indeed, been part of an attempt to wrongly characterize Black residents as the instigators of violence, the fact remains that no such searches for weapons appear to have been conducted against the city's white residents.

273. *See, e.g.*, Brief of the Black Attorneys of Legal Aid, The Bronx Defenders, Brooklyn Defender Services, et al. as Amici Curiae in Support of Petitioners, *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022) (No. 20-843), 2021 U.S. S. Ct. BRIEFS LEXIS 2581, at *9; Stephen P. Halbrook, *To Bear Arms for Self-Defense: A “Right of the People” or a Privilege of the Few? Part 2*, 21 *FEDERALIST SOC'Y REV.* 56, 56 (2020) (detailing gun control schemes in the Reconstruction Era South that were facially race-neutral but motivated by racial animus and had the intent and effect of limiting the right to keep and bear arms for non-white populations).

274. Alex Lichtenstein, *Racial Conflict and Racial Solidarity in the Alabama Coal Strike of 1894: New Evidence for the Gutman-Hill Debate*, 36 *LAB. HIST.* 63, 71 (1995).

275. *See generally* KRUGLER, *supra* note 248.

276. *See id.* at 157.

277. *Id.*

278. *Id.* at 184–85.

279. *Id.* at 225.

white individuals who were found in possession of firearms during that time.²⁸⁰

The prevalence of clearly discriminatory crisis-based gun restrictions in the historical record gives rise to an important question: Is mere consistency with historical practice enough for purposes of the *Bruen* test when the historical practices are themselves constitutionally illegitimate? When assessing the existence and parameters of any purported national tradition of crisis-based temporary gun regulations, what weight ought courts give to regulations motivated by racial animus and deployed primarily to infringe upon the rights of disfavored groups? At a minimum, reliance on these laws as evidence of a national tradition of firearms regulation is a precarious and problematic endeavor—and one upon which the Court has seemed, at least indirectly, to frown.²⁸¹

4. Curfews as De Facto Restraints on Public Carry

Another clear historical tradition of crisis-based restrictions that implicate the right to keep and bear arms in public is the imposition of emergency curfews. State and federal courts have routinely upheld the constitutionality of curfew regulations imposed to protect public welfare during times of rioting and general turmoil that threaten widespread violence, destruction of property, and loss of life.²⁸² This includes upholding curfews imposed on adults during times of violent civil disorder, insofar as those curfews are time-limited, nondiscriminatory, and reasonably related to a compelling government interest.²⁸³

Traditional curfew laws can certainly impact the ability of ordinary citizens to exercise their right to keep and bear arms, especially if the

280. *Id.* at 229–30.

281. *See, e.g.,* McDonald v. City of Chicago, 561 U.S. 742, 778–80 (2010) (acknowledging the Fourteenth Amendment’s antidiscriminatory purpose with respect to the right to keep and bear arms, even while rejecting respondents’ purely antidiscrimination theory); N.Y. State Rifle & Pistol Ass’n v. Bruen, 597 U.S. 1, 63 n.27 (2022) (noting, in a less than positive light, the reality of race-based discriminatory enforcement of concealed carry laws in the Reconstruction South); United States v. Rahimi, 602 U.S. 680, 723 (2024) (Kavanaugh, J., concurring) (explaining that the Equal Protection Clause “sought to reject the Nation’s history of racial discrimination, not to backdoor incorporate racially discriminatory and oppressive historical practices and laws into the Constitution”); *id.* at 774, 776 (Thomas, J., dissenting) (explaining, in agreement with the majority’s rejection of the Government’s contention that it may disarm any person it deems “irresponsible,” that the Government’s proffered historical analogues were racially discriminatory, and thus are “cautionary tales” rather than examples of the Government’s legitimate regulatory authority).

282. *See, e.g.,* United States v. Chalk, 441 F.2d 1277, 1283 (4th Cir. 1971); State v. Dobbins, 178 S.E.2d 449, 501 (N.C. 1971); *In re Juan C.*, 33 Cal. Rptr. 2d 919, 1100 (Cal. Ct. App. 1994); Larson v. City of Minneapolis, 568 F. Supp. 3d 997, 1012 (D. Minn. 2021).

283. *In re Juan C.*, 33 Cal. Rptr. 2d at 920, 922–24. A different California Superior Court had earlier reversed criminal convictions for three people charged with violating the curfew imposed in the city of Los Angeles, but not because the curfew was determined to be constitutionally void. Rather, the court agreed with the plaintiffs that, despite the curfew’s broad prohibitions, their “mere presence” on the street did not violate the administrative code under which they were charged, which required their acts to be of a nature imperiling the lives or property of others or preventing, hindering, or delaying the defense or protection of the city. *See* People v. Continola, 19 Cal. Rptr. 2d 225, 226–29 (Cal. App. Dep’t Super. Ct. 1993); Allen v. Robbins, 12 RACE RELS. L. REP. 35, 35–37 (S.D. Miss. 1966); Ruff v. Marshall, 438 F. Supp. 303, 305–06 (M.D. Ga. 1977).

curfew extends into normal business hours for area gun stores, thereby limiting the time frame for unarmed citizens to purchase a firearm for self-defense. At the same time, curfews impose a lesser burden on the right of self-defense because they do not prevent individuals from lawfully carrying in public during non-curfew hours. Nor do curfews on their own prohibit individuals who are exempted from the curfew's travel restrictions from otherwise exercising their right to armed self-defense in public during a time where a person's interest in self-defense is heightened.

5. Twentieth-Century Machine Gun Restrictions

As states began to enact their own restrictions on the civilian possession of machine guns in the early twentieth century, they sometimes expressly justified the restrictions on the premise that the criminal misuse of machine guns constituted an "emergency" to the "public peace, health, and safety."²⁸⁴ Despite these references to public health and states of emergency, the primary argument for the constitutionality of these prohibitions was not that they were necessary as temporary measures during a sudden public health crisis. Rather, when the Supreme Court upheld the constitutionality of convictions under the National Firearms Act (the federal framework that first imposed significant restrictions on the civilian possession of certain types of firearms, including machine guns), it did so using language that fits squarely within the Court's modern Second Amendment jurisprudence—namely, that machine guns are uniquely dangerous and unusual weapons that are not typically possessed by law-abiding citizens for lawful purposes.²⁸⁵ Therefore, these regulations fit within a historical tradition of similar restrictions on especially dangerous weapons.

Nonetheless, the debate over machine gun restrictions has very few implications for the debate over whether using gun violence as the basis for declaring public health emergencies, or the extent to which there exists any historical tradition of imposing additional temporary restrictions on public carry during a declared public health or safety crisis. Whatever *Bruen* may mean for the Second Amendment's protection of machine gun possession, it cannot mean that historical restrictions on the possession of machine guns may act as the "tradition" justifying modern temporary restrictions the public carrying of handguns. Even if the Court determines

284. See, e.g., Uniform Machine Gun Act, Act No. 80, §§ 1–14, 1935 Ark. Acts 171–75; An Act Relating to Machine Guns, 1933 Wash. Sess. Laws 335–36, ch. 64, §§ 1–5 (governing the manufacture, possession, and sale of machine guns and parts and punishment for respective violations).

285. Compare *United States v. Miller*, 307 U.S. 174, 175, 177–79, 182–83 (1939) (finding that, historically, men called for militia duty "were expected to appear bearing arms supplied by themselves and of the kind in common use at the time" and that it was "[c]ertainly . . . not within judicial notice that [a short-barreled shotgun] is any part of the ordinary military equipment or that its use could contribute to the common defense"), with *District of Columbia v. Heller*, 554 U.S. 570, 576, 627, 635 (2008) ("Miller said, as we have explained, that the sorts of weapons protected were those 'in common use at the time.' We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'"). See also *Staples v. United States*, 511 U.S. 600, 610–12 (1994) (describing guns that fall outside of the categories of weaponry at issue in *Miller* as those that "traditionally have been widely accepted as lawful possessions" by ordinary civilians).

that machine guns are not a type of arm protected by the Second Amendment and cloaks its reasoning in the language of some historical tradition of declaring public health and safety emergencies for dangerous and unusual weapons, this would render machine guns categorically distinct from handguns, which are a type of weapon commonly possessed by ordinary Americans for lawful purposes.

V. POTENTIAL MODERN ANALOGUES OF THE HISTORICAL “PUBLIC SAFETY CRISIS” FRAMING

The overview of examples of crisis-based gun regulation undertaken above is cursory and likely fails to account for every instance of crisis-based gun regulation throughout American history. It is, however, a useful starting point for a preliminary assessment of the potential scope of historical, crisis-based gun restrictions under *Bruen*’s historical-analogue test and provides an outline for what relevantly similar modern scenarios and restrictions might entail. In short, to whatever extent historical public safety crises may have been considered “extraordinary circumstances” justifying ad hoc emergency restrictions on the right to keep and bear arms, modern parallels to those events are few and far between. Moreover, in many cases it is far from certain how the historical burdens imposed during public safety crises operated in practice or what the equivalents of those mechanisms would be under modern circumstances. Even then, the potential modern utility of many historical crisis-based restrictions is muddled by the influence of obvious racial animosity that often resulted in an unconstitutionally discriminatory application of historical restrictions.

The “extraordinary circumstances” that historically gave rise to ad hoc emergency gun restrictions were (1) times of extraordinary violent civil unrest in which general emergency powers were in fact or reasonably could have been invoked; (2) spurred by actual insurrection, rebellion, or rioting; and (3) marked by widespread violence or the threat of violence, particularly violence involving the use of firearms. The search for relevantly similar modern equivalents to these historical scenarios appears, at first glance, most difficult with respect to extraordinary civil unrest spurred by actual insurrection or rebellion. The nation arguably has not experienced any additional periods of active, armed rebellion or insurrection truly analogous to these historical examples—particularly in terms of their widespread and prolonged nature—since the time period in which those examples occurred. The Whiskey Rebellion, the factional violence in the Kansas Territory between proslavery and free-state militias, and the Civil War were lengthy, large-scale conflicts, the “smallest” of which involved thousands of armed individuals engaged in open rebellion across four Pennsylvania counties over the course of several months.²⁸⁶

There are, nonetheless, several modern candidates that, under a generous and broad application of historical analogical reasoning, might

286. See generally COAKLEY, *supra* note 207, at chs. 2–4, 8.

plausibly constitute circumstances that are relevantly similar to those of historical analogues. Among those modern candidates are the 2016 occupation of the Malheur National Wildlife Refuge by armed elements of a citizen's militia group,²⁸⁷ the unlawful establishment of the Capitol Hill Autonomous Zone in Seattle by anti-police protestors in the summer of 2020,²⁸⁸ the weeks-long nightly targeting of the federal courthouse in Portland by Antifa members that same year,²⁸⁹ and the January 6, 2021, storming of the United States Capitol by supporters of Donald Trump during a joint session of Congress to count the Electoral College votes.²⁹⁰ These events all involved highly organized group efforts to forcibly disrupt or undermine government authority, included underlying actions that were certainly criminal in nature, and have been characterized by some as insurrectionary.²⁹¹ In each case, the government did invoke or reasonably could have invoked its general emergency powers in a variety of ways.²⁹²

287. Carissa Wolf, Peter Holley, & Wesley Lowery, *Armed Men, Led by Bundy Brothers, Take Over Federal Building in Rural Oregon*, WASH. POST (Jan. 3, 2016, 7:50 PM), <https://www.washingtonpost.com/news/post-nation/wp/2016/01/03/armed-militia-bundy-brothers-take-over-federal-building-in-rural-oregon/>.

288. SEATTLE OFF. OF INSPECTOR GEN., SENTINEL EVENT REVIEW OF POLICE RESPONSE TO 2020 PROTESTS IN SEATTLE, WAVE 3: JUNE 8–JULY 1, 2020, at 57 (2022) [hereinafter SENTINEL EVENT], <https://www.seattle.gov/documents/Departments/OIG/Sentinel%20Event%20Review/Wave3ReportFinal.pdf>; Andy Ngo, *My Terrifying Five-Day Stay Inside Seattle's Cop-Free CHAZ*, N.Y. POST, <https://nypost.com/2020/06/20/my-terrifying-5-day-stay-inside-seattles-autonomous-zone/> (June 22, 2022, 10:42 AM); Becca Savransky, *How CHAZ Became CHOP: Seattle's Police-Free Zone Explained*, SEATTLE POST-INTELLIGENCER, <https://www.seattlepi.com/seattlenews/article/What-is-CHOP-the-zone-in-Seattle-formed-by-15341281.php> (June 22, 2020, 6:43AM).

289. DEP'T OF HOMELAND SEC., OFF. OF INSPECTOR GEN., OIG-21-31, DHS HAD AUTHORITY TO DEPLOY FEDERAL LAW ENFORCEMENT OFFICERS TO PROTECT FEDERAL FACILITIES IN PORTLAND, OREGON, BUT SHOULD ENSURE BETTER PLANNING AND EXECUTION IN FUTURE CROSS-COMPONENT ACTIVITIES 3 (2021), <https://www.oig.dhs.gov/sites/default/files/assets/2021-04/OIG-21-31-Mar21.pdf>.

290. See BENNIE G. THOMPSON ET AL., H.R., NO. 117-663, FINAL REPORT OF THE SELECT COMMITTEE TO INVESTIGATE THE JANUARY 6TH ATTACK ON THE UNITED STATES CAPITOL 1–2 (2022), <https://www.govinfo.gov/content/pkg/GPO-J6-REPORT/pdf/GPO-J6-REPORT.pdf>.

291. See, e.g., Courtney Sherwood & Kirk Johnson, *Bundy Brothers Acquitted in Takeover of Oregon Wildlife Refuge*, N.Y. TIMES (Oct. 27, 2016), <https://www.nytimes.com/2016/10/28/us/bundy-brothers-acquitted-in-takeover-of-oregon-wildlife-refuge.html> (characterizing the armed standoff at the Malheur National Wildlife Refuge as an “insurrection” that fizzled); NO MAN’S LAND (Old West LLC 2017), <https://www.pbs.org/independentlens/documentaries/no-mans-land/> (describing a documentary on the Malheur National Wildlife Refuge takeover as providing “remarkable access to the inner workings of the insurrection”); Rowan Scarborough, *Jan. 6 Democrats Praised Portland, White House Insurrectionists*, WASH. TIMES (June 17, 2022), <https://www.washingtontimes.com/news/2022/jun/17/jan-6-democrats-praised-portland-white-house-insur/> (characterizing rioters’ months-long nightly assault on Portland’s federal courthouse as a “left-wing insurrection”); Press Release, Ted Cruz: U.S. Senator for Texas, Sen. Cruz in Wall Street Journal: A Way to Take Back Portland (July 22, 2020), <https://www.cruz.senate.gov/newsroom/press-releases/sen-cruz-in-wall-street-journal-a-way-to-take-back-portland> (referring to assaults on the Portland federal courthouse and the establishment of the Seattle autonomous zone in the context of a bill introduced to hold local leaders accountable for “[i]nsurrection and [m]ayhem”); Mica Soellner, *Defund the Police, CHOP Insurrection Aftermath Still Vex Seattle: ‘Crime Has Increased Everywhere,’* WASH. TIMES (Aug. 12, 2022), <https://www.washingtontimes.com/news/2022/aug/12/defund-police-chop-insurrection-aftermath-still-ve/>.

292. At 2:10 p.m. on January 6, 2021, as rioters began breaching final external security barriers, the Sergeants at Arms for both the House and Senate issued an emergency declaration on behalf of the

None of these potential modern analogues, however, are perfectly analogous to the historical examples in which crisis-based ad hoc gun restrictions were imposed, and they likely would not be considered “relevantly similar” under more restrictive applications of the *Bruen* test. With some limited exceptions stemming from the January 6th mob attack, these events did not result in federal charges for insurrection, sedition, or seditious conspiracy, and many participants have argued that these were mere demonstrations and not acts of open rebellion or insurrection.²⁹³ Participants’ actions overwhelmed the officers present, but the loss of government control was, compared to the historical analogues, quite time-limited and confined to a geographically small area.²⁹⁴ None of the participants’

Capitol Police Board, consistent with 2 U.S.C. § 1974, and requested National Guard assistance. S. STAFF REPORT, EXAMINING THE U.S. CAPITOL ATTACK: A REVIEW OF THE SECURITY, PLANNING, AND RESPONSE FAILURES ON JANUARY 6, at 24 (2021), <https://www.rules.senate.gov/imo/media/doc/Jan%206%20HSGAC%20Rules%20Report.pdf>. Steven Sund, former Chief of Police for the United States Capitol Police, later testified before Congress that days before the violence, he requested that the Capitol Police Board preemptively make an emergency declaration and authorize National Guard assistance, but that this request was denied over concerns about the “optics” of deploying the National Guard. *Id.* at 65–66. On the evening of May 30, 2020, following a second day of widespread unrest in the city, Seattle Mayor Jenny Durkan proclaimed a civil emergency and issued an executive order imposing a 5 p.m. citywide curfew and prohibiting the sale or possession of weapons within a “restricted area” comprising the entire downtown area. City of Seattle Civ. Emergency Ord. Establishing Prohibited Items (May 30, 2020), https://durkan.seattle.gov/wp-content/uploads/sites/9/2020/05/0898_001.pdf. She did not terminate that order until June 17, 2020. City of Seattle Mayoral Proclamation Terminating Civil Emergency (June 17, 2020), <https://durkan.seattle.gov/wp-content/uploads/sites/9/2020/06/Proclamation-Terminating-the-Civil-Emergency-due-to-Protesting.pdf>. On June 30, 2020, she issued an executive order directing various city agencies to retake control of the occupied neighborhood and arrest any individual who refused to vacate or disperse. City of Seattle Exec. Order No. 2020-08 (June 30, 2020), https://durkan.seattle.gov/wp-content/uploads/sites/9/2020/07/Executive-Order-2020-08_Directive-City-Depts_Cal-Anderson-Park-Area.pdf. Although this executive order did not state the legal authority by which the mayor acted, it is shrouded in language consistent with an appeal to the mayor’s emergency powers to address unlawful assemblies and “other disturbance[s]” that require “extraordinary measures to . . . protect the public peace, safety, and welfare, and alleviate damage, loss, hardship, or suffering.” *Cf.* SEATTLE MUN. CODE § 10.02.010(A) (2024). Both the Malheur National Wildlife Refuge occupation and the nightly assaults on Portland’s Mark O. Hatfield federal courthouse occurred in Oregon, which authorizes the Governor to declare a state of emergency due to “civil disturbance, riot, sabotage, [and] acts of terrorism,” as well as to activate the National Guard “to such extent and in such a manner as the Governor may deem necessary” to quell any “insurrection, riot, [or] breach of the peace.” *See* OR. REV. STAT. §§ 399.065(1), 401.025(1)(a), 401.165 (2024).

293. The leaders of the Malheur National Wildlife Refuge occupation were charged with conspiring to impede federal workers from doing their jobs and were ultimately acquitted. Hal Bernton, *Jury Acquits Leaders of Malheur Wildlife-Refuge Standoff*, SEATTLE TIMES, <https://www.seattletimes.com/seattle-news/law-justice/verdict-near-in-malheur-wildlife-refuge-standoff-trial/> (Oct. 28, 2016, 10:30 AM). Those arrested for the nightly assaults on the Portland federal courthouse were charged all manner of lesser federal crimes, from trespassing on federal property to assaulting federal officers to failing to comply with a lawful order. Press Release, U.S. Attorney’s Office: District of Oregon, 18 Arrested, Facing Federal Charges After Weeknight Protests at Federal Courthouse in Portland (July 24, 2020), <https://www.justice.gov/usao-or/pr/18-arrested-facing-federal-charges-after-weeknight-protests-federal-courthouse-portland>. When Seattle police finally dispersed CHOP protestors, thirty-one were arrested for assault, failure to disperse, obstruction, and unlawful weapon possession. Emily Shapiro, *Seattle Police Clear CHOP Zone, Make Arrests After Mayor’s Executive Order*, ABC NEWS (July 1, 2020, 10:42 AM), <https://abcnews.go.com/US/seattle-police-clear-chop-zone-make-arrests-mayors/story?id=71551625>.

294. In terms of uninterrupted action, the longest lasting of these events was the Malheur National Wildlife refuge takeover, which ended just over five weeks after participants first occupied the building. Conrad Wilson & John Rosman, *Malheur National Wildlife Refuge Occupation Ends*, OR.

actions involved large scale armed conflict. Indeed, only the Malheur National Wildlife Refuge occupation involved the significant use or threatened use of firearms to advance the participants' cause.²⁹⁵ Moreover, both the January 6th Capitol riot and the Malheur National Wildlife Refuge occupation occurred in locations where the civilian possession of firearms is already prohibited by state and federal law.²⁹⁶

Modern analogues for historical riot-based restrictions are, at first glance, more prevalent. In recent decades, numerous cities have experienced outbreaks of sudden, anarchic mob violence that overwhelmed local governments and required days of large-scale, atypical law enforcement efforts to regain a semblance of order. Recently, bouts of rioting have been precipitated by high-profile and controversial instances of police actions resulting in the death of Black citizens—most notably the death of George Floyd in the summer of 2020, after which numerous cities around the country experienced large demonstrations that at times devolved into varying degrees of violence and destruction.²⁹⁷ In several cities—including Chicago, Los Angeles, Seattle, and Minneapolis²⁹⁸—the situations were at

PUB. BROAD. (Feb. 11, 2016, 9:00 AM), <https://www.opb.org/news/series/burns-oregon-standoff-bundy-militia-news-updates/malheur-occupation-ends/>. Some may argue that the nightly clashes at the Portland federal courthouse during the summer and fall of 2020 formed one continuous action lasting over 120 days. However, the “insurrectionary” and violent nature of these clashes ebbed and flowed considerably throughout that time and occurred almost exclusively at night.

295. The January 6, 2021, storming of the Capitol involved some individuals who kept stashes of firearms in Virginia, but the majority of participants appeared to have been unarmed while actually on Capitol grounds—where firearms are prohibited even for concealed carry permit holders and members of Congress. In fact, earlier that day, police officers screening individuals for admission into the secure area for President Trump's speech confiscated hundreds of other weapons, but not a single firearm. THOMPSON ET AL., *supra* note 290, at 68. None of the injuries inflicted by participants included a gunshot wound. Meanwhile, organizers of the Capitol Hill Autonomous Zone in Seattle clearly maintained some level of armed participation and the zone experienced surges in crime rates. SENTINEL EVENT, *supra* note 288, at 22–23, 58; Eric L. Piza & Nathan Connealy, *The Effect of the Seattle Police-Free CHOP Zone on Crime: A Microsynthetic Control Evaluation*, 21 CRIMINOLOGY & PUB. POL'Y 35, 41, 52 (2022). But the protestors on the whole refrained from using or threatening to use those firearms against law enforcement as it attempted to regain control of the area, and generally maintained that the possession of firearms was to ensure their own security. SENTINEL EVENT, *supra* note 288, at 23.

296. Federal law generally prohibits the possession of weapons inside of federal facilities, and specifically prohibits carrying weapons or having them “readily accessible” on U.S. Capitol grounds or in any building forming part of the Capitol complex. 18 U.S.C. § 930(a)–(d); 40 U.S.C. § 5104(e)(1). In addition to imposing significant burdens and restrictions on public carry, the District of Columbia additionally prohibits even concealed carry permit holders from possessing firearms in Capitol buildings or on Capitol grounds. D.C. CODE § 7-2509.07(a)(10) (2024).

297. According to one analysis of more than 10,600 demonstrations around the country between May 24, 2020, and August 22, 2020, “[f]ewer than 570—or approximately 5%—involve demonstrators engaging in violence. Well over 80% of all demonstrations [during that time frame] are connected to the Black Lives Matter movement or the COVID-19 pandemic.” Roudabeh Kishi & Sam Jones, *Demonstrations and Political Violence in America: New Data for Summer 2020*, THE ARMED CONFLICT LOCATION & EVENT DATA PROJECT (Sept. 3, 2020), <https://acleddata.com/2020/09/03/demonstrations-political-violence-in-america-new-data-for-summer-2020/>; see also Victoria Bekiempis et al., *'Absolute Chaos' in Minneapolis as Protests Grow Across U.S.*, N.Y. TIMES, <https://www.nytimes.com/2020/05/29/us/floyd-protests-usa.html> (May 24, 2021).

298. See, e.g., Christy Gutowski, Gary Marx, Todd Lighty, & William Lee, *Chicago's 2020 Unrest: A Tribune Investigation Documents the Scope of the Damage and Its Lingering Impact on*

least plausibly analogous in terms of how local governments experienced a widespread loss of control and how the outbreaks were marked by significant violence and destruction. But unlike the historical analogues, the acts of rioting overwhelmingly did not involve large groups of rioters who sought to quickly obtain firearms to advance their criminal behavior or who carried firearms during the disorder for purposes of either engaging law enforcement in gunfights or targeting victims for rape, homicide, or assault.²⁹⁹ Many of the dozens of deaths reported to be associated with the riots were later determined to be entirely unrelated.³⁰⁰ And of those deaths determined to be related to the riots, some involved the use of firearms in lawful self-defense by victims of the violence—to say nothing of the numerous documented instances in which armed victims successfully repelled violent attacks without having to shoot their assailants.³⁰¹

The 1992 Los Angeles Riots stand out as perhaps the most analogous example of a modern city lost to mob violence that specifically included the widespread use of firearms (by perpetrators of violence as well as by

Neighborhoods, Businesses, CHI. TRIB., <https://www.chicagotribune.com/2021/06/02/chicagos-2020-unrest-a-tribune-investigation-documents-the-scope-of-the-damage-and-its-lingering-impact-on-neighborhoods-businesses/> (June 14, 2024, 6:47 PM); CITY OF CHI., OFF. OF INSPECTOR GEN., OIG FILE #20-0754, REPORT ON CHICAGO'S RESPONSE TO GEORGE FLOYD PROTESTS AND UNREST 7–9 (2021), <https://igchicago.org/wp-content/uploads/2023/08/OIG-Report-on-Chicagos-Response-to-George-Floyd-Protests-and-Unrest.pdf>; Alejandra Reyes-Velarde, Brittny Mejia, Joseph Serna, Ruben Vives, Melissa Etehad, Matthew Ormseth, & Hailey Branson-Potts, *Looting Hits Long Beach, Santa Monica as Countywide Curfew Goes Into Effect*, L.A. TIMES, <https://www.latimes.com/california/story/2020-05-31/looting-vandalism-leaves-downtown-l-a-stunned> (June 1, 2020, 12:26 AM); GERALD CHALEFF, AN INDEPENDENT EXAMINATION OF THE LOS ANGELES POLICE DEPARTMENT 2020 PROTEST RESPONSE 57 (2021), <https://int.nyt.com/data/documenttools/lapd-george-floyd-protests-report/ec6b2bf2056f6727/full.pdf>; Jon Jackson, *More Than 1,500 Minnesota Businesses Damaged in George Floyd Protests, Expect to Take Years to Rebuild*, NEWSWEEK (June 1, 2021, 3:18 PM), <https://www.newsweek.com/businesses-year-after-floyd-1596610>; *Violent Protests and Looting in Seattle Saturday Leads to at Least 55 Arrests*, KING 5 SEATTLE, <https://www.king5.com/article/news/local/seattle/seattle-protest-death-of-george-floyd/281-bba2f836-c4a2-48e1-b5df-189527e08a7d> (May 31, 2020, 7:04 PM); Emma Colton, *Seattle to Pay Millions to Settle Lawsuit Over Damages from George Floyd-Inspired 'Autonomous Zone' Protests*, FOX BUS. (Feb. 25, 2023, 8:00 AM), <https://www.foxbusiness.com/lifestyle/seattle-to-pay-millions-to-settle-lawsuit-over-damages-from-george-floyd-inspired-autonomous-zone-protests>.

299. There were, of course, isolated incidents of gun violence directly related to the unrest. See Bekiempis et al., *supra* note 297. In one demonstration that ended in gun violence, a participant who was openly open carrying firearm received well-documented criticisms and pleas to disarm from other participants, but his being armed appears to have been an anomaly and not the norm. See Ricardo Torres-Cortez, *The Last Minutes of Protestor Jorge Gomez's Life*, LAS VEGAS SUN (June 7, 2020, 2:00 AM), <https://lasvegassun.com/news/2020/jun/07/the-last-minutes-of-jorge-gomezs-life/>.

300. Lois Beckett, *At Least 25 Americans Were Killed During Protests and Political Unrest in 2020*, THE GUARDIAN (Oct. 31, 2020), <https://www.theguardian.com/world/2020/oct/31/americans-killed-protests-political-unrest-acled>; Philip Bump, *Few of the Deaths Linked to Recent Protests Are Known to Have Been Caused by Demonstrators*, WASH. POST (Aug. 26, 2020, 10:00 PM), <https://www.washingtonpost.com/politics/2020/08/26/almost-none-deaths-linked-recent-protests-are-known-have-been-committed-by-protesters/>.

301. Libor Jany, *Prosecutors: No Charges in Pawnshop Killing During George Floyd Unrest*, STAR TRIBUNE (Dec. 14, 2020, 7:50 PM), <https://www.startribune.com/prosecutors-no-charges-in-pawnshop-killing-during-george-floyd-unrest/573391381/>; David E. Bernstein, *The Right to Armed Self-Defense in Light of Law Enforcement Abdication*, 19 GEO. J.L. & PUB. POL'Y 177, 202–08 (2021) (summarizing dozens of instances of armed self-defense in public places during the summer unrest of 2020).

those defending their lives and livelihoods against it).³⁰² Over five days of rioting that devastated large swaths of the city, thirty-six people died in riot-related homicides, and another ten were shot to death by police officers.³⁰³ Yet, as with the historical crises surveyed above, the Los Angeles Riots were also unique for the prevalence of verifiable incidents of armed self-defense by victims despite the implementation of overnight curfews and the incredibly restrictive nature of the state's existing gun laws.³⁰⁴

Even in these rare, extraordinary scenarios where violent civil unrest might historically have justified ad hoc restrictions on the right to keep and bear arms, it is not clear whether this framework would meaningfully expand the capacity of modern governments to restore order beyond that already provided to them by traditional emergency powers. Indeed, the most useful interpretation of these historical analogues may be that they merely inform the limits of existing emergency police powers with respect to crisis-based restrictions on the right to keep and bear arms rather than necessarily expanding them. In that case, however, for states purporting to authorize broad emergency powers under vaguely defined circumstances, the historical tradition of crisis-based, ad hoc gun regulations could act to *limit* the government's ability to restrict Second Amendment rights during public safety emergencies. Consider, for example, Hawaii's emergency powers statute, which authorizes the governor to declare the existence of a state of emergency whenever the governor "finds that an emergency or a disaster has occurred or that there is imminent danger or threat of an emergency or a disaster in any portion of the State."³⁰⁵ Not only is the governor "the sole judge of the existence of the danger, threat, or circumstances giving rise" to that declaration but the state of emergency may last for up to sixty days without any apparent recourse by the legislature, unless the governor rescinds the proclamation.³⁰⁶ And through the duration of that emergency, the governor may suspend any law or regulation that impedes expeditious and efficient emergency responses.³⁰⁷ In this sense, the general themes of historically permissible crisis-based gun restrictions would likely impose limitations on these emergency powers that go beyond the limitations specified in state statute.

302. See David Freed, *Under Fire: Guns in Los Angeles County: Proliferation of Guns May Be Bloody Legacy of Riots*, L.A. TIMES (May 17, 1992, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1992-05-17-mn-415-story.html>. See generally PAULA YOO, *RISING FROM THE ASHES: LOS ANGELES, 1992. EDWARD JAE SONG LEE, LATASHA HARLINS, RODNEY KING, AND A CITY ON FIRE* (2024).

303. Los Angeles Times Staff, *Deaths During the L.A. Riots*, L.A. TIMES (Apr. 25, 2012), <https://spreadsheets.latimes.com/la-riots-deaths/>.

304. At the time of the riots in 1992, California prohibited all manner of open carry, utilized a restrictive "may-issue" framework for concealed carry permits that in practice made it nearly impossible for ordinary L.A. residents to obtain that permit, and required a fifteen-day waiting period on all handgun purchases. See Cherney, Morral, Schell, Smucker, & Hoch, *supra* note 13.

305. HAW. REV. STAT. § 127A-14(a) (2024).

306. *Id.* §§ 127A-14(c)–(d).

307. *Id.* § 127A-13(a)(3).

Finally, applications of historical analogical reasoning under an appeal to this limited, though plausible, public safety crisis framing would not meaningfully strengthen Governor Grisham's legal arguments in defense of her and her Secretary of Health's crisis-based gun restrictions. Even if the Governor's claims about the scope of violent crime in Albuquerque and Bernalillo County are taken at face value, the circumstances are not analogous to historical examples of widespread rioting or insurrection marked by the significant loss of government control and a near cessation of law and order.

CONCLUSION

Governor Grisham's and Secretary Allen's attempt to supersede the right to keep and bear arms using emergency public health powers comes from a long history of gun control advocates attempting to shroud the national conversation about gun violence in the language of epidemiology instead of criminal justice. It is unique insofar as it attempts, for the first time, to clearly use the public health emergency framing as a *legal* justification for gun control, as opposed to a mere public relations or academic model to build a basis of public support. This attempted legal justification, however, was undermined by the questionable authority on which Governor Grisham and Secretary Allen purported to issue the orders from the beginning and, in the end, abandoned any pretense of relying on the presence of a public health emergency to justify the orders.

Going forward, there may well be some utility to the "public health emergency" framing, but only insofar as a public health emergency is rendered synonymous with an acute public *safety* crisis that is on par with the rebellions and riots that historically justified the imposition of significant but time-limited emergency gun restrictions. Ordinary violent crimes are not a "public health emergency" because that term is limited to what is ordinarily deemed a widespread pathogen-caused disease, like an epidemic or pandemic, not the type of violent street crimes that, unfortunately, will continue to occur with regularity. We treat the former with medicine, and we respond to the latter with government law enforcement and by allowing private parties to arm themselves for self-defense. The precise scope of the *why* and *how* of crisis-based historical restrictions deserves additional study. But a cursory analysis concludes that any potential utility of a public safety emergency framing to justify generally applicable firearms restrictions would likely be undermined by the infrequency of public safety crises that are on par with the historical examples. To the extent that the national historical tradition of gun regulation might support significant crisis-based, ad hoc gun restrictions, it is on the condition of extraordinary events marked by extraordinary threats of violence. An appeal to public health emergencies is not—and by definition cannot be—the standard default argument for historically typical circumstances.