Supreme Court No. 102609-9
(COA No. 84490-3)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

HOWARD ROSS,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

PETITION FOR REVIEW

GREGROY C. LINK
Attorney for the Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711

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A. IDENTITY OF PETITIONER

Howard Ross asks this Court to accept review of the Court of Appeals' decision terminating review. RAP 13.3, RAP 13.4.

B. COURT OF APPEALS DECISION

Mr. Ross seeks review of the Court of Appeals decision dated November 6, 2023, which is attached as an appendix. In its decision, the Court of Appeals held that restricting firearms from those convicted of second-degree burglary is constitutional. App. 1.

C. ISSUES PRESENTED FOR REVIEW

Does a prior conviction for second-degree burglary provide a constitutional basis for depriving persons of their Second Amendment right to possess a firearm?

D. STATEMENT OF THE CASE

Based on a prior second-degree burglary conviction, the government charged Howard Ross with first-degree unlawful firearm possession for a pistol the police found on him during an arrest. CP 12. A jury found Mr. Ross guilty of the offense, from which he appealed. RP 75. The Court of Appeals held RCW 9.41.040(1)(a), which prohibited Mr. Ross' possession of the firearm found in his possession, was constitutional as applied. App. 1.[1]

[1] The United States Supreme Court has recently heard arguments on the question of whether Whether 18 U.S.C. 922(g)(8), which prohibits the possession of firearms by persons subject to domestic-violence restraining orders, violates the Second Amendment on its face. *United States v. Rahimi*, ___ U.S. ___, 143 S. Ct. 2688 (2023). Because no opinion has been issued in that case, this brief does not address how it might impact the restriction of firearms on non-violent ex-felons.

E. ARGUMENT

The Second Amendment prohibits restricting the right to possess a firearm based on a prior second-degree burglary conviction.

For a prohibition on the right to possess a firearm to be valid, it must be "consistent with the Nation's historical tradition of firearm regulation." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, ___ U.S. ___, ___, 142 S. Ct. 2111, 2130, 213 L. Ed. 2d 387 (2022). The government cannot demonstrate a historical basis for preventing persons convicted of second-degree burglary from possessing firearms, invalidating Mr. Ross' conviction.

Whether the Second Amendment allows the government to prosecute a person for unlawful possession of a firearm where the predicate conviction is for second-degree burglary warrants review by this Court. RAP 13.4(b). This issue is a significant question

of constitutional law and involves an issue of substantial public interest, which this Court should decide. *Id.*

a. There must be a historical tradition justifying the restriction of the right to possess a firearm.

The Court of Appeals rightly recognizes the Supreme Court's pre-*Bruen* decisions restricting the government's ability to prohibit firearm possession. App. 3-4. These decisions make clear that the Second Amendment protects "an individual right to keep and bear arms" for self-defense. *District of Columbia v. Heller*, 554 U.S. 570, 581, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008); *McDonald v. City of Chicago*, 561 U.S. 742, 749-50, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010).

To determine the scope of this right, the Supreme Court instructs that if the Constitution's plain text covers an individual's conduct, the Constitution "presumptively protects that conduct." *Bruen*, 142 S.

Ct. at 2126. Where the government seeks to restrict behavior beyond the text's plain meaning, it bears the burden of rebutting the presumption of legality. *Id.* at 2130. It must justify it by demonstrating consistency with the historical tradition of firearm regulation. *Id.* Only if the government shows consistency with the historical tradition of firearm regulation does the government establish that an individual's conduct falls "outside the Second Amendment's unqualified command." *Id.* (internal quotation marks omitted).

b. The government cannot show there is a historic tradition of prohibiting firearm possession because of a second-degree burglary conviction.

The Court of Appeals relies on language from *Bruen,* which states law-abiding citizens should not have their right to possess a firearm restricted. App. 5-6; *see also Bruen*, 142 S. Ct. at 2131. But like the Supreme Court, the Court of Appeals does not analyze

what this phrase means other than to assume it applies to persons with prior convictions. App. 8. The Court of Appeals' analysis is inconsistent with historical tradition. Indeed, only a limited number of offenses historically warranted restricting the right to possess a firearm, focused primarily on acts of treason.[2]

The Court of Appeals also relies on language from *Heller*, which declared certain firearm regulations "presumptively lawful," including "longstanding prohibitions on the possession of firearms by felons." App. 8 (citing *Heller*, 554 U.S. at 626-27, n.26). But *Heller* does not explain the presumptive lawfulness of such laws, promising to provide a "historical

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[2] *See e.g., Acts and Laws Passed by the Great and General Court of Assembly of Their Majesties Province of the Massachusetts-Bay* 18 (1692); *Acts and Laws of His Majesty's Province of New-Hampshire in New-England* 2 (1759); 2 *Laws of the Commonwealth of Massachusetts, from November 28, 1780 to February 28, 1807*, 652-53 (enacted Jan. 27, 1795) (1807).

justification" for such laws when a better opportunity arises. *Id.* at 635. And even though the Court of Appeals cites *McDonald*, it fails to elaborate on the historical basis for the regulations. 561 U.S. at 786. This Court should reject the Court of Appeals' analysis of *Heller* and *McDonald*.

Instead, this Court should examine whether there was a historical basis for restricting the firearm rights of persons convicted of second-degree burglary. To do this, this Court should recognize that the legislature defines second-degree burglary as a non-violent felony, which historical tradition would support. RCW 9.94A.030(33). The Court of Appeals discounts this definition, instead focusing on the legislature's determination that second-degree burglary is a serious offense. App. 9; *see also* RCW 9.41.010(33). But this Court should not lose sight of the

plain text of RCW 9.94A.030(33), where the legislature determined second-degree burglary is a non-violent offense. The legislature's classification of second-degree burglary as a non-violent offense is consistent with historical tradition.

Conducting an independent analysis of the history of firearm possession demonstrates that the founders did not intend for it to apply to low-level felonies like second-degree burglary, which conflicted with their view of the right to possess a firearm as broad, robust, and uniquely American. Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms,* 20 Wyo. L. Rev. 249, 286 (2020).[3]

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[3] *See, e.g.,* 1 William Blackstone, *Commentaries* 143-44 n.40 & n.41 (St. George Tucker ed., Lawbook Exchange, Ltd. 1996) (1803); James Madison, *Notes for Speech in Congress Supporting Amendments*, June 8, 1789, in The Origin of the Second Amendment 645

There is little evidence historical traditions support restricting the right of those with non-violent felonies like second-degree burglary from possessing a firearm. C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 Harv. J. L. & Pub. Pol'y 695, 708 (2009). In fact, there is little evidence that banning persons with convictions from possessing firearms did not occur until around World War I. *Id.*

Instead, the only laws that prohibited possessing or carrying arms restricted those possessing the firearms in an aggressive and terrifying manner. Greenlee, 20 Wyo. L. Rev. at 262. Other laws removed guns from those disloyal to the government. *Id.* at 263.

> "[T]hese revolutionary and founding-era gun regulations ... targeted particular groups for public safety reasons... Although

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(David Young ed., 1991); William Rawle, *A View of the Constitution of the United States of America* 126 (2nd ed. 1829); 3 Joseph Story, *Commentaries on the Constitution of the United States* 747 (1833).

> these Loyalists were neither criminals nor traitors, American legislators had determined that permitting these persons to keep and bear arms posed a potential danger."

Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms and Explosives, 700 F.3d 185, 200 (5th Cir. 2012). These laws restricted possession from those who presented a danger to the state, not those with non-violent felony convictions.

Samuel Adams stated that the Constitution should "be never construed … to prevent the people of the United States who are peaceable citizens, from keeping their own arms." Bernard Schwartz, *The Bill of Rights: A Documentary History* 675 (1971). At the time of the country's founding, "peaceable" meant "non-violent." Samuel Johnson's dictionary defined "peaceable" as "1. Free from war; free from tumult. 2. Quiet; undisturbed. 3. Not violent; not bloody. 4. Not

quarrelsome; not turbulent." Samuel Johnson, *A Dictionary of the English Language* (5th ed. 1773). Thomas Sheridan defined "peaceable" as "Free from war, free from tumult; quiet, undisturbed; not quarrelsome, not turbulent." Thomas Sheridan, *A Complete Dictionary of the English Language* 438 (2d ed. 1789). Noah Webster defined "peaceable" as "Not violent, bloody or unnatural." Noah Webster, *Peaceable, American Dictionary of the English Language* (1828).[4] *Heller* relies on these sources to define the Second Amendment, as should this Court.[5]

In fact, every arms prohibition before the enactment of the Constitution was based on perceived

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[4] http://webstersdictionary1828.com/Dictionary/peaceable

[5] For Johnson, *see Heller*, 554 U.S. at 581 ("arms"), 582 ("keep"), 584 ("bear"), 597 ("regulate") (2008). For Sheridan, *see id.* at 584 (defining "bear"). For Webster, *see id.* at 581 ("arms"), 582 ("keep"), 584 ("bear"), 595 ("militia").

dangerousness. *See* Rawle, at 126. Rawle explained that the right to arms "ought not ... be abused to the disturbance of the public peace. An assemblage of persons with arms, for an unlawful purpose, is an indictable offense, and even the carrying of arms abroad by an individual, attended with circumstances giving just reason to fear that he purposes to make an unlawful use of them, would be sufficient cause to require him to give surety of the peace." *Id.* There is no indication that anyone sought to expand firearm restrictions beyond those who created a "real danger to public injury." Greenlee, 20 Wyo. L. Rev. at 267.

Only in the twentieth century did legislatures begin to pass laws directly tied to convictions. In 1923, New Hampshire, California, and Nevada passed laws restricting ex-felons from possessing handguns. 1923 N.H. Laws 138, ch. 118 § 3; 1923 N.D. Laws 380, ch.

266 § 5; 1923 Ca. Laws 696, ch. 339 § 2; 1925 Nev. Laws 54, ch. 47 § 2. Oregon passed a law restricting machine gun possession. 1933 Or. Laws 488. Notably, none of these laws were as restrictive as present-day bans.

Rhode Island passed the only law that prohibited all firearms possession in 1927, but it only applied to persons who had committed a "crime of violence." 1927 R.I. Pub. Laws 256 § 1. Likewise, the federal ban was originally intended to keep firearms out of the hands of violent persons. Federal Firearms Act, ch. 850, § § 1(6), 2(f), 52 Stat. 1250, 1250-51 (1938). Broader restrictions only came later.

Bruen calls these restrictions into question. Restricting firearm possession by persons with violent felony convictions may have a basis in historical tradition, but restrictions for non-violent felonies do

not. As argued below, restrictions on persons without historical tradition are a proxy for racial restrictions and should not be used as a basis to uphold firearm restrictions. Adam Winkler, *Racist Gun Laws and the Second Amendment*, 135 Harv. L. Rev. F. 537, 537 (2022). This Court should interpret the restriction on persons with non-violent felony convictions according to historical tradition and hold that the founders did not intend for the mere conviction for a crime to be a valid basis for restricting firearm rights. As such, RCW 9.41.040's restriction on non-violent felonies is unconstitutional.

c. This Court's current framework is unconstitutional.

While the Court of Appeals did not address whether this Court's framework for determining Second Amendment protection is constitutional, this Court must.

Under its current test, this Court applies "intermediate scrutiny" to evaluate whether RCW 9.41.040(2)(a)(iv) violated the Second Amendment. *State v. Jorgenson*, 179 Wn.2d 145, 148, 312 P.3d 960 (2013). Applying intermediate scrutiny, this Court found the statute did not violate the Second Amendment because it was limited only to persons charged with serious crimes and was substantially related to an important governmental purpose. *Id.* at 162.

The U.S. Supreme Court rejected this intermediate scrutiny analysis in *Bruen*. "*Heller* and *McDonald* do not support applying means-end scrutiny in the Second Amendment context. Instead, the government must affirmatively prove that its firearms regulation is part of the historical tradition that

delimits the outer bounds of the right to keep and bear arms." *Bruen*, 142 S. Ct. at 2127.

At a minimum, this Court should accept review to reverse *Jorgenson*, which *Bruen* clearly abrogates.

d. Applying the historical tradition test reduces racial disparity.

The Court of Appeals noted that it would not address the issue of racial disparity because the legislature should address such issues. App. 9. This Court has rejected this approach, instead recognizing that "[t]he legal community must recognize that we all bear responsibility for this on-going injustice, and that we are capable of taking steps to address it, if only we have the courage and the will." Letter from Wash.

State Supreme Court to Members of Judiciary & Legal Cmty. at 2 (Wash. Jun. 4, 2020).[6]

"Race and racial bias continue to matter in ways that are not fair, that do not advance legitimate public safety objectives, that produce disparities in the criminal justice system, and that undermine public confidence in our legal system." Fred T. Korematsu Center for Law and Equality, *Race and the Criminal Justice System, Task Force 2.0: "Race and Washington's Criminal Justice System: 2021 Report to the Washington Supreme Court,"* 4 (2021). The unequal enforcement of firearm restrictions is such a place. Applying historical tradition can work to restore public confidence in the legal system and reduce the disparities this Court seeks to eliminate.

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[6]https://www.courts.wa.gov/content/publicUpload/Supreme% 20Court% 20News/Judiciary% 20Legal% 20Community% 20SIGNED% 20060420.pdf.

From their inception, laws restricting firearm possession were applied unequally to persons of color. Winkler, 135 Harv. L. Rev. F. at 537 (*citing* Clayton E. Cramer, *The Racist Roots of Gun Control,* Kan. J.L. & Pub. Pol'y, 17, 18, Winter 1995). Indeed, in *Dred Scott v. Sandford*, the chief justice argued that one of the reasons that Black people could not be citizens was that it "would give to persons of the negro race" the right "to keep and carry arms wherever they went." 60 U.S. 393, 417, 15 L. Ed. 691 (1857) (superseded by Constitutional Amendment (1868)).

These restrictions persisted. After the Civil War, the Black Codes made it a crime for a Black person to have a gun. Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 Geo. L.J. 309, 344 (1991). Even facially neutral laws like concealed weapon permits

were discriminatory, such as when the government denied Martin Luther King Jr. a gun permit after terrorists firebombed his home. Adam Winkler, *Gunfight: The Battle over the Right to Bear Arms in America* 235 (2011).

And while the "original understanding" of the Second Amendment defines its scope, looking to the nineteenth-century experience can explain why returning to the historical traditions of firearm restrictions can reduce racial disparity. Laws from this period focused on discriminatory bans on Black people. *See, e.g.,* 1804 Miss. Laws 90; 1804 Ind. Acts 108 § 4 (enslaved people); 1806 Md. Laws 44 (enslaved people); 1851 Ky. Acts 296 § 12 (freed persons); 1860-61 N.C. Sess. Laws 68 (freed persons); 1863 Del. Laws 332 (freed persons). Most other restrictions were based on transient persons, who would presumably have their

rights restored once they were no longer transient. *See, e.g., A Digest of the Statute Law of the State of Pennsylvania from the Year 1700 to 1894*, 541 (Frank F. Brightly ed., 12th ed. 1894). None of these laws suggest that expanding who can be restricted from possessing a firearm beyond dangerous persons has resulted in a less discriminatory system.

Even when the restrictions are race-neutral, they disparately affect Black persons like Mr. Ross. In their amicus brief in *Bruen*, New York public defenders analyzed their caseloads and confirmed that "virtually all" of their clients charged with firearm offenses were Black or Hispanic. Brief of the Black Attorneys of Legal Aid Society, et al. as Amici Curiae, *New York State Rifle and Pistol Association, Inc. vs. Bruen*, 142 S. Ct. 2111 (2022), 2021 WL 4173477 at 5. For their clients, the consequences of the prosecution of firearm

possession was "brutal." *Id.* It had resulted in harassment by the police, invasions of their homes, and forcible removal to dirty and dangerous jails, all of which deprived their clients of "their jobs, children, livelihoods, and ability to live in this country." *Id.*

Much of the scholastic justification for restricting non-violent ex-felons from possessing firearms is based on the racist restrictions that prohibited Black, indigenous, and enslaved persons from possessing firearms. Winkler, 135 Harv. L. Rev. F. at 540. Being mindful of these historical traditions demonstrates why the government should be limited in how it restricts firearm possession. Clearly, there is no justification for finding persons of color "dangerous," nor is there a basis for restricting firearm possession based on race or ethnicity.

The Court of Appeals' analysis that law-abiding citizens are those without criminal history has a basis in bias and discrimination. Erin Kelly, *Racism & Felony Disenfranchisement: An Intertwined Criminal History*, Brennan Center for Justice, 3 (May 9, 2017).[7] Characterizing ex-felons as not law-abiding citizens makes the improper assumption that persons cannot reform. Indeed, felony disenfranchisement corresponds to the same time when Black men were given the right to vote. *Id.* This Court should clarify that this assumption is improper and that having a criminal record does not mean a person cannot be law-abiding. Separating these two concepts promotes racial justice.

Strictly limiting when the government can deprive a person of their firearm rights to those who

[7] https://www.brennancenter.org/our-work/research-reports/racism-felony-disenfranchisement-intertwined-history

are demonstrably dangerous can achieve the goals of the Second Amendment and work to reduce racial disparity. Because persons with non-violent felony convictions like Mr. Ross do not fall into a historical category other than race, this Court should hold that restricting his right to possess a firearm was unconstitutional.

F. CONCLUSION

There is both a "lack of distinctly similar historical regulation addressing the problem" and evidence that "earlier generations addressed" non-violent convictions "through materially different means." *Bruen*, 142 S. Ct. at 2131. This Court should accept review of whether RCW 9.41.040's restrictions on non-violent ex-felons are unconstitutional. RAP 13.4 (b).

This petition containss 3,050 words and complies with RAP 18.7.

DATED this 4th day of December 2023.

Gregory C. Link – 25228
Attorney for the Appellant
Washington Appellate Project - 91052
greg@washapp.org

APPENDIX

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Court of Appeals Opinion..... APP 1

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. HOWARD LEE ROSS, Appellant.	No. 84490-3-I DIVISION ONE PUBLISHED OPINION

MANN, J. — RCW 9.41.040(1) makes it a class B felony for a person previously convicted of a serious offense to possess a firearm. Howard Ross was convicted of first degree unlawful firearm possession under RCW 9.41.040(1) based on a prior conviction for second degree burglary—a defined serious offense. Ross appeals and argues that under the Second Amendment to the U.S. Constitution and New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. ___, 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022), RCW 9.41.040 is unconstitutional as applied. We disagree and affirm.

I

Ross was convicted by a jury of unlawful possession of a firearm in the first degree. A person "is guilty of the crime of unlawful possession of a firearm in the first

degree, if the person owns, accesses, has in the person's custody, control or possession, or receives any firearm after having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any serious offense." RCW 9.41.040(1)(a). Ross's conviction was based on his previous 2010 conviction for burglary in the second degree.

Ross appeals.

II

Ross argues that, as applied to him, RCW 9.41.040(1) is unconstitutional because the government cannot justify restricting the possession of firearms for those with nonviolent felony convictions. We disagree.

We review constitutional challenges de novo. City of Seattle v. Evans, 184 Wn.2d 856, 861-62, 366 P.3d 906 (2015). "We presume that statutes are constitutional and place 'the burden to show unconstitutionality . . . on the challenger.'" Evans, 184 Wn.2d at 861-62 (quoting In re Estate of Hambleton, 181 Wn.2d 802, 817, 335 P.3d 398 (2014)). An as-applied challenge to a statute's constitutionality requires examination of the statute in the specific circumstances of the case. See Fields v. Dep't of Early Learning, 193 Wn.2d 36, 46, 434 P.3d 999 (2019); see also City of Redmond v. Moore, 151 Wn.2d 664, 668-69, 91 P.3d 875 (2004) (as-applied challenges are "characterized by a party's allegation that application of the statute in the specific context of the party's actions or intended actions is unconstitutional"). Holding a statute unconstitutional as-applied does not invalidate the statute, but prohibits its application in that specific context and future similar contexts. Moore, 151 Wn.2d at 669.

A

The Second Amendment to the U.S. Constitution provides that "[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." U.S. CONST. amend. II.[1]

In District of Columbia v. Heller, 554 U.S. 570, 573, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008), the Supreme Court considered whether the District of Columbia's ban on an individual's right to possess handguns, and requirement that firearms in the home be kept nonfunctional, violated the Second Amendment. After analyzing the language and history of the Second Amendment, the Court held "that the Second Amendment conferred an individual right to keep and bear arms." Heller, 554 U.S. at 595. Accordingly, the District's "ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." 554 U.S. at 635.

The Court recognized, however, that "the right secured by the Second Amendment is not unlimited." Heller, 554 U.S. at 626. The Court identified several longstanding prohibitions, including possession by felons:

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

[1] While Ross does not cite the Washington constitution, we note that it provides independent individual protection of the right to bear arms, "the right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired." WASH. CONST. art. I, § 24.

Heller, 554 U.S. at 626-27.

Consistent with its holding and recognition of longstanding limitations, the Court required the District to permit Heller to register his handgun and issue him a license to carry it in the home, assuming that he was "not disqualified from the exercise of Second Amendment rights." Heller, 554 U.S. at 635.

Two years later in McDonald v. City of Chicago, Ill., 561 U.S. 741, 130 S. Ct. 3030, 177 L. Ed. 2d 894 (2010), the Supreme Court addressed Chicago's similar ban on handguns under the Second and Fourteenth Amendments. The Court concluded "that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in Heller." McDonald, 561 U.S. at 791. In doing so, the Supreme Court again emphasized that the Second Amendment had limits, including prohibiting felons from possession:

> We made it clear in Heller that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill,' 'laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.' We repeat those assurances here.

McDonald, 561 U.S. at 786 (quoting Heller, 554 U.S. at 626-27).

Most recently in Bruen, the Supreme Court considered and struck down New York's regulatory licensing program that required applicants to prove that they had "proper cause" to carry a handgun in public. 142 S. Ct. at 2122. The Court held:

> We recognized that the Second and Fourteenth Amendments protect the right of an ordinary, law-abiding citizen to possess a handgun in the home for self-defense. In this case, petitioners and respondents agree that ordinary, law-abiding citizens have a similar right to carry handguns publicly for their self-defense. We too agree and now hold, consistent with Heller and McDonald, that the Second and Fourteenth Amendments

> protect an individual's right to carry a handgun for self-defense outside the home.

142 S. Ct. at 2122.

The Court contrasted New York's permissive "may issue" concealed carry licensing regime with "'shall issue' jurisdictions, where authorities must issue concealed-carry licenses whenever applicants satisfy certain threshold requirements, without granting licensing officials discretion to deny licenses based on a perceived lack of need or suitability." Bruen, 142 S. Ct. at 2123-24. The Court explained that "shall issue" regulations are not affected by the Court's decision because those are designed to ensure that those possessing firearms "are, in fact, law-abiding, responsible citizens." Bruen, 142 S. Ct. at 2138 n.9. It also explained that nothing in Bruen should be interpreted to call into question the constitutionality of 43 states' "shall issue" regimes. Bruen, 142 S. Ct. at 2138 n.9.

Relevant here, Bruen did not overrule, or cast doubt, on the Court's recognition in Heller and McDonald that the Second Amendment did not preclude prohibitions on felons possessing firearms. The six-Justice majority opinion fully embraced the earlier decisions in Heller and McDonald that the Second and Fourteenth Amendments protect the right of "ordinary, law-abiding citizens to possess a handgun in the home for self-defense." Bruen, 142 S. Ct. at 2122 (emphasis added). Indeed, at least 11 times the majority referenced the Second Amendment right of "law-abiding" citizens. Bruen, 142 S. Ct. at 2122, 2125, 2133, 2134, 2138, 2150, 2156. Of the six justices in the majority, three wrote or joined in concurring opinions clarifying the scope of their decision. Justice Alito emphasized that:

> Today's decision therefore holds that a State may not enforce a law, like New York's Sullivan Law, that effectively prevents its law-abiding residents from carrying a gun for [self-defense].
>
> That is all we decide. Our holding decides nothing about who may lawfully possess a firearm or the requirements that must be met to buy a gun. Nor does it decide anything about the kinds of weapons that people may possess. Nor have we disturbed anything that we said in Heller or McDonald . . . about restrictions that may be imposed on the possession or carrying of guns.

Bruen, 142 S. Ct. at 2157 (Alito, J., concurring).

Similarly, Justice Kavanaugh, joined by Chief Justice Roberts, confirmed the prohibitions recognized in Heller and McDonald:

> as Heller and McDonald established and the Court today again explains, the Second Amendment "is neither a regulatory straightjacket nor a regulatory blank check." Ante, at 2133. Properly interpreted, the Second Amendment allows a "variety" of gun regulations. Heller, 554 U.S. at 636. As Justice Scalia wrote in his opinion for the Court in Heller, and Justice Alito reiterated in relevant part in the principal opinion in McDonald:
>
> > Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. . . . [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Bruen, 142 S. Ct. at 2162 (Kavanaugh, J., concurring) (quoting Heller, 554 U.S. at 626-27 & n.26, McDonald, 561 U.S. at 786).[2]

Ross challenges RCW 9.41.040(1) which makes it illegal for a person convicted of a serious office to possess a firearm:

> (1)(a) A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, accesses, has in the person's custody, control, or possession, or receives any firearm after having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any serious offense.
>
> (b) Unlawful possession of a firearm in the first degree is a class B felony punishable according to chapter 9A.20 RCW.

We hold that consistent with Heller, McDonald, and Bruen, the Second Amendment does not bar the state from prohibiting the possession of firearms by felons as it has done in RCW 9.41.040(1). RCW 9.41.040(1) is facially constitutional.

B

Recognizing that historically "the government could prohibit persons charged with crimes like taking up arms against the country from possessing firearms," Ross argues that because his underlying crime of second degree burglary was nonviolent, we should find RCW 9.41.040(1) unconstitutional as applied. We disagree for two reasons.

First, Ross's attempt to distinguish violent and nonviolent felons is of his own construct. Neither Bruen nor Heller frame the analysis in terms of violent versus nonviolent felons. Instead, both held that the Second Amendment protects the individual right of "law-abiding, responsible citizens" to possess firearms. Bruen, 142 S.

[2] In the dissent Justice Breyer, joined by Justices Kagan and Sotomayor, explained that "[l]ike Justice Kavanaugh, I understand the Court's opinion today to cast no doubt on that aspect [prohibition on the possession of firearms by felons] of Heller's holding." Bruen, 142 S. Ct. at 2189.

Ct. at 2131, Heller, 554 U.S. at 635 (emphasis added). Again, the Bruen majority describes those who fall under the Second Amendment aegis as "law-abiding" citizens at least 11 times. The Court found that New York's licensing regime was unconstitutional because "it prevent[ed] law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms." Bruen, 142 S. Ct. at 2156 (emphasis added). Moreover, in setting forth the proper framework to assess constitutionality under the Second Amendment, the Court explained that courts should analyze how and why historically relevant regulations "burden a law-abiding citizen's right to armed self-defense." Bruen, 142 S. Ct. at 2133 (emphasis added).

Similarly, both Heller and McDonald specifically recognized the "longstanding prohibition on the possession of firearms by felons" as not violating the Second Amendment. Heller, 554 U.S. at 626; McDonald, 561 U.S. at 786. Neither opinion distinguished violent felons from nonviolent felons and Ross offers no authority in support of such a distinction.

A felon is "[s]omeone who has been convicted of a felony." BLACK'S LAW DICTIONARY 762 (11th ed. 2019). In Washington, a felony, under the unlawful possession of firearms statute, is defined as "any felony offense under the laws of this state or any federal or out-of-state offense comparable to a felony offense under the laws of this state." RCW 9.41.010(17). Burglary in the second degree is defined as a class B felony. RCW 9A.52.030(2). Thus, Ross was convicted of a felony and as such is not a "law-abiding" citizen.[3]

[3] Ross is, however, able to petition to have his firearm rights restored under RCW 9.41.041(2)-(4).

Second, the legislature has defined second degree burglary as a violent crime. The prohibition on possession of firearms under RCW 9.41.040(1)(a) applies to any person previously convicted of "any serious offense." A "serious offense" is defined by the same statute to include "[a]ny crime of violence." RCW 9.41.010(42)(a). And a "crime of violence" is defined to include burglary in the second degree. RCW 9.41.010(7)(a). When, as here, the language of the statute is unambiguous, we "must give effect to that plain meaning as an expression of legislative intent." Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). Ross offers no support for the proposition that the legislature did not intend to define burglary in the second degree as a serious offense and crime of violence.

Ross's as-applied challenge to RCW 9.41.040(1) fails.[4]

We affirm.

Mann, J.

WE CONCUR:

Birk, J.

Chung, J.

[4] Ross also makes a policy argument that limiting unlawful possession of a firearm to violent offenses can reduce racial disparity. Again, the legislature has made it unlawful for those convicted of "serious offenses" to possess firearms and has explicitly defined which crimes are "serious offenses." RCW 9.41.040(1), RCW 9.41.010(36). Policy arguments "are more properly addressed to the Legislature, not to the courts." Blomster v. Nordstrom, Inc., 103 Wn. App. 252, 258, 11 P.3d 883 (2000).

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☒ respondent Gavriel Jacobs, DPA
[gavriel.jacobs@kingcounty.gov]
[PAOAppellateUnitMail@kingcounty.gov]
King County Prosecutor's Office-Appellate Unit

☐ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Paralegal
Washington Appellate Project

Date: December 4, 2023

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