No. _____

In The
Supreme Court of the United States

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC.,

Petitioner,

v.

STEVEN C. MCCRAW, in his official capacity as Director of the Texas Department of Public Safety,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Second Amendment right to bear arms for self-defense in case of confrontation includes the right to bear arms in public.

2. Whether that right to bear arms extends to responsible, law-abiding 18-to-20-year-old adults.

3. Whether Texas's ban on responsible, law-abiding 18-to-20-year-old adults bearing handguns in public for self-defense violates the Second Amendment and the Equal Protection Clause.

PARTIES TO THE PROCEEDING

Petitioner, which was a plaintiff and an appellant below, is the National Rifle Association of America, Inc. Also appearing as plaintiffs and appellants below were Rebekah Jennings, Brennan Harmon, and Andrew Payne, all of whom turned 21 during the course of these proceedings and are thus no longer subject to the legal restrictions on Second Amendment rights that are challenged here.

Respondent, who was the defendant and appellee below, is Steven C. McCraw, in his official capacity as Director of the Texas Department of Public Safety.

CORPORATE DISCLOSURE STATEMENT

The National Rifle Association of America, Inc. has no parent corporation. No publicly held company owns 10% or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

The fundamental right to keep and bear arms is not "a second-class right." *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3044 (2010) (plurality). But this Nation's lower courts have allowed restrictions on Second Amendment rights that would be unimaginable in the context of any other enumerated constitutional right. This massive judicial resistance to implementing this Court's Second Amendment decisions is particularly acute in challenges to laws restricting the right to carry a firearm in public. A number of courts have held that the right to keep and bear arms does not extend beyond the home, while others have subjected restrictions on that right to a form of intermediate scrutiny that is heightened in theory but toothless in fact. The practical result under both approaches is the same: the fundamental right to defend oneself with a firearm is effectively limited to the home, and this Court's decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald* are effectively limited to their facts.

This case presents a prime example of this de facto rejection of *Heller* and *McDonald* by lower courts. The State of Texas has deemed an entire class of more than one million law-abiding adults aged 18 to 20 unsuitable for exercising their Second Amendment right to carry a handgun for self-defense in public. The court below condoned this categorical infringement by, among other things, construing the Second Amendment to be principally about self-defense in the home and employing an intermediate

scrutiny test indistinguishable from the "interest-balancing inquiry" that was championed by the *Heller* dissent, *see* 554 U.S. at 689-90 (Breyer, J., dissenting), but emphatically rejected by the Court itself, *see id*. at 634-35.

Some courts have been faithful to *Heller* and *McDonald*. Both the Seventh Circuit and the Supreme Court of Illinois, for example, struck down Illinois's ban on carrying firearms in public as flatly and categorically inconsistent with the Second Amendment. *See Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012); *People v. Aguilar*, No. 112116, ___ N.E.2d ___, 2013 IL 112116 (Ill. Sept. 12, 2013). As the Seventh Circuit recognized, this conclusion follows directly from this Court's holding "that the [Second Amendment] confers a right to *bear* arms for self-defense, which is as important outside the home as inside." *Moore*, 702 F.3d at 942 (emphasis added).

This Court should grant review in this case both to resolve the split that has developed in the lower courts and to reiterate that "[t]he very enumeration of the [Second Amendment] 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." *Heller*, 554 U.S. at 634. The Second Amendment expressly protects the right of the law-abiding adult citizens of this Nation to bear a firearm for self-defense, and the Texas laws at issue in this case simply cannot be squared with that guarantee.

OPINIONS BELOW

The panel opinion of the Court of Appeals is reported at 719 F.3d 338 and reproduced at App.1a. The order of the Court of Appeals denying rehearing is reproduced at App.43a. The order of the District Court granting summary judgment to respondent is not reported but is reproduced at App.23a.[1]

JURISDICTION

The Court of Appeals issued its judgment on May 20, 2013 and denied petitioner's timely petition for rehearing on June 26, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1).

[1] This action was brought in parallel with *National Rifle Association of America, Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185 (5th Cir. 2012) (hereinafter "*BATF*"), *petition for writ of certiorari pending*, No. 13-137. For the Court's convenience, the Fifth Circuit's decision in *BATF* and the dissent from denial of rehearing en banc in that case, *NRA v. BATF*, 714 F.3d 334, 335 (5th Cir. 2013) (hereinafter "*BATF* Dissent") (Jones, J., joined by Jolly, Smith, Clement, Owen and Elrod, JJ., dissenting from denial of reh'g en banc), are included in the Appendix at App.65a and App.123a, respectively. This case and *BATF* both concern laws that restrict the Second Amendment rights of 18-to-20-year-olds. While Petitioner believes this Court should grant certiorari in this case now, in the alternative, and at a minimum, Petitioner requests that its petition be held pending disposition of the *BATF* petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portions of the Second and Fourteenth Amendments to the United States Constitution; Texas Penal Code §§ 12.21 and 46.02; and Texas Government Code §§ 411.172, 411.174, and 411.188 are reproduced at App.47a.

STATEMENT OF THE CASE

I. Challenged Provisions.

This case involves a challenge to several Texas statutes that combine to deny law-abiding adults the right to carry a handgun in public for purposes of self-defense simply because those adults are ages 18, 19, or 20, rather than 21.

In Texas:

> A person commits an offense if the person intentionally, knowingly, or recklessly carries on or about his or her person a handgun . . . if the person is not: (1) on the person's own premises or premises under the person's control; or (2) inside of or directly en route to a motor vehicle or watercraft that is owned by the person or under the person's control.

TEX. PENAL CODE § 46.02(a) (hereinafter "the Texas Carry Ban"). Although there are exceptions for some public officials (*e.g.*, peace officers, *see id.* § 46.15(a)(1)),

and for some activities (*e.g.*, hunting, *see id.* § 46.15(b)(3)), these exceptions provide no relief to Texans who wish to carry a handgun for self-defense.

There is, however, one exception that permits most adult Texans to bear a handgun in public for self-defense: the Texas Carry Ban does not apply when one possesses "a valid license issued under Subchapter H, Chapter 411, Government Code, to carry a concealed handgun." *Id*. § 46.15(b)(6). But to obtain a Texas Concealed Handgun License ("CHL"), a law-abiding adult must not only complete a firearms-safety course approved by the State, TEX. GOV'T CODE § 411.188, but also be "at least 21 years of age," unless he or she is in the military or has been honorably discharged from the military. Adults in this restricted class can obtain a CHL upon turning 18. *Id*. § 411.172(g). But a law-abiding 18-to-20-year-old adult civilian in Texas who carries a handgun for self-defense outside of his or her home, vehicle, or boat is guilty of a crime punishable by a year in jail and a fine of $4,000. TEX. PENAL CODE §§ 12.21, 46.02(b). The net result, as conceded by the court below, is that "Texas's statutory scheme in effect prohibits the majority of 18-20-year-olds from carrying a handgun in public . . . ." App.3a.

II. Parties and Proceedings Below

1. Petitioner, the National Rifle Association of America, Inc. ("NRA"), is America's oldest civil rights

organization and is widely recognized as its foremost defender of the Second Amendment. The NRA was founded in 1871 by Union generals who, based on their experiences in the Civil War, desired to promote marksmanship and expertise with firearms among the citizenry. The NRA is America's leading provider of firearms marksmanship and safety training for both law enforcement and civilians (young and old). The NRA has approximately five million members, including thousands of members aged 18 to 20 throughout the United States, including the State of Texas.

2. The NRA and three of its law-abiding adult members under the age of 21 – Rebekah Jennings, Brennan Harmon, and Andrew Payne – brought this lawsuit asserting that the Texas Carry Ban violates both the Second Amendment and the Equal Protection Clause.[2] The district court had jurisdiction pursuant to 28 U.S.C. § 1331. Plaintiff Jennings, a decorated pistol champion and former member of the United States Olympic Development Team, asserted that she was injured by the ban because she wished to carry a handgun for self-defense but was prohibited by the ban from doing so. App.189a-190a. Plaintiffs Harmon and Payne likewise asserted that, but for the ban, they would carry handguns for self-defense.

[2] The original plaintiff in this case withdrew after moving to Florida. Pls.' Mot. To Amend Complaint at 1-2, *D'Cruz v. McCraw*, No. 10-cv-141 (N.D. Tex. Apr. 28, 2011), ECF No. 44.

App.185a-186a, 193a. The NRA proceeded on behalf of its hundreds of law-abiding 18-to-20-year-old adult members whose constitutional rights are similarly abridged by the ban. App.183a (declaration of Managing Director of Membership for the NRA stating that, as of May 3, 2011, the NRA in Texas had at least 710 life members between the ages of 18 and 20 and at least 671 life members between the ages of 15 and 17). During the course of these proceedings, Jennings, Harmon, and Payne have all turned 21. Accordingly, petitioner NRA continues the case on behalf of its law-abiding 18-to-20-year-old Texas members. *See* App.8a (holding that "the NRA, on behalf of its under-21 members, ha[s] standing" (citation omitted)).

An illustration of how the Texas Carry Ban continues to infringe the right to bear arms of the NRA's young adult members is provided by the Declaration of Katherine Taggart. App.196a.[3] Ms. Taggart,

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[3] The court below summarily denied Plaintiffs' motion to add Ms. Taggart as a party or, alternatively, to supplement the record on appeal with her declaration. *See* Order, *NRA v. McCraw*, No. 12-10091 (5th Cir. June 17, 2013), Doc. 5122876108. Ms. Taggart's declaration was filed in the court below along with Plaintiffs' motion. *See* Decl. of Katherine Taggart, *NRA v. McCraw*, No. 12-10091 (5th Cir. June 11, 2013), Doc. 512270421, App.196a; *cf.* SUP. CT. R. 12.7 ("If the record, or stipulated portions have been printed for the use of the court below, that printed record, plus the proceedings in the court below, may be certified as the record unless one of the parties or the Clerk of this Court requests otherwise."); *id.* R. 26.1 ("[T]he joint appendix shall contain: . . . the relevant docket entries in all the courts

(Continued on following page)

a 19-year-old martial-arts instructor, student, and NRA member, would like to carry a handgun for self-defense, but she is barred from doing so by the Texas Carry Ban. She is but one of the 1,138,897 Texans aged 18 to 20 – some 4.4% of the State's population – whose Second Amendment right to armed self-defense is infringed by Texas law (unless, of course, they have been in the military). *See* U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, ANNUAL ESTIMATES OF THE RESIDENT POPULATION BY SINGLE YEAR OF AGE AND SEX: APRIL 1, 2010 TO JULY 1, 2012 (2013), *available at* http://factfinder2.census.gov/bkmk/table/1.0/en/PEP/2012/PEPSYASEX (select "Texas" from Geography dropdown menu).

3. On May 16, 2011, Plaintiffs and Texas filed cross-motions for summary judgment. App.23a-24a. On January 19, 2012, the district court upheld the Texas law because "*the Second Amendment does not confer a right that extends beyond the home . . . .*" App.37a (emphasis added).

4. On May 20, 2013, a panel of the United States Court of Appeals for the Fifth Circuit affirmed, reasoning that it "must hold that the state scheme withstands [Plaintiffs'] challenge, because we are bound by a prior panel opinion of this court, *NRA v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185 (5th Cir. 2012) . . . ." *Id.* at 1a-2a. The Fifth Circuit held in *BATF* that it is permissible to bar federally licensed firearms dealers from selling

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below; . . . and . . . any other parts of the record that the parties particularly wish to bring to the Court's attention.").

handguns to law-abiding adults under age 21. *Id.* at 66a.

The panel below acknowledged that this Court has "recognized that the Second Amendment 'guarantees the individual right to possess and carry weapons in case of confrontation,'" and that the "'*central component* of this right' is self-defense." *Id*. at 12a (alteration omitted) (quoting *Heller*, 554 U.S. at 592, 599). The panel likewise acknowledged that this Court decided *Heller* not by resort to tiers of scrutiny and balancing tests, but by "conducting an analysis 'of both text and history.'" *Id*.

Nevertheless, the panel applied the "two-step" balancing test set forth in the Fifth Circuit's earlier decision in *BATF*. *Id.* at 13a. "The first question is whether the challenged conduct is even within the scope of the Second Amendment right." *Id*. at 14a. The panel opined that the Texas laws stripping law-abiding young adults of their right to bear arms in public for self-defense were

> likely *outside the scope of the Second Amendment* because such restrictions are "consistent with" both the "longstanding tradition of targeting select groups' ability to access and to use arms for the sake of public safety" and the "longstanding tradition of age- and safety-based restrictions on the ability to access arms . . . ."

Id. (emphasis added) (quoting *BATF*, 700 F.3d at 203).

But the precedents cited by *BATF* for this supposedly "longstanding tradition of targeting select groups[ ]" for disarmament were Revolutionary War provisions disarming Tories who had sworn allegiance to King George and colonial laws denying arms to "slaves" and "free blacks." *See id*. at 95a.

BATF also relied in part on *State v. Callicutt*, 69 Tenn. 714 (1878), a case that did not involve the Second Amendment but rather involved a state constitutional provision. *See* App.100a-101a. Furthermore, *Callicutt*, which held that Tennessee's right-to-arms provision – unlike the Second Amendment – was limited to communal, not individual, self-defense, had relied on *Aymette v. State*, 21 Tenn. (2 Hum.) 155 (1840). *Callicutt*, 69 Tenn. at 716. *Aymette* was considered by this Court in *Heller* and rejected as adopting an "odd reading of the right [to keep and bear arms, that] is, to be sure, *not* the one we adopt." *Heller*, 554 U.S. at 613 (emphasis added).

Thus, the panel decision below, like the *BATF* decision that preceded it, ignored the clear teaching of *Heller* in favor of obscure state court decisions that this Court had already either dismissed or distinguished. But the panel *did* advert to *Heller* at one important juncture in its analysis: it reasoned that the Plaintiffs' right to bear handguns in public for self-defense could be outlawed by analogy to "'presumptively lawful regulatory measures'" such as "'prohibitions on the possession of firearms by felons and the mentally ill . . . .'" App.13a (quoting *Heller*, 554 U.S. at 626-27 & n.26). The Fifth Circuit panel

thus equated responsible, law-abiding 18-to-20-year-old adults with "felons and the mentally ill."

As in *BATF*, the panel below hedged its bet and proceeded to the second stage of the two-step analysis, which involves selecting and applying an "appropriate level of scrutiny." *Id*. at 15a (quoting *BATF*, 700 F.3d at 195). Again invoking *BATF*, the panel held that intermediate scrutiny is the appropriate standard: "[E]ven if 18-20-year-olds' gun rights are at the core of the Second Amendment," the panel reasoned, "we cannot say that . . . the Texas scheme burdens those rights to any greater degree than the federal law challenged in *BATF*." *Id*. at 17a.

The panel then concluded that the Texas Carry Ban satisfies intermediate scrutiny:

> Texas determined that a particular group was generally immature and that allowing immature persons to carry handguns in public leads to gun violence. Therefore, it restricted the ability of this particular group to carry handguns outside their vehicles in public. This means is substantially related to . . . Texas's stated goal of maintaining public safety, and it still allows 18-20-year-olds to have handguns in their cars and homes and to apply for concealed handgun licenses as soon as they turn 21.

Id. at 20a.

5. In light of its Second Amendment holding, the panel applied mere rational basis review to Plaintiffs' equal protection claim and held that the Texas Carry Ban satisfied that standard. *Id*. at 20a-21a.

REASONS FOR GRANTING THE WRIT

I. The Circuits Are Deeply Divided in Resolving Second Amendment Claims, a Division that Is Particularly Pronounced in the Context of Claims Asserting the Right To *Bear* Arms for Self-Defense in Public.

The substance of the Second Amendment right resides in the verbs of the operative clause: "the right of the people to *keep* and *bear* Arms, shall not be infringed." (Emphasis added.) Many courts, emphasizing that *Heller* itself addressed only firearms restrictions inside the home, have held that the Second Amendment guarantees the right to possess firearms only in one's home, and that firearms restrictions outside the home do not even implicate the Second Amendment. *See infra* at pp. 17-18. But if this were true, a right to "keep" arms – that is, to "have weapons" – would have been sufficient without an explicit guarantee of the right to "bear" arms as well. *See Heller*, 554 U.S. at 581-82. Yet "the founding generation 'were for every man bearing his arms about him *and* keeping them in his house, his castle, for his own defense.'" *Id.* at 616 (emphasis added) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 362, 371

(1866) (statement of Sen. Davis regarding the Freedmen's Bureau Act)).

The explicit guarantee of the right to "bear" arms would mean nothing if it did not protect the right to "bear" arms outside of the home where the Amendment already guarantees that they may be "kept." The most fundamental canons of construction forbid any interpretation that would discard this language as meaningless surplus. *See, e.g.*, *Wright v. United States*, 302 U.S. 583, 588 (1938). So does the decision in *Heller*, where this Court explained that "keep" and "bear" have distinct meanings and that "[t]here is nothing to" the argument that the phrase "keep and bear Arms" preserves one right instead of multiple distinct rights. *Heller*, 554 U.S. at 591. Courts may no more ignore the Second Amendment's unmistakable distinction between the people's right to "keep" arms in their home and to "bear" them outside the home than they may ignore the word "persons" in the Fourth Amendment guarantee of the people's right to be secure "in their persons, houses, papers, and effects." U.S. CONST. amend. IV.

Heller explained that "[a]t the time of the founding, as now, to 'bear' meant to 'carry,'" and "[w]hen used with 'arms,' . . . the term has a meaning that refers to carrying for a particular purpose – confrontation." 554 U.S. at 584. Accordingly, this Court concluded that the Second Amendment "guarantee[s] the individual right to . . . carry weapons in case of confrontation." *Id*. at 592. Relying on a consistent

course of interpretation of federal firearms statutes, *Heller* stressed that "the natural meaning of 'bear arms'" is to "'wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person.'" *Id*. at 584 (alterations in original) (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting) (quoting BLACK'S LAW DICTIONARY)).

Thus, the text of the Second Amendment and the decision in *Heller* are plainly irreconcilable with the misguided notion that the founding generation meant to guarantee a right to bear arms only when moving from room to room within one's home.

The Seventh Circuit recently applied *Heller* in striking down the State of Illinois's ban on carrying firearms in public for self-defense. *Moore*, 702 F.3d at 939. As Judge Posner explained, "appellees ask us to repudiate the Court's historical analysis. That we can't do. Nor can we ignore the implication of the analysis that the constitutional right of armed self-defense is broader than the right to have a gun in one's home." *Id*. at 935; *see also id.* at 935-36 ("*Heller* repeatedly invokes a broader Second Amendment right than the right to have a gun in one's home, as when it says that the amendment 'guarantee[s] the individual right to possess and carry weapons in case of confrontation.' 554 U.S. at 592. Confrontations are

not limited to the home.").[4] At any rate, "[t]o speak of 'bearing' arms within one's home would at all times have been an awkward usage." *Id.* at 936. "A right to bear arms thus implies a right to carry a loaded gun outside the home." *Id*.

In short, the core purpose of the Second Amendment is protecting the right to carry weapons for the purpose of self-defense – not only for self-defense *within the home*, but for self-defense, *period*. *See Heller*, 554 U.S. at 599 ("[S]elf-defense . . . was the *central component* of the right itself."); *McDonald*, 130 S. Ct. at 3036 ("Self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in *Heller*, we held that individual self-defense is 'the *central component*' of the Second Amendment right." (footnote and citation omitted)).

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[4] As the Seventh Circuit explained,

> The first sentence of the *McDonald* opinion states that "two years ago, in *District of Columbia v. Heller*, we held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense," and later in the opinion we read that "*Heller* explored the right's origins, noting that the 1689 English Bill of Rights explicitly protected a right to keep arms for self-defense, and that by 1765, Blackstone was able to assert that the right to keep and bear arms was 'one of the fundamental rights of Englishmen[.]' " And immediately the Court adds that "Blackstone's assessment was shared by the American colonists."

Moore, 702 F.3d at 935 (citations omitted).

Indeed, in the founding era "a distinction between keeping arms for self-defense in the home and carrying them outside the home would, as we said, have been *irrational*." *Moore*, 702 F.3d at 937 (emphasis added). It is no more rational today, for "the interest in self-protection is as great outside as inside the home." *Id*. at 941. "To confine the right to be armed to the home is to divorce the Second Amendment from the right of self-defense described in *Heller* and *McDonald*." *Id*. at 937.[5]

Likewise, the Illinois Supreme Court has recently agreed with the Seventh Circuit that bearing a handgun for self-defense in public is "the exercise of a personal right that is specifically named in and guaranteed by the United States Constitution, as construed by the United States Supreme Court." *Aguilar*, 2013 IL 112116, at *5.

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[5] [A] Chicagoan is a good deal more likely to be attacked on a sidewalk in a rough neighborhood than in his apartment on the 35th floor of the Park Tower. A woman who is being stalked or has obtained a protective order against a violent ex-husband is more vulnerable to being attacked while walking to or from her home than when inside. She has a stronger self-defense claim to be allowed to carry a gun in public than the resident of a fancy apartment building (complete with doorman) has a claim to sleep with a loaded gun under her mattress. But Illinois wants to deny the former claim, while compelled by *McDonald* to honor the latter. That creates an arbitrary difference.

Moore, 702 F.3d at 937.

But many other courts, including the district court in this case, have flatly ruled that "the Second Amendment does not confer a right that extends beyond the home . . . ." App.37a. *See, e.g.*, *Little v. United States*, 989 A.2d 1096, 1101 (D.C. 2010); *Williams v. State*, 10 A.3d 1167, 1169, 1177 (Md. 2011); *People v. Williams*, 962 N.E.2d 1148, 1153-54 (Ill. App. Ct. 2011), *abrogated by Aguilar*, 2013 IL 112116; *Commonwealth v. Perez*, 952 N.E.2d 441, 451 (Mass. App. Ct. 2011); *Shepard v. Madigan*, 863 F. Supp. 2d 774, 782 & n.7 (S.D. Ill. 2012), *rev'd*, *Moore*, 702 F.3d 933; *Moore v. Madigan*, 842 F. Supp. 2d 1092, 1102 (C.D. Ill. 2012), *rev'd*, *Moore*, 702 F.3d 933; *Kachalsky v. Cacace*, 817 F. Supp. 2d 235, 264-65 (S.D.N.Y. 2011), *aff'd sub nom. Kachalsky v. Cnty. of Westchester*, 701 F.3d 81 (2d Cir. 2012); *Moreno v. N.Y.C. Police Dep't*, No. 10-cv-6269, 2011 WL 2748652, at *3 (S.D.N.Y. May 7, 2011), *report and recommendation adopted*, 2011 WL 2802934 (S.D.N.Y. July 14, 2011); *Gonzalez v. Vill. of W. Milwaukee*, No. 09CV0384, 2010 WL 1904977, at *4 (E.D. Wis. May 11, 2010), *aff'd in part, vacated as moot in part*, 671 F.3d 649 (7th Cir. 2012).

The Fifth Circuit, to be sure, stopped short of formally holding that the Second Amendment's protection is limited to the home. But it held that Texas's categorical ban on public carriage of firearms by 18-to-20-year-old civilian adults does not severely burden their Second Amendment rights because, among other things, they remain free to possess handguns in the home. App.16a-17a. The Fifth Circuit thus

applied a highly deferential form of intermediate scrutiny to uphold the Texas Carry Ban.

Several other courts have also taken this approach – *i.e.*, remaining agnostic on whether the Second Amendment applies outside the home, but balancing the right away by deeming the public carriage of firearms outside the Second Amendment's "core" protection. *See, e.g.*, *Kachalsky*, 701 F.3d at 96-97; *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013).

These courts generally have strained to uphold restrictions on public carriage of firearms without deciding whether the Second Amendment extends beyond the home – thus leaving open the possibility that they ultimately will conclude that it does not. A panel majority of the Fourth Circuit, for example, refused to address this issue because it read *Heller* as "portend[ing] all sorts of litigation . . . . The whole matter strikes us as a vast *terra incognita* that courts should enter only upon necessity and only then by small degree." *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011); *see also, e.g.*, *Kachalsky*, 701 F.3d at 89. As Judge Posner retorted, "Fair enough; but that 'vast *terra incognita*' has been opened to judicial exploration by *Heller* and *McDonald.* There is no turning back by the lower federal courts . . . ." *Moore*, 702 F.3d at 942.

Perhaps the most extreme example of this approach comes recently from the Third Circuit. Rejecting a Second Amendment challenge to New Jersey's

regime requiring a showing of "justifiable need" for issuing handgun-carry permits, the Federal District Court treated the Second Amendment issue as a nuisance:

> Given the considerable uncertainty regarding if and when the Second Amendment rights should apply outside the home, this Court does not intend to place a burden on the government to endlessly litigate and justify every individual limitation on the right to carry a gun in any location for any purpose.

Piszczatoski v. Filko, 840 F. Supp. 2d 813, 829 (D.N.J. 2012), *affirmed sub nom*. *Drake v. Filko*, 724 F.3d 426, 2013 U.S. App. LEXIS 15635 (3d Cir. July 31, 2013). On appeal, a divided Third Circuit panel affirmed, likewise concluding that it was "not inclined to address [the plaintiffs' claim of a historic right to carry arms in public] by engaging in a round of full-blown historical analysis . . . ." *Drake*, 2013 U.S. App. LEXIS 15635, at *12.

In contrast, the dissenting judge in *Drake*: (a) read *Heller* as obliging the court to undertake an historical and textual analysis, *id*. at *51-59, *69-76; (b) condemned the panel majority's "balancing" act as "explicitly rejected" by *Heller*, *id*. at *91; and (c) concluded that New Jersey's demand that an applicant demonstrate a special need to exercise her Second Amendment *right – not privilege* – of armed self-defense was unconstitutional, *id*. at *95.

A recent article in a leading law journal summarized the lower federal courts' reaction to *Heller* this way:

> Some judges have answered by mechanically citing broad dicta in *Heller* and *McDonald* concerning th[e] "presumptively lawful" regulations, rather than conducting the historical inquiry the Court ostensibly demands. Other judges have simply ignored the Court's rejection of balancing tests. Instead, they have allowed the right to keep and bear arms to be gobbled up by intermediate scrutiny or similar tests . . . .

Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852, 855 (2013) (footnote omitted).

The latter of these approaches is perhaps the more revealing. The lower courts have typically applied an impotent form of intermediate scrutiny that effectively gives lawmakers a blank check to override Second Amendment rights because (a) "public safety" is always deemed an important interest, and (b) the courts defer to the legislature's view that the challenged law will advance public safety. In *BATF*, for example, the Fifth Circuit echoed Justice Breyer's *Heller* dissent in insisting that the courts should defer to the legislature's "predictive judgments." App.119a-120a. *See also, e.g.*, *Kachalsky*, 701 F.3d at

97; *Drake*, 2013 U.S. App. LEXIS 15635, at *29. *Compare Heller*, 554 U.S. at 704-05 (Breyer, J., dissenting).

This parallel to Justice Breyer's *dissent* underscores the point that *Heller* forecloses the application of intermediate scrutiny or similar balancing tests. In that dissent, Justice Breyer repeatedly advocated a legal analysis, which he called "interest-balancing," drawn from "cases applying intermediate scrutiny" in the First Amendment context, such as *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997). *See Heller*, 554 U.S. at 704 (Breyer, J., dissenting); *see also id.* at 689-90, 696. He contended that "[t]here is no cause here to depart from the standard set forth in *Turner*." *Id.* at 705.

The *Heller* majority, however, ruled that the line between permissible regulations and impermissible bans on firearms is to be determined by the text and history of the Second Amendment, not by balancing the individual Second Amendment right against competing government interests (such as public safety). *That balance has already been struck*. The Second Amendment itself "is the very *product* of an interest-balancing by the people," and "[t]he very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Id.* at 634, 635 (majority op.). *McDonald* likewise emphasized that resolving Second Amendment cases *would not* "require judges to assess the

costs and benefits of firearms restrictions and thus to make difficult empirical judgments in an area in which they lack expertise." 130 S. Ct. at 3050 (plurality).

Thus, *Heller* and *McDonald* unambiguously foreclose the application of intermediate scrutiny to a regulation, such as the Texas Carry Ban, that impinges upon the core Second Amendment right of armed self-defense by law-abiding adults. *See Heller v. District of Columbia*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) ("*Heller II*") (Kavanaugh, J., dissenting) ("*Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test . . . .").[6]

Despite the clarity of this Court's rejection of intermediate scrutiny and interest-balancing, a host of appellate courts have nonetheless applied these disapproved methodologies – and almost invariably

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[6] This Court's decision not "to employ strict or intermediate scrutiny appears to have been quite intentional and well-considered." *Heller II*, 670 F.3d at 1273 n.5 (Kavanaugh, J., dissenting) (citing Tr. of Oral Arg. at 44, *Heller*, 554 U.S. 570 (Mar. 18, 2008) (No. 07-290) (Chief Justice Roberts: "Well, these various phrases under the different standards that are proposed, 'compelling interest,' 'significant interest,' 'narrowly tailored,' none of them appear in the Constitution. . . . I mean, these standards that apply in the First Amendment just kind of developed over the years as sort of baggage that the First Amendment picked up.")).

have upheld the statutes being challenged. *See, e.g.*, *McCraw*, App.17a-20a; *BATF*, App.106a, 111a; *Drake*, 2013 U.S. App. LEXIS 15635, at *8; *Kwong v. Bloomberg*, 723 F.3d 160, 168 (2d Cir. 2013); *Woollard*, 712 F.3d at 876; *Kachalsky*, 701 F.3d at 96-97; *Masciandaro*, 638 F.3d at 460, 468-69; *United States v. Mazzarella*, 614 F.3d 85, 96 (3d Cir. 2010). *See generally*, Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 706-07 (2012) ("The lower courts . . . have effectively embraced the sort of interest-balancing approach that Justice Scalia condemned, adopting an intermediate scrutiny test and applying it in a way that is highly differential to legislative determination and that leads to all but the most drastic restrictions on guns being upheld."). Adding to the confusion, some courts have required a party to satisfy a "substantial burden" test before intermediate scrutiny or some other balancing test is even potentially implicated. *See United States v. Decastro*, 682 F.3d 160, 166 (2d Cir. 2012).

This Court should grant certiorari to correct the widespread misapplication of *Heller* and to resolve the split among the State and Federal appellate courts regarding the meaning and scope of that decision.

II. The Fundamental Second Amendment Right To Bear Arms for Self-Defense in Public Extends to Responsible, Law-Abiding Adult Citizens Aged 18 to 20.

The Fifth Circuit's application of an impotent intermediate-scrutiny balancing test is particularly

problematic in this case, for the Texas Carry Ban would be doomed by application of the historical and textual analysis mandated by *Heller*, as demonstrated below.

A. The Framers Understood the Right To Bear Arms To Include Adults Aged 18 to 20.

The Second Amendment guarantee of "the right of the people to keep and bear Arms" has always been understood to include "the whole people." THOMAS MCINTYRE COOLEY, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 267-68 (1880). This Court has accordingly held that "the Second Amendment right is exercised individually and belongs to all Americans." *Heller*, 554 U.S. at 581. Although the constitutional rights of children sometimes may be restricted in ways that adults' may not, *see, e.g.*, *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 72-75 (1976), compelling historical evidence from the founding generation demonstrates that adults aged 18 to 20 are not to be treated as children for purposes of the Second Amendment.

Although the Second Amendment's prefatory clause cannot be read to "limit or expand the scope of the operative clause," "[l]ogic demands that there be a link between the stated purpose and the command." *Heller*, 554 U.S. at 577-78. The prefatory clause – "A well regulated Militia, being necessary to the security of a free State" – "announces the purpose for which the right was codified: to prevent elimination of the militia." *Id.* at 599. Given this purpose, it follows that

the Amendment's protections extend *at the very least* to those citizens whom the Framers understood to constitute the militia; the Framers surely did not enumerate a constitutional right to arms for the purpose of ensuring an armed militia and yet fail to extend that right to the militia's own members. *See id.* at 580 ("[T]he 'militia' in colonial America consisted of a *subset* of 'the people . . . .'" (emphasis added)). Indeed, a contrary interpretation would destroy the "perfect[ ]" fit that *Heller* discerned between the Amendment's preface and its operative clause. *Id*. at 598.

There is no doubt that able-bodied adult males aged 18 to 20 were members of the militia when the Second Amendment was adopted. And for those young men to be part of the militia necessarily meant that the law understood them to have not only the right but the *duty* to keep and bear arms. "Those subject to militia duty are therefore a subset of citizens entitled to be armed, and for them the right is essential." *BATF* Dissent, App.130a. This was evident from the very first congressional exercise of its power to "provide for organizing, arming, and disciplining, the militia." U.S. CONST. art. I, § 8, cl. 16. On May 8, 1792, mere months after ratification of the Second Amendment, Congress enacted a law mandating that "every free able-bodied white male citizen . . . who is or shall be of the age of eighteen years, and under the age of forty-five years (except as is herein after excepted) shall severally and respectively be enrolled in the militia. . . ." Militia Act of 1792, 2d Cong., Sess. 1, ch. 33, § 1, 1 Stat. 271 (1792) ("Militia Act").

As a contemporaneous act of Congress, the Militia Act provides extraordinarily powerful evidence that adult males aged 18 to 20 were entitled by the Second Amendment to keep and bear arms:

> [M]any of the members of the Second Congress were also members of the First, which had drafted the Bill of Rights. But more importantly, they were conversant with the common understanding of both the First Congress and the ratifying state legislatures as to what was meant by "Militia" in the Second Amendment.

Parker v. District of Columbia, 478 F.3d 370, 387 (D.C. Cir. 2007), *aff'd sub nom. Heller*, 554 U.S. 570; *see Eldred v. Ashcroft*, 537 U.S. 186, 213 (2003) (explaining that "contemporaneous legislative exposition of the Constitution" by the Framers "fixes the construction to be given [the Constitution's] provisions" (alteration in original)).

The legislative history of the Militia Act lends further support. In 1790, Secretary of War Henry Knox submitted a plan to Congress providing that "all men of the legal military age should be armed" and that "[t]he period of life in which military service shall be required of the citizens of the United States [was] to commence at eighteen . . . ." *See* 2 ANNALS OF CONGRESS 2145-46 (Joseph Gales ed., 1834). Acknowledging that "military age has generally commenced at sixteen," Secretary Knox instead drew the line at 18 because "the youth of sixteen do not commonly attain such a degree of robust strength as to enable them to sustain without injury the hardships incident to

the field. . . ." *Id.* at 2153. Representative Jackson explained "that from eighteen to twenty-one was found to be the *best age* to make soldiers of." *Id.* at 1860 (emphasis added).

Eighteen was also the age that George Washington recommended for militia enrollment. In a letter to Alexander Hamilton, General Washington wrote that "the Citizens of America . . . from 18 to 50 Years of Age should be borne on the Militia Rolls" and "so far accustomed to the use of [Arms] that the Total strength of the Country might be called forth at a Short Notice on any very interesting Emergency." *Sentiments on a Peace Establishment* (May 2, 1783), *reprinted in* 26 THE WRITINGS OF GEORGE WASHINGTON 389 (John C. Fitzpatrick ed., 1938).

State militia laws enacted shortly before the Second Amendment established minimum ages for militia service from 16 to 18. Delaware, Pennsylvania, South Carolina, and Virginia set a minimum age of 18. The other States at that time all set the minimum at age 16. *See* App.154a-180a. Not a single State exempted 18-to-20-year-olds from militia service at the time the Second Amendment was ratified.[7]

This Court has recognized that *militia membership presupposed firearm possession*, because "when called for service these men were expected to appear

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[7] This followed colonial practice. *See* Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment, in* GUN CONTROL AND THE CONSTITUTION 66, 77 n.46 (Robert J. Cottrol ed., 1994).

bearing arms supplied by *themselves* . . . ." *United States v. Miller*, 307 U.S. 174, 179 (1939) (emphasis added). This is reflected in the Militia Act, which required each enrollee, regardless of age, to "provide himself with a good musket or firelock." Militia Act, ch. 33, § 1, 1 Stat. 271. Several state laws contained similar provisions. *See, e.g.*, militia laws of Connecticut, New Jersey, New York, Rhode Island, and Vermont, App.154a-155a, 168a-171a, 175a-177a, 178a-179a. These rules confirm the Framers' understanding that Second Amendment rights extend to adults aged 18 to 20 because by that age, individuals not only were entrusted with firearms in connection with organized militia activities, but also were expected to keep and maintain those arms as private citizens.

The court below could avoid these ineluctable conclusions only by wholly ignoring the Militia Act – the single most important article of contemporaneous evidence about the original understanding of the Second Amendment. The Militia Act is not even mentioned in the Fifth Circuit's opinion. Rather, the court relied on its earlier decision in *BATF*. But as Judge Jones observed in dissenting from the denial of en banc reconsideration, it is equally telling "that the [*BATF*] panel relegates militia service to a footnote." App.134a. *See id*. at 104a-106a.

Under *Heller*, "a government entity that seeks significantly to interfere with the Second Amendment rights of an entire class of citizens bears a heavy burden to show, with relevant historical materials,

that the class was originally outside the scope of the Amendment." *BATF* Dissent, App.132a. The Fifth Circuit, however, did not require Texas to make any such showing. This Court should grant certiorari to prevent this misapplication of *Heller* from further spreading through the lower federal courts.

B. Never in the Modern Era Has This Court Held that a Fundamental Constitutional Right May Be Abridged for an Entire Class of Responsible, Law-Abiding Adult Citizens.

As Judge Jones – joined by five other Circuit Judges – wrote in her dissent from the denial of rehearing en banc in the *BATF* case, the implications of the panel's "decision – that a whole class of adult citizens, who are not as a class felons or mentally ill, can have its constitutional rights truncated because Congress considers the class 'irresponsible' – are far reaching." App.125a. The court below offered several justifications for the Texas Carry Ban; none is remotely persuasive.

First, the panel argues that the Texas Carry Ban is but a minor imposition because it bans only the carrying of *handguns*, leaving adults aged 18 to 20 to carry shotguns and rifles in public to defend themselves. App.18a-19a. But for many of the same "reasons that a citizen may prefer a handgun for home defense," a citizen may also prefer a handgun for self-defense in public. *Heller*, 554 U.S. at 629. Indeed,

given its portability and concealability, the reasons for preferring a handgun are surely more pronounced in public than in the home. In any event, this argument was already rejected in *Heller*:

> It is no answer to say . . . that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed. It is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon.

Id.

Second, the panel perceives the Texas Carry Ban as a minimal infringement of the right to armed self-defense because adults aged 18 to 20 are allowed to keep handguns in their cars and in their boats. App.16a-17a. That might mean something if the only crimes the public had to fear were car-jacking and piracy, but it does nothing to ameliorate the fact that Texas law leaves the State's law-abiding young adults unarmed and defenseless whenever they step out of their vehicles (whether land- or water-borne) and onto the streets.

Third, the court below contends that the Texas Carry Ban's infringement of the Second Amendment must be tolerated because it "has only a temporary effect" – young adults under 21 are disarmed only for three years and their constitutional right is restored once they reach age 21. *Id*. "It's hard to imagine anyone suggesting that [Texas] may prohibit the

exercise of a free-speech or religious-liberty right" by 18-to-20-year-old adults "on the rationale that those rights may be freely enjoyed" when those adults turn 21. *Ezell v. City of Chicago*, 651 F.3d 684, 697 (7th Cir. 2011). But if the state legislature's condemnation *en masse* of 18-to-20-year-old civilian adults as irresponsible justifies curtailing the Second Amendment rights of law-abiding individuals, the same assumption would likewise justify withholding the other protections of the Bill of Rights from Texas citizens until they celebrate their 21st birthdays.

Fourth, the court below reasoned that the Texas Carry Ban does not implicate the Second Amendment because it has a "narrow ambit" and "target[s]" a "'discrete category' of 18-20-year-olds." App.18a. We are aware of no principle holding that a state may violate the constitutional rights of some of its citizens so long as it does not target too many of them. In any event, the impact of the Texas Carry Ban is huge: there are approximately 1,138,897 Texans aged 18 to 20 whose rights are trampled by the laws challenged here. *See supra* at p. 8.

Finally, the Fifth Circuit's attempt to justify the Texas Carry Ban on the fact that some individuals aged 18 to 20 commit crimes is without merit. A person's membership in a particular *group* cannot form the basis for a classification that infringes that person's fundamental "*individual* right to possess and carry weapons in case of confrontation." *Heller*, 554 U.S. at 592 (emphasis added); *cf. Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

III. The Texas Carry Ban Violates the Equal Protection Clause.

The Fifth Circuit acknowledged that "[e]qual protection analysis requires strict scrutiny of a legislative classification" if the "classification impermissibly interferes with the exercise of a fundamental right . . . ." App.21a. And this Court has held that Second Amendment rights are "fundamental to our scheme of ordered liberty." *McDonald*, 130 S. Ct. at 3036 (emphasis omitted). Yet the court below sidestepped strict scrutiny and applied mere rationality review on the premise that stripping law-abiding adults under age 21 of their Second Amendment right to armed self-defense "does not implicate such a protected right." App.21a. As demonstrated above, at the time of the founding, law-abiding adults aged 18 to 20 were members of the militia and therefore were at the very heart of the rights guaranteed by the Second Amendment. None of the purported rationales for the discrimination wrought by the Texas Carry Ban comes close to surviving *genuine* intermediate scrutiny, let alone the strict scrutiny that the Second Amendment requires.

Any argument based on the alleged criminality of adults under 21 suffers from fatal overinclusiveness. Only a minuscule fraction of 18-to-20-year-olds engage in criminal violence: FBI and Census Bureau data indicate that not even half of 1% of this age

group was arrested for a violent crime in 2012.[8] Texas thus strips *all* 18-to-20-year-olds of a fundamental constitutional right because of the sins of the very few. That is not how the Bill of Rights works. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975) ("[D]eeply etched in our law [is the theory that] a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." (emphasis added)).

This is amply demonstrated by *Craig v. Boren*, 429 U.S. 190 (1976), where this Court struck down an Oklahoma law that prohibited the sale of "'nonintoxicating' 3.2% beer" to men under 21 but permitted sales to women 18 and over. *Id.* at 190. This Court rejected Oklahoma's statistics showing that 18-to-20-year-old men were over *ten times* more likely (2% vs. 0.18%) than their female counterparts

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[8] The calculation proceeds as follows, with an adjustment for the number of 18-to-20-year-olds to reflect the fact that the FBI arrest statistics cover about 77.4% of the total 2012 United States population:

> 50,296 violent crime arrests ÷ (13,320,486 x .774) 18-to-20-year-olds = .0049, or **0.49%**

See FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2012, TABLE 38: ARRESTS BY AGE, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/38tabledatadecoverviewpdf (compiling arrest data based on an estimated United States population of 243 million people, or 77.4% of the estimated 2012 population); U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, ANNUAL ESTIMATES OF THE RESIDENT POPULATION BY SINGLE YEAR OF AGE AND SEX, APRIL 1, 2010 to JULY 1, 2012 (2013), *available at* http://factfinder2.census.gov/bkmk/table/1.0/en/PEP/2012/PEPSYASEX (select "United States" from Geography dropdown menu).

to have been arrested for "alcohol-related driving offenses." *Id.* at 201-02. Although "such a disparity is not trivial in a statistical sense," the Court reasoned that "it hardly can form the basis for employment of a gender line as a classifying device." *Id*. at 201; *see also id.* at 201-02 ("Certainly if maleness is to serve as a proxy for drinking and driving, a correlation of 2% must be considered an unduly tenuous 'fit.'").

That fit was insufficient to justify the sex-based classification under intermediate scrutiny. *A fortiori*, the discrimination at issue here cannot survive equal protection scrutiny even if intermediate scrutiny were to apply: to paraphrase this Court, "the principles embodied in the [fundamental right to keep and bear arms] are not to be rendered inapplicable by statistically measured but loose-fitting generalities . . . ." *Id*. at 208-09.

Texas law enforces another unjustifiable classification: Texas allows 18-to-20-year-old members of the armed forces (and veterans) to obtain concealed-carry permits, while denying permits to all others in the same age cohort.

First, it is difficult to imagine a classification more in tension with the animating purpose of the Second Amendment than one that reserves the right to bear arms exclusively for members of the armed forces. The founding generation recognized what remains true today: no shield of government can be relied upon to provide complete protection from violence. It was precisely the Founders' institutional distrust of government military forces that drove

them to enshrine in the Constitution the right of *the people*, not merely a select subset of them, to keep and bear arms. *See, e.g.*, *Heller*, 554 U.S. at 598-600. Texas's ban cannot be reconciled with this fundamental constitutional guarantee.

Second, Texas's purported rationale for the Carry Ban is that 18-to-20-year-olds are not sufficiently mature to carry handguns in public. *See, e.g.*, State Brief at 7-8, *NRA v. McCraw*, No. 2012-10091 (5th Cir. May 23, 2012), Doc. 511865787. But Texas has offered no evidence showing that 18-to-20-year-old members (and former members) of the military are on average more responsible than others in that age cohort. Indeed, the statutory exception allowing that class to receive handgun permits extends to all those "discharged under honorable conditions," TEX. GOV'T CODE § 411.172(g)(2), which sweeps in soldiers discharged for flunking alcohol or drug abuse rehab programs, for unsatisfactory performance, or, in certain circumstances, for misconduct. *See* U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS (2011), chs. 9-4, 13-10, 14-3.

Third, firearms training cannot justify the distinction between 18-to-20-year-olds with military service and civilians. As with military service in general, Texas has offered no evidence that military firearms training increases a person's baseline maturity level. And military service is not the only outlet for obtaining firearms training. It is doubtful, for example, that any member of the military but a special forces soldier receives training or target practice comparable to that of NRA member and former named plaintiff Rebekah Jennings, with her

thousands of hours of range time, multiple pistol shooting championships, and membership on the Olympic Development Team. App.188a-189a. At any rate, Texas has deemed a certain level of training appropriate for concealed carry licensees, *see* TEX. GOV'T CODE § 411.188, and 18-to-20-year-olds would of course have to meet this training requirement before obtaining a carry permit.

In sum, crime and census statistics reveal that over 99% of 18-to-20-year-olds *are not* arrested for committing a violent crime in any given year, and they confirm that 18-to-20-year-olds have the highest "rates of *victimization* by armed offenders," U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REP., WEAPON USE AND VIOLENT CRIME 4 (Sept. 2003) (emphasis added). Texas thus bars the individuals who most need guns for the "core lawful purpose of self-defense," *Heller*, 554 U.S. at 630, from carrying them because a tiny fraction of their peers – the fraction *least* likely to obey the ban – misuses guns. Given that intermediate scrutiny prohibits a State from justifying legislation on the basis of "overbroad generalizations," *Virginia*, 518 U.S. at 533, and "statistically measured but loose-fitting generalities," *Craig*, 429 U.S. at 209, Texas's ban is surely unconstitutional.

IV. This Case Is a Particularly Suitable Vehicle for Addressing the Scope of the Second Amendment Right To Bear Arms for Self-Defense Outside the Home.

Several petitions for review are currently pending before this Court that involve challenges to state

laws regulating the carrying of handguns in public. The present case has the comparative advantage of being free of any possible distractions or complications relating to a public official's exercise of discretion in denying a handgun carry permit. Under the Texas laws challenged here, *all law-abiding civilian adults aged 18 to 20 are categorically stripped* of their Second Amendment right to bear handguns in public for self-defense. This case thus provides a pristine vehicle for addressing an important question that has divided the State and Federal appellate courts.

CONCLUSION

For the reasons set forth above, a writ should issue and this Court should reverse the judgment below.

Respectfully submitted,

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September 24, 2013

Appendix A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 12-10091

NATIONAL RIFLE ASSOCIATION OF AMERICA, INCORPORATED; REBEKAH JENNINGS; BRENNAN HARMON; ANDREW PAYNE,

Plaintiffs-Appellants

v.

STEVEN C. MCCRAW, in his official capacity as Director of the Texas Department of Public Safety,

Defendant-Appellee

Appeal from the United States District Court for the Northern District of Texas

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Filed: May 20, 2013
Revised: May 21, 2013

Before HIGGINBOTHAM, CLEMENT, and HAYNES, Circuit Judges.

EDITH BROWN CLEMENT, Circuit Judge:

This case presents a constitutional challenge to Texas's statutory scheme, which does not allow 18-20-year-old adults to carry handguns in public. We must

hold that the state scheme withstands this challenge, because we are bound by a prior panel opinion of this court, *NRA v. Bureau of Alcohol, Tobacco, Firearms, & Explosives,* 700 F.3d 185 (5th Cir. 2012) (hereinafter *BATF*).

FACTS AND PROCEEDINGS

Statutory Framework

In 1871, the State of Texas first prohibited individuals from carrying handguns in public. The current version of this proscription, codified in 1973, provides that a "person commits an offense if the person intentionally, knowingly, or recklessly carries on or about his or her person a handgun . . . if the person is not: (1) on the person's own premises or premises under the person's control; or (2) inside of or directly en route to a motor vehicle or watercraft that is owned by the person or under the person's control." TEX. PENAL CODE § 46.02(a). This crime is punishable by imprisonment for up to a year and a fine of up to $4,000. *Id.* § 46.02(b); *see id.* § 12.21.

In 1995, Texas created an exception to this general criminal prohibition when it enacted the concealed licensing program. The program allows persons who acquire concealed carry licenses to carry concealed handguns in public. TEX. GOV'T CODE § 411.172(a). Licenses cost $140 each and applicants must submit their fingerprints and their criminal, psychiatric treatment, and drug treatment histories. *Id.* § 411.174. They must also successfully complete a 10-hour course, which includes both a written exam

and a practical component to demonstrate proficiency. *Id.* § 411.174(a)(7); *see id.* § 411.188. Moreover, in order to qualify for a license, an applicant must, among other things, be "at least 21 years of age" and "fully qualified under applicable federal and state law to purchase a handgun."[1] *Id.* § 411.172(a).

During legislative debate on the concealed licensing program, several legislators advocated for the 21-year-old minimum-age requirement because they believed that younger individuals were generally not mature enough to carry and handle handguns in public. In 2005, Texas relaxed the licensing requirements to allow persons under 21 who had military training to apply for concealed handgun licenses, *id.* § 411.172(g), because this group's "extensive training in handling weapons" mitigated the legislature's concern that persons under 21 generally were not sufficiently mature to handle guns responsibly. Nevertheless, Texas's statutory scheme in effect prohibits the majority of 18-20-year-olds from carrying a handgun in public: the general criminal provision sets as the default rule that Texans may not carry a handgun in public, and the civil licensing law

[1] Under a federal statute recently upheld as constitutional by this court, 18 U.S.C. § 922(b)(1), federally licensed firearms dealers may not sell handguns to persons under 21. *BATF,* 700 F.3d at 212. Texas law, however, permits those 18 and over to buy handguns.

makes 18-20-year-olds ineligible for the concealed handgun license exception to this default rule.[2]

Procedural Background

Three individual plaintiffs, ages 18-20, and the National Rifle Association ("NRA"), on behalf of its 18-20-year-old members, brought this constitutional challenge to Texas's constructive ban on 18-20-year-olds carrying handguns in public. Each of the three individual plaintiffs claim that they wish to carry a handgun in public for self-defense but are unable to apply for one solely because of their age. While this appeal was pending, however, two of them, Rebekah Jennings and Brennan Harmon, turned 21. The third, Andrew Payne, will not turn 21 until July 2013.

Following discovery, the parties filed cross-motions for summary judgment. The district court denied plaintiffs' motion and granted the state's motion. The court first addressed the question of standing. It concluded that the individual plaintiffs had standing to challenge the licensing law, because they had presented evidence that, except for their age, they qualified for concealed handgun licenses. Moreover, they had each alleged that, but for their inability to get a license, they would carry a handgun

[2] For clarity, we refer to § 46.02 as the "general criminal provision," § 411.172 as the "licensing law" or "licensing program," and the two statutes, working together, as the "Texas scheme."

in public for self-defense. But the court held that plaintiffs lacked standing to challenge the general criminal provision because they had not alleged that they wanted to carry handguns without a license, which the court concluded was necessary to show the credible threat of prosecution under the law required for Article III standing. The court recognized that it need not address whether the NRA had associational standing, since "[o]nce a court has determined that at least one plaintiff has standing, it need not consider whether the remaining plaintiffs have standing to maintain the suit."

Turning to the merits, the district court upheld the handgun licensing law on the ground that "the Second Amendment does not confer a right that extends beyond the home." Thus, a prohibition on carrying a handgun in public did not infringe on plaintiffs' Second Amendment rights. And, because neither age nor non-military status is a suspect classification, the court applied rational basis scrutiny to the Texas law and rejected plaintiffs' equal protection claim. Plaintiffs appeal.

STANDARD OF REVIEW

This court reviews questions of standing *de novo. NAACP v. City of Kyle, Tex.,* 626 F.3d 233, 236 (5th Cir. 2010). The parties seeking access to federal court bear the burden of establishing their standing. *Time Warner Cable, Inc. v. Hudson,* 667 F.3d 630, 635 (5th Cir. 2012). The court "review[s] a district court's grant

of summary judgment *de novo,* applying the same standard as did the district court." *Stults v. Conoco, Inc.,* 76 F.3d 651, 654 (5th Cir. 1996). We "may affirm summary judgment on any legal ground raised below, even if it was not the basis for the district court's decision." *Performance Autoplex II Ltd. v. Mid-Continent Cas. Co.,* 322 F.3d 847, 853 (5th Cir. 2003). We examine *de novo* the constitutionality of state statutes. *Ortiz v. Quarterman,* 504 F.3d 492, 496 (5th Cir. 2007).

DISCUSSION

Plaintiffs appeal the district court's decision that they lack standing to challenge Texas's general criminal provision barring persons from carrying handguns in public. They also claim that the district court erred in ruling that the Texas scheme regulating persons carrying handguns in public does not violate the Second Amendment rights of, or deny equal protection to, non-military or non-veteran 18-20-year-olds. Plaintiffs contend that 18-20-year-olds have full Second Amendment rights and that the fundamental right to carry a handgun for self-defense extends to carrying a handgun in public. Texas opposes these contentions and also alleges that plaintiffs Jennings's and Harmon's claims are moot because they are now 21 years old.

A. Mootness

Although all parties agree that the claims raised by Payne are not moot, Texas argues that the court should dismiss Jennings's and Harmon's claims as moot because both are now 21.[3]

If a claim is moot, it "presents no Article III case or controversy, and a court has no constitutional jurisdiction to resolve the issues it presents." *Goldin v. Bartholow,* 166 F.3d 710, 717 (5th Cir. 1999). A claim becomes moot when "the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack,* 395 U.S. 486, 496 (1969). "Mootness in

[3] The parties also agree that the district court was correct that it need not address the NRA's associational standing because *Massachusetts v. EPA* holds that "[o]nly one of the petitioners needs to have standing to permit us to consider the petition for review." 549 U.S. 497, 518 (2007); *see also Bowsher v. Synar,* 478 U.S. 714, 721 (1986) (holding that because it was clear that union members had standing, the Court need not consider the standing issue as to the Union or Members of Congress who were parties to the case). Plaintiffs contend that the court need not address Jennings's and Harmon's standing for the same reason. We disagree. While *EPA* and *Bowsher* give courts license to *avoid* complex questions of standing in cases where the standing of others makes a case justiciable, it does not follow that these cases permit a court that *knows* that a party is without standing to nonetheless allow that party to participate in the case. *Cf. Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth.,* 389 F.3d 491, 501 n.18 (5th Cir. 2004) ("[W]hen one of multiple co-parties raising the same claims and issues properly has standing, we do not need to *verify* the independent standing of the other co-plaintiffs." (emphasis added)).

this context is the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Goldin,* 166 F.3d at 717 (citation and quotation marks omitted).

Our court's recently issued opinion in *BATF* controls this issue. In that case, the same plaintiffs appealing here brought constitutional challenges against a federal law prohibiting federally licensed firearms dealers from selling handguns to persons under 21 years of age.[4] *BATF,* 700 F.3d at 188. Addressing the standing of the now-21-year-old plaintiffs Jennings and Harmon, the court held that, "[b]ecause they have aged out of the demographic group affected by the ban at bar, the issues on appeal are moot as to them." *Id.* at 191. The court then concluded that "Payne and the NRA, on behalf of its under-21 members, have standing." *Id.* We reach the same conclusion. Jennings's and Harmon's claims are moot, as these two plaintiffs have aged out of the 18-20-year-old range.

[4] Because the statute challenged in *BATF* was a federal statute, the plaintiffs brought their claims directly under the Second Amendment and through the equal protection component of the Fifth Amendment.

B. Standing

Although the remaining plaintiffs continue to have the requisite personal interest to pursue their claims, their claims must also satisfy the injury requirement for Article III standing. The district court determined that plaintiffs had such standing to challenge the concealed handgun licensing law, but concluded that plaintiffs lacked standing to challenge the general criminal provision banning carrying a handgun in public. It came to this conclusion based on the fact that plaintiffs did not allege "that they desire to carry a handgun openly (as opposed to concealed), concealed without a license, or in a manner inconsistent with the limitations governing licensed concealed carry." According to the court, "because the possession of a validly issued [license] excepts the license holder from prosecution . . . , Plaintiffs have not demonstrated a credible threat of prosecution" necessary to show injury. Both plaintiffs and the state argue that the court erred in this conclusion.

"A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt v. United Farm Workers Nat. Union,* 442 U.S. 289, 298 (1979). When asking a federal court to engage in pre-enforcement review of a criminal statute, a plaintiff need not violate the statute; he may meet this injury requirement by showing "an intention to engage in a course of conduct arguably affected with a constitutional interest,

but proscribed by a statute, and . . . a credible threat of prosecution thereunder." *Id.*

The district court erred in its standing analysis. Plaintiffs maintain that "Texas must permit them *some manner* of exercising their fundamental right to carry a handgun."[5] The criminal provision forbids them from carrying a handgun altogether. The licensing program declines to grant their age group, specifically, a limited exception in the form of a concealed handgun license from this alleged burden on their Second Amendment rights. Thus, both laws, as part of a statutory scheme, combine to deprive plaintiffs of their alleged constitutional rights. While striking down the age restriction in the concealed handgun licensing law would grant the plaintiffs the relief they

[5] Texas argues that "plaintiffs' sole contention" is that they are constitutionally entitled to apply for concealed handgun licenses. Although the state concedes that plaintiffs have standing, it asserts that "plaintiffs' failure to support their constitutional challenge to section 46.02's prohibitions on unlicensed or exposed handgun carriage should lead the Court to reject their claims on the merits" after the court determines that the plaintiffs do have standing to challenge the criminal provision. Texas's understanding, however, is plainly refuted by plaintiffs' Second Amended Complaint, in which they allege that the licensing provision and criminal provision, in concert, "prohibit law-abiding adults between the ages of eighteen and twenty, who are not or have not been in the United States armed forces, *from carrying a handgun outside the person's own premises or automobile.*" (Emphasis added.) Plaintiffs are clearly contending that the two statutes unconstitutionally prevent them from carrying a handgun in public, not merely that the licensing provision bars them from applying for a license.

seek – some manner in which to legally carry a handgun in public – and lift the threat of prosecution, so would invalidation of the general criminal provision alone, because then plaintiffs could carry guns openly, even if they could not obtain a license to carry them concealed. Plaintiffs, therefore, have standing to challenge both laws together, because together they bar 18-20-year-olds from carrying handguns in public in Texas.

C. Second Amendment claim

Plaintiffs contend that the district court erred in upholding this Texas scheme, because such a bar violates the Second Amendment. They argue that a scheme that bans 18-20-year-olds from carrying handguns in public, either openly or concealed, is an unconstitutional infringement on 18-20-year-olds' right to use handguns in self-defense. Texas responds that its scheme is the type of longstanding prohibition that the Supreme Court recognized as lawful in *District of Columbia v. Heller,* 554 U.S. 570 (2008).

The Second Amendment states 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.[6]

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[6] The Supreme Court has held that the Second Amendment right is fully applicable to the states through the Fourteenth Amendment. *McDonald v. City of Chicago,* 130 S. Ct. 3020, 3026 (2010). As Texas notes, the Fourteenth Amendment itself

(Continued on following page)

In *Heller,* the Supreme Court struck down a D.C. law that banned handgun possession and required all firearms in the home to be kept in an inoperable state, because the statute violated this amendment. 554 U.S. at 635. After conducting an analysis "of both text and history," *id.* at 595, the Court recognized that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation," *id.* at 592. The "*central component* of [this] right" is self-defense. *Id.* at 599. Because the law at issue in *Heller* "bann[ed] from the home the most preferred firearm in the nation to keep and use for protection of one's home and family, [it] fail[ed] constitutional muster." *Id.* at 628-29 (citation and quotation marks omitted).

Despite holding that the statute before it was unconstitutional, the Court expressly noted that "the right was not unlimited, just as the First Amendment's right of free speech was not." *Id.* at 595. It recounted that, historically, "[f]rom 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." *Id.* at 626. For example, the Court said, "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state

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references the age of twenty-one, not eighteen. *See* U.S. CONST. amend. XIV, § 2.

analogues." *Id.* It went on to make clear that "nothing in our opinion should be taken to cast doubt on [such] longstanding prohibitions." *Id.* It then "identif[ied several more of] these presumptively lawful regulatory measures [] as examples," which included "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." *Id.* at 626-67 & n.26.

Following *Heller* and *McDonald v. City of Chicago,* this circuit adopted a two-step inquiry to evaluate whether a firearms regulation comports with the Second Amendment:

> [T]he first inquiry is whether the conduct at issue falls within the scope of the Second Amendment right. . . . If the challenged law burdens conduct that falls outside the Second Amendment's scope, then the law passes constitutional muster. If the law burdens conduct that falls within the Second Amendment's scope, we then proceed to apply the appropriate level of means-ends scrutiny. We agree with the prevailing view that the appropriate level of scrutiny depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right.

BATF, 700 F.3d at 194-95 (citations and quotation marks omitted). We proceed to evaluate the Texas scheme according to this test.

1. Step one

The first question is whether the challenged conduct is even within the scope of the Second Amendment right. Here, the Texas statutes collectively prohibit carrying a handgun in public by 18-20-year-olds. This court has held that statutes enacted to safeguard the public using age-based restrictions on access to and use of firearms are part of a succession of "longstanding prohibitions," *Heller,* 554 U.S. at 626, that are likely outside the scope of the Second Amendment, because such restrictions are "consistent with" both the "longstanding tradition of targeting select groups' ability to access and to use arms for the sake of public safety" and the "longstanding tradition of age- and safety-based restrictions on the ability to access arms," *BATF,* 700 F.3d at 203. In *BATF,* the court held that a federal law that restricted 18-20-year-olds' access to and use of firearms by prohibiting federally licensed firearms dealers from selling handguns to those under 21 was consistent with these traditions, because Congress had passed the law to deter violent crime by restricting the ability of minors under 21, who were relatively immature, to buy handguns. *Id.* The Texas scheme restricts the same age group's access to and use of handguns for the same reason. Therefore, under circuit precedent, we conclude that the conduct burdened by the Texas

scheme likely "falls outside the Second Amendment's protection." *Id.*

2. Step two

Notwithstanding this conclusion, we face the same concern about the "institutional challenges in conducting a definitive review of the relevant historical record," *id.* at 204, that the court faced in *BATF*. This concern leads us to proceed to the second step of the analysis, just as the *BATF* court did.

In the second step, we initially determine which level of scrutiny to apply. "[T]he appropriate level of scrutiny depends on [1] the nature of the conduct being regulated and [2] the degree to which the challenged law burdens the right." *Id.* at 195 (citation and quotation marks omitted). "A law that burdens the core of the Second Amendment guarantee – for example, 'the right of law-abiding, responsible citizens to use arms in defense of hearth and home,' – would trigger strict scrutiny." *Id.* at 205 (quoting *Heller*, 554 U.S. at 635). "[A] less severe law" only "requires the government to show a reasonable fit between the law and an important government objective." *Id.*

This court held that the age-based federal statute challenged in *BATF* "[u]nquestionably" triggered nothing more than the latter, intermediate scrutiny. *Id.* The court first concluded that the federal statute does not burden the core of the Second Amendment based on (1) the fact that the law is "not a salient

outlier in the historical landscape of gun control" and, (2) "unlike the D.C. ban in *Heller,* this ban does not disarm an entire community, but instead prohibits commercial handgun sales to 18-to-20-year-olds – a discrete category." *Id.* Furthermore, the court observed, "[t]he Second Amendment, at its core, protects 'law-abiding, *responsible*' citizens," and Congress had determined that persons under 21 tend to be irresponsible and emotionally immature, and can be thrill-bent and prone to criminal behavior. *Id.* at 206 (quoting *Heller,* 554 U.S. at 635) (emphasis added in *BATF*).

The court also gave three reasons why, even if the Second Amendment rights of 18-20-year-olds come within the core of the amendment, the degree to which the federal statute burdens those rights is not severe: (1) the law affects only handgun sales, rather than completely banning handgun possession and use; (2) the law does not prevent 18-20-year-olds from possessing and using guns in defense of hearth and home; and (3) the law's age qualification has only a temporary effect that ends as soon as the person turns 21. *See id.* at 206-07. Because the federal law does not burden the core of the Second Amendment right and, even if it does, the degree of burden is not severe, the *BATF* court held that the law warranted intermediate scrutiny.

The *BATF* court's rationales for why an age-based restriction on gun possession and use does not burden the core of the Second Amendment right apply equally to the state's age-based restriction here.

Moreover, we cannot say that, even if 18-20-year-olds' gun rights are at the core of the Second Amendment, the Texas scheme burdens those rights to any greater degree than the federal law challenged in *BATF.* As in *BATF,* the restriction here has only a temporary effect. And, because it restricts only the ability to carry handguns in public, it does not prevent those under 21 from using guns in defense of hearth and home. Finally, it is not a complete ban on handgun use; it bans such use only outside a home or vehicle. Therefore, we must follow our decision in *BATF* and apply intermediate scrutiny to the Texas laws.

In order to withstand intermediate scrutiny, the Texas scheme must be reasonably adapted to achieve an important government interest. *Id.* at 207. Furthermore, "[t]he justification must be genuine, not hypothesized or invented *post hoc* in response to litigation," or relying "on overbroad generalizations." *United States v. Virginia,* 518 U.S. 515, 533 (1996).

The Texas laws advance the same important government objective as the one upheld in *BATF* under the intermediate scrutiny standard, namely, advancing public safety by curbing violent crime. *BATF,* 700 F.3d at 209 ("'The legitimate and compelling state interest in protecting the community from crime cannot be doubted.'" (quoting *Schall v. Martin,* 467 U.S. 253, 264 (1984))). Evidence in the record shows that curbing gun violence by keeping handguns out of the hands of immature individuals was in fact the goal of the state legislature in enacting the licensing provision. And historical analysis in the

record indicates that Texas implemented the general criminal provision to keep its public spaces safe. Federal statistics also back up this rationale. *Id.* at 208-10.

Texas's handgun carriage scheme is substantially related to this important government interest in public safety through crime prevention. The discussion in *BATF* and the record in this case emphasize that those under 21 years of age are more likely to commit violent crimes with handguns than other groups. Nevertheless, plaintiffs argue that the laws are ill-adapted to promote public safety because they are overbroad and, in any event, will not further the state's proffered goal. Plaintiffs contend that the Texas scheme is too broad because it amounts to a total ban on carrying handguns in public by 18-20-year-olds. They further challenge the breadth of the Texas scheme by arguing that the laws assume that all 18-20-year-olds are too immature to carry a handgun in public. The number of modifiers plaintiffs must use by itself undermines both these arguments: the Texas laws prohibit (1) 18-20-year-olds from (2) publicly carrying (3) handguns. First, the Texas laws have a similarly "narrow ambit" as the federal law in *BATF*. *Id.* at 205. Both the state scheme and the federal laws target the "discrete category" of 18-20-year-olds. *Id.* Second, the state scheme is in some ways more related to Texas's public safety objective that [sic] the law in *BATF,* because the state laws only regulate those persons who carry guns in public. Third, the Texas scheme restricts only the carrying of

one type of gun – handguns. It is true, as plaintiffs claim, that Texas could have taken other, less restrictive approaches, such as allowing 18-20-year-olds to get a license if they demonstrate a particularly high level of proficiency and responsibility with guns. But the state scheme must merely be reasonably adapted to its public safety objective to pass constitutional muster under an intermediate scrutiny standard. Texas need not employ the least restrictive means to achieve its goal. Given the substantial tailoring of the Texas scheme, plaintiffs [sic] overbreadth argument is unpersuasive.

Plaintiffs next argue that Texas's scheme will not promote public safety. They first contend that the scheme "assumes that 18-20-year-olds who *are* disposed toward violent criminal behavior will refrain from carrying a handgun if doing so is unlawful." That assumption would be far-fetched, since it is not clear why those disposed to violent criminal behavior would refrain from violating the statutory ban on publicly carrying handguns. But Texas is not necessarily making such an assumption. The state may also wish to have a way to take 18-20-year-olds who are disposed to violence off the street before they commit such violence. Convicting them of carrying a gun in public would accomplish this goal. Second, plaintiffs note that 18-20-year-olds are at greater risk of harm by violent offenders than older persons. They do not, however, say who perpetrates such harm or where it occurs. If members of the 18-20-year-old age cohort are at greater risk of harm from peers with

guns, then the Texas scheme may reduce the risk. And if the harm occurs in the home, the laws, while not reducing this risk, will not prevent the 18-20-year-olds from defending themselves in their residences.

Texas determined that a particular group was generally immature and that allowing immature persons to carry handguns in public leads to gun violence. Therefore, it restricted the ability of this particular group to carry handguns outside their vehicles in public. This means is substantially related to the [sic] Texas's stated goal of maintaining public safety, and it still allows 18-20-year-olds to have handguns in their cars and homes and to apply for concealed handgun licenses as soon as they turn 21. The Texas scheme thus survives intermediate scrutiny, and we affirm the district court's conclusion that it does not violate the Second Amendment.

D. Equal protection claim

Plaintiffs argue that the Texas scheme denies them equal protection of the laws because it burdens their fundamental right to bear arms. They contend that the state scheme cannot survive the strict scrutiny it must withstand for burdening such a fundamental right. Whether or not Texas's scheme satisfies the strict scrutiny standard is not the question presented by this appeal.

"'Equal protection analysis requires strict scrutiny of a legislative classification only when the

classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class.'" *Id.* at 211-12 (quoting *Mass. Bd. of Ret. v. Murgia,* 427 U.S. 307, 312 (1976)). If a law does not implicate such a protected right or class, then it need only be rationally related to a legitimate government interest to survive an equal protection challenge. *Id.* at 212. And for such laws, plaintiffs "'bear[ ] the burden of proving the facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.'" *Id.* (quoting *Kimel v. Fla. Bd. of Regents,* 528 U.S. 62, 84 (2000)).

Because the state scheme does "not impermissibly interfere with Second Amendment rights," *id.* at 212, or disadvantage a protected class,[7] it does not trigger strict scrutiny. We evaluate the Texas statutes merely to determine that they rationally relate to a legitimate government interest. Plaintiffs did not attempt to carry their burden by showing that the state scheme is irrational in the district court or on appeal. Moreover, we concluded in the previous section that the scheme survives the more stringent intermediate scrutiny. Therefore, we affirm the district court's decision to uphold the Texas scheme against plaintiffs' equal protection challenge.

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[7] As the district court noted, neither age nor military status is a suspect classification. Plaintiffs do not argue that they are members of or that the laws discriminate on the basis of any other suspect classification.

CONCLUSION

Because plaintiffs Jennings and Harmon are now 21, we REMAND their claims to the district court with instructions to dismiss them as moot. We also REVERSE the district court's ruling that the remaining plaintiffs do not have standing to challenge Texas's general criminal provision barring persons from carrying handguns in public. Finally, with respect to the general criminal provision, we REDER, and with respect to the licensing law we AFFIRM the district court, holding that the Texas scheme does not violate the Second Amendment or the Equal Protection Clause.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

REBEKAH JENNINGS; BRENNAN HARMON; ANDREW PAYNE; NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., Plaintiffs, v. STEVEN McCRAW, in his official capacity as Director of the Texas Department of Public Safety, Defendant.	)	Civil Action No. 5:10-CV-141-C

ORDER

(Filed Jan. 19, 2012)

On this date, the Court considered:

(1) Plaintiffs Rebekah Jennings, Brennan Harmon, Andrew Payne, and National Rifle Association of America, Inc.'s ("Plaintiffs") Motion for Summary Judgment, Brief, and Appendix, filed May 16, 2011;

(2) the Response and Brief filed by Defendant Steven McCraw, in his Official Capacity

as Director of the Texas Department of Public Safety ("McCraw") on June 6, 2011;

(3) Defendant McCraw's Motion for Summary Judgment, Brief, and Appendix, filed May 16, 2011;

(4) Plaintiffs' Response and Brief, filed June 6, 2011; and

(5) Brief of *Amici Curiae* Brady Center to Prevent Gun Violence, Graduate Student Assembly and Student Government of the University of Texas at Austin, Mothers Against Teen Violence, Students for Gun-Free Schools in Texas, and Texas Chapters of the Brady Campaign to Prevent Gun Violence in Support of Defendants [sic], filed May 18, 2011.

After considering the relevant arguments and authorities, the Court **GRANTS** Defendant's Motion for Summary Judgment and **DENIES** Plaintiffs' Motion for Summary Judgment.

I. FACTS

a. Preliminary Statement

Plaintiffs bring this action for declaratory and injunctive relief challenging the constitutionality of Texas statutes that prohibit persons under the age of 21 and who have not served or are not serving currently in the military from carrying a handgun outside the home. The crux of Plaintiffs' allegations is that the statutes violate both the Second Amendment

to the United States Constitution, as it applies to the states through the Fourteenth Amendment, and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

b. Statutory Scheme

Under Texas law, a "person commits an offense if the person intentionally, knowingly, or recklessly carries on or about his or her person a handgun . . . if the person is not: (1) on the person's own premises or premises under the person's control[1]; or (2) inside of or directly en route to a motor vehicle or watercraft that is owned by the person or under the person's control." Tex. Penal Code § 46.02(a). If a person "is at least 21 years of age" (and meets other requirements), he or she "is eligible for a license to carry a concealed handgun" ("CHL") ("the licensing scheme"). Tex. Gov't Code § 411.172(a)(2).[2]

Moreover, if "a person . . . is at least 18 years of age but not yet 21 years of age," he or she "is eligible for a license to carry a concealed handgun if the person is a member or veteran of the United States

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[1] It is undisputed that, under Texas law, the Individual Plaintiffs can carry a handgun in their own homes, among other specified locations not at issue here.

[2] Texas Penal Code § 46.02(a) also does not apply to, in general, a person who is traveling or engaging in lawful hunting, fishing, or other sporting activity. Tex. Penal Code § 46.15. Various occupational exceptions also apply to the general prohibition. *See id.*

armed forces, including a member or veteran of the reserves or national guard" or "was discharged under honorable conditions, if discharged from the United States armed forces, reserves, or national guard" and meets other eligibility requirements except the age condition mentioned above.[3] Tex. Gov't Code §§ [sic] 411.172(g).

c. Plaintiffs

Jennings, Harmon, and Payne are all Texas residents between the ages of 18 and 20. They have expressed a desire to carry a handgun outside of the home or automobile for self-defense purposes but currently do not because Texas law prohibits them from doing so. All of the Individual Plaintiffs allege that they meet each of the requirements for obtaining a Texas CHL save the age requirement. They have completed a handgun safety course taught by a CHL instructor licensed by the Texas Department of Public Safety and have passed both the written and range tests that are given to applicants for a CHL. The Individual Plaintiffs further allege that but for the age requirement they would have been able to obtain a Texas CHL and would occasionally carry a handgun as permitted by the license.

The National Rifle Association ("NRA") is a membership organization committed to protecting and

[3] For ease of reference, the Court will refer to those excluded from this classification as "non-military personnel."

defending the fundamental right to keep and bear arms as well as promoting the safe and responsible use of firearms for self-defense and other lawful purposes. Hundreds of the NRA's members in Texas are 18 to 20 years old. But for the minimum age requirement imposed by Texas Government Code § 411.172, some of these 18- to 20-year-old NRA members, including Jennings, Harmon, and Payne, would be eligible to obtain a CHL and would carry a handgun for self-defense outside of the home or automobile.

II. STANDARD

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine dispute of material fact exists when the evidence is such that a reasonable jury could return a verdict for the non-movant, *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986); that is, "[a]n issue is material if its resolution could affect the outcome of the action." *Wyatt v. Hunt Plywood Co.,* 297 F.3d 405, 409 (5th Cir. 2002). When reviewing a motion for summary judgment, the court views all facts and evidence in the light most favorable to the non-moving party. *United Fire & Cas. Co. v. Hixson Bros.,* 453 F.3d 283, 285 (5th Cir. 2006). In doing so, the court "refrain[s] from making credibility determinations or weighing the evidence." *Turner v. Baylor Richardson Med. Ctr.,* 476 F.3d 337, 343 (5th Cir. 2007).

Where parties have filed cross-motions for summary judgment, the court must consider each motion separately because each movant bears the burden of showing that no genuine dispute of material fact exists and that it is entitled to judgment as a matter of law. *Shaw Constructors, Inc. v. ICF Kaiser Eng'rs, Inc.,* 395 F.3d 533, 538-39 (5th Cir. 2004).

III. ANALYSIS

a. Standing

McCraw challenges the standing to bring suit of the Individual Plaintiffs where they have not actually applied for a CHL and they do not face immediate criminal prosecution,[4] as well as the associational standing of the NRA, who brings this suit on behalf of its 18- to 20-year-old members. Article III restricts the judicial power to actual "cases" and "controversies," a limitation understood to confine the federal judiciary to "the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private

[4] McCraw also challenges Plaintiffs' standing based on their failure to exhaust administrative remedies. No argument accompanies this assertion in McCraw's brief, nor does it identify any potential administrative remedies Plaintiffs could have pursued prior to the filing of this suit. Nevertheless, when a plaintiff's claims are premised on 42 U.S.C. § 1983, as are the ones here, no exhaustion of administrative remedies is required. *Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth.,* 389 F.3d 491, 497 n.10 (5th Cir. 2004).

or official violation of law." *Summers v. Earth Island Inst.,* 555 U.S. 488, 492 (2009); *see* U.S. Const. art. III, § 1. The doctrine of standing enforces this limitation. *Summers,* 555 U.S. at 492; *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 559-60 (1992).

1. Texas Government Code § 411.172

In order to satisfy the standing requirement of an "actual or imminent" injury, a plaintiff generally must submit to the challenged policy before pursuing an action to dispute it. *See, e.g., Moose Lodge No. 107 v. Irvis,* 407 U.S. 163, 166-71 (1972); *Grant ex rel. Family Eldercare v. Gilbert,* 324 F.3d 383, 388 (5th Cir. 2003). Strict adherence to this general rule, however, may be excused when a policy's flat prohibition would render submission futile. *Davis v. Tarrant Cnty. Tex.,* 565 F.3d 214, 220 (5th Cir. 2009) (citing *LeClerc v. Webb,* 419 F.3d 405, 413 (5th Cir. 2005)); *see also Ellison v. Connor,* 153 F.3d 247, 255 (5th Cir. 1998) (holding that plaintiffs did not need to apply for building permits to establish standing where the defendant had already "specifically stat[ed] that it would not permit the construction or placement of any structures on their land.").

Plaintiffs seek to carry a concealed handgun but are prevented from doing so because they do not posses [sic] a CHL. The right to carry a concealed handgun arguably touches on Plaintiffs' Second Amendment right to bear arms, and this Court could provide Plaintiffs the relief sought should it hold

unconstitutional the age requirement of Texas Government Code § 411.172. Although Plaintiffs have not actually completed their applications for a CHL, to do so would be futile. The issuance of this license to non-military individuals under 21 years of age is categorically prohibited by statute. *See* Tex. Gov't Code § 411.172(a)(2) & (g). Plaintiffs have put forward evidence that they would be qualified for a CHL but for the minimum age requirement, and McCraw has not demonstrated evidence to the contrary. The futility of a formal application, coupled with the fact that Plaintiffs would qualify for a CHL but for the age requirement, is sufficient to confer standing.

Once a court has determined that at least one plaintiff has standing, it need not consider whether the remaining plaintiffs have standing to maintain the suit. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.,* 429 U.S. 252, 264 n.9 (1977). Because the Court has held that the Individual Plaintiffs have standing to challenge Texas Government Code § 411.172, it need not reach the question of the NRA's associational standing to challenge the same statute.

2. Texas Penal Code § 46.02

To establish standing to challenge the constitutionality of a criminal statute, a plaintiff must show a "credible threat" that the statute will be enforced against the plaintiff. *Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298 (1979). While a plaintiff need not first expose himself to actual arrest or

prosecution to gain standing to challenge a criminal statute, "[w]hen plaintiffs 'do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible,' they do not allege a dispute susceptible to resolution by a federal court." *Id.* at 298-299 (quoting *Younger v. Harris,* 401 U.S. 37, 42 (1971)).

Plaintiffs have not alleged facts sufficient to confer standing to challenge Texas Penal Code § 46.02 because they cannot demonstrate a credible threat that McCraw will enforce the statute against them.[5] The relief Plaintiffs seek, as detailed in their complaint, is the issuance of a CHL in order to lawfully carry a handgun. *See* Pls.' Second Am. Compl. 7, 9, & 10 ("But for the age requirement, [Plaintiff] would have obtained [his or her] Texas CHL and occasionally would carry a handgun as permitted by the license."). At no point in their complaint do Plaintiffs allege that they desire to carry a handgun openly (as opposed to concealed), concealed without a license, or in a manner inconsistent with the limitations governing licensed concealed carry. And because the possession of a validly issued CHL excepts the license holder from prosecution under Texas Penal Code

[5] Although the Court has misgivings as to whether McCraw, under *Ex parte Young,* 209 U.S. 123 (1908), is the proper defendant with respect to Plaintiffs' challenge of Texas Penal Code § 46.02, it need not reach this question in light of its resolution of the Article III standing issue.

§ 46.02 for all intents and purposes, Plaintiffs have not demonstrated a credible threat of prosecution.

Therefore, the Court is of the opinion that Plaintiffs lack standing to challenge Texas Penal Code § 46.02. The Court is also of the opinion that, because the relief sought by the NRA with respect to its challenge to Texas Penal Code § 46.02 involves the issuance of CHLs for its otherwise qualified 18- to 20-year-old membership, it therefore lacks standing for the same reasons that are fatal to the Individual Plaintiffs' challenge.

b. Second Amendment

The text of the Second Amendment reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. In 2008, the Supreme Court held in *District of Columbia v. Heller* that the Second Amendment confers an individual right to keep and bear arms apart from any connection with a state-regulated militia.[6] 554 U.S. 570, 595 (2008). The Court stated, however, that the right to bear arms is not absolute: "Like most

[6] Two years later, in *McDonald v. City of Chicago,* the Supreme Court held that the Second Amendment is fully applicable to the states. 130 S. Ct. 3020, 3026 (2010). While this case is of obvious importance with regard to constitutional challenges to state laws, the Court focuses its discussion on *Heller* because it is the case that more fully discusses the nature of the right conferred by the Second Amendment.

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.***" *Id.* at 626-27 (citations omitted and emphasis added).

As groundbreaking as *Heller* was to the realm of constitutional jurisprudence, the Court's treatment of the Second Amendment is actually quite narrow in that the opinion focuses primarily on self-defense in the home. *See id.* at 635 ("In sum, we hold that 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."); *see also District of Columbia v. Heller,* 552 U.S. 1035, 1035 (2007) (The Supreme Court certified the following question for consideration: Whether the [D.C. gun laws] violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use *in their homes*?) (emphasis added).

While not addressed directly in any controlling authority of which the Court is aware, the specific relief requested by Plaintiffs, i.e., the right to carry a handgun outside of the home, seems to be beyond the scope of the core Second Amendment concern articulated in *Heller. See, e.g., Moreno v. N.Y. City Police Dep't,* Civ. No. 10-6269, 2011 U.S. Dist. LEXIS 76129,

at *7-8 (S.D.N.Y. May 9, 2011) (noting that "*Heller* has been narrowly construed, as protecting the individual right to bear arms for the specific purpose of self-defense within the home."), *report and recommendation adopted,* 2011 U.S. Dist. LEXIS 76131 (S.D.N.Y. July 14, 2011); *Osterweil v. Bartlett,* No. 1:09-CV-825, 2011 U.S. Dist. LEXIS 54196, at *18 (N.D.N.Y May 20, 2011) (quoting *Heller,* 554 U.S. at 635 (*Heller* "appears to suggest that the core purpose of the right conferred by the Second Amendment was to allow 'law-abiding, responsible citizens to use arms in defense of hearth and home'")); *United States v. Tooley,* 717 F. Supp. 2d 580, 596 (S.D. W. Va. 2010) ("[P]ossession of a firearm outside of the home or for purposes other than self-defense in the home are not within the 'core' of the Second Amendment right as defined by *Heller.*"); *Gonzalez v. Vill. of W. Milwaukee,* No. 09-384, 2010 U.S. Dist. LEXIS 46281, at *10 (E.D. Wis. May 11, 2010) (citing *Heller* for the proposition that "[t]he Supreme Court has never held that the Second Amendment protects the carrying of guns outside the home"); *Heller v. District of Columbia,* 698 F. Supp. 2d 179, 188 (D.D.C. 2010) (the "core Second Amendment right" is "the right of law-abiding, responsible citizens to use arms in defense of hearth and home") (internal quotation marks omitted); *see also United States v. Masciandaro,* 638 F.3d 458, 470 (4th Cir. 2011) ("[A]s we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense."); *Yohe v. Marshall,* Civ. No. 08-10922-MBB, 2010 U.S. Dist. LEXIS 109415, at

*7-8 (D. Mass. Oct. 14, 2010) (quoting *McDonald v. City of Chicago,* 130 S. Ct. at 3047) ("Thus, incorporating the right to bear arms in the Second Amendment as a fundamental right applicable to the states through the Fourteenth Amendment 'does not imperil every law regulating firearms.'"); *Beachum v. United States,* 19 A.3d 311, 320 n.11 (D.C. 2011) ("*Heller* does not address, and we have not decided, whether the Second Amendment protects the possession of handguns for other than defensive use in the home."); *Little v. United States,* 989 A.2d 1096, 1100-01 (D.C. 2010) (rejecting defendant's Second Amendment challenge to his conviction under D.C. gun statute because "[i]n *Heller,* the issue was the constitutionality of the District of Columbia's law on the possession of usable handguns in the home," and defendant conceded that he was outside of his home) (internal quotation marks and citation omitted); *State v. Knight,* 218 P.3d 1177, 1189 (Kan. Ct. App. 2009) ("It is clear that the Court [in *Heller*] was drawing a narrow line regarding the violations related solely to use of a handgun in the home for self-defense purposes.").

Indeed, the D.C. laws at issue in *Heller* were extreme in that they totally banned handgun possession in the home and required that any lawful firearm in the home be disassembled or bound by trigger lock at all times, rendering it inoperable. *Heller,* 554 U.S. at 628. These laws essentially made it impossible for citizens to use guns for their core lawful purpose of self-defense. *See id.* at 630. By contrast, Texas

law permits broad usage of long arms outside of the home[7] and actually confers wider protection with regard to handgun usage than that specifically addressed in *Heller* in that, in general, it permits anyone over the age of 18 to carry a handgun in his or her vehicle or watercraft, carves out various exceptions for hunting and sport, and provides for the concealed carriage of a handgun by most of the law-abiding population. *See* Tex. Penal Code §§ 46.02 & 46.15; Tex. Gov't Code § 411.172.

It is axiomatic that a statutory scheme that essentially provides more protection of an individual right than that conferred by the Constitution cannot, therefore, be unconstitutional. Absent further guidance from controlling authority, the Court is unwilling to expound upon the meaning of the Second Amendment beyond the parameters previously recognized by the Supreme Court. *See Williams v. State,* 417 Md. 479, 496 (Md. 2011) ("If the Supreme Court . . . meant its holding to extend beyond home possession, it will need to say so more plainly."); *see also Dronenburg v. Zech,* 741 F.2d 1388, 1396 (D.C. Cir. 1984) ("If it is in any degree doubtful that the Supreme Court should freely create new constitutional

[7] The Court is cognizant of the fact that granting rights for the usage of long guns does not necessarily mitigate against the encroachment, if any, on the right to possess a handgun. *See Heller,* 554 U.S. at 629. Nevertheless, the Court mentions this aspect of Texas law merely to highlight the fact that the state law provides more broad-reaching protections than the right recognized in *Heller*.

rights, we think it certain that lower courts should not do so."). The proper remedy to supply Plaintiffs' desired relief is legislative in nature, not judicial: either to petition the Texas Legislature for a change in state law or, on a national level, to rally for a constitutional amendment. *See Ferguson v. Skrupa,* 372 U.S. 726, 729 (1963) ("Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation.").

While not skirted entirely, the focus of the parties' briefing does not center on the breadth of the Second Amendment but rather on the question of at what age does the right to keep and bear arms vest. This approach puts the cart before the horse. Because the Court is of the opinion that the Second Amendment does not confer a right that extends beyond the home, it need not reach the question regarding the age of investiture of such a right. *See United States v. Marzzarella,* 614 F.3d 85, 89 (3d Cir. 2010) (suggesting that a court's inquiry into the constitutionality of a statute is complete upon holding that a challenged law does not burden conduct falling within the scope of the Second Amendment's guarantee).

Therefore, with regard to the Second Amendment issue, Defendant's Motion for Summary Judgment is **GRANTED** and Plaintiffs' Motion for Summary Judgment is **DENIED**.

c. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The focus of Plaintiffs' Equal Protection claim is on the allegedly unequal treatment effected by the licensing scheme between non-military personnel, ages 18 to 20 years, and those over the age of 20, as well as between those over the age of 18 who have served or are currently serving in the military.

While creating no substantive rights, the Equal Protection Clause embodies a general rule that states must treat like cases alike but may treat unlike cases accordingly. *Plyler v. Doe,* 457 U.S. 202, 216 (1982) (quoting *Tigner v. Texas,* 310 U.S. 141, 147 (1940) ("The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.")). A legislative classification or distinction that does not burden either a fundamental right or target a suspect class will be upheld if it bears a rational relation to some legitimate end. *Vacco v. Quill,* 521 U.S. 793, 799 (1997). "The burden is upon the challenging party to negative any reasonably conceivable state of facts that could provide a rational basis for the classification." *Bd. of Trs. of the Univ. of Ala. v. Garrett,* 531 U.S. 356, 367 (2001) (internal quotation marks omitted).

As the Court has discussed above, the licensing scheme does not burden the fundamental right to

keep and bear arms.[8] Neither does the licensing scheme target a suspect class. Traditionally, suspect class status is applied to a class that has been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Indep. Sch. Dist. v. Rodriguez,* 411 U.S. 1, 28 (1973).

The Supreme Court has categorically rejected age as a suspect classification. *Kimel v. Fla. Bd. of Regents,* 528 U.S. 62, 83 (2000) ("[A]ge is not a suspect classification under the Equal Protection Clause."). Therefore, Texas "may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest." *Id.* The Constitution permits states to "draw lines on the basis of age when they have a rational basis for doing so at a class-based level, even if it 'is probably not true' that those reasons are valid in the majority of cases." *Id.* at 86.

It follows, then, that Plaintiffs must demonstrate that no reasonably conceivable state of facts could

[8] Although pleaded in broad terms, Plaintiffs' Equal Protection argument seems to center on the infringement of a fundamental right. The Court has rejected that argument. Therefore, the Court will conduct only a short analysis on suspect classification because, although not clear from the complaint, Plaintiffs' briefing indicates that they likely did not intend to raise this issue.

provide a rational basis for the licensing scheme. McCraw avers that individuals under 21 are less suited to carry concealed handguns than persons over the age of 21 and that withholding licenses from underage residents promotes public safety and crime prevention. McCraw likens Texas Government Code § 411.172 to Texas Alcoholic Beverage Code § 106.06, which makes it a crime to furnish an alcoholic beverage to a minor, the policy basis of which considers the relative immaturity and poor judgment of young people. Therefore, in implementing Texas Government Code § 411.172, Texas has identified a legitimate state interest – public safety – and passed legislation that is rationally related to addressing that issue – the licensing scheme; thus, it acted within its constitutional powers and in accordance with the Equal Protection Clause. *See Madriz-Alvarado v. Ashcroft,* 383 F.3d 321, 332 (5th Cir. 2004) (quoting *FCC v. Beach Commc'ns,* 508 U.S. 307, 313 (1993) ("Under rational basis review, differential treatment 'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'")).

As for Plaintiffs' companion claim under the Equal Protection Clause, the Court is of the opinion that what can best be described as "non-military personnel" does not constitute a suspect class. Therefore, like the age distinction, McCraw demonstrates merely that the issuance of CHLs to military personnel between the ages of 18 and 20 and not to

non-military personnel of the same ages is rationally related to a legitimate state interest. In so doing, McCraw avers that those who are serving currently or have previously served in the military are more equipped to handle concealed handguns than those members of the citizenry between the ages of 18 and 20 who have not served in the military. *See* Def.'s App. 22, Senate Comm. on Veterans Affairs and Military Installations, Bill Analysis, Tex. S.B. 322, 79th Leg., C.S. (2005) ("[M]ilitary personnel currently receive[ ] extensive training in handling weapons."). The fact that most military personnel have extensive training in handling weapons is rationally related to the concept that they could be entitled to CHL privileges earlier than the general citizenry. Therefore, Plaintiffs' Equal Protection challenge must fall.

Accordingly, with regard to the Equal Protection issues, Defendants' Motion for Summary Judgment is **GRANTED** and Plaintiffs' Motion for Summary Judgment is **DENIED**.

IV. CONCLUSION

For the reasons stated herein,

(1) Defendant's Motion for Summary Judgment is **GRANTED**; and

(2) Plaintiffs' Motion for Summary Judgment is **DENIED**.

SO ORDERED.

Dated January 19, 2012.

/s/ Sam R. Cummings
SAM R. CUMMINGS
UNITED STATES
DISTRICT JUDGE

Appendix C

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 12-10091

NATIONAL RIFLE ASSOCIATION OF AMERICA, INCORPORATED; REBEKAH JENNINGS; BRENNAN HARMON; ANDREW PAYNE,

Plaintiffs-Appellants

v.

STEVEN C. MCCRAW, in his official capacity as Director of the Texas Department of Public Safety,

Defendant-Appellee

Appeal from the United States District Court for the Northern District of Texas, Lubbock

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ON PETITION FOR REHEARING EN BANC

(Filed Jun. 26, 2013)

(Opinion 05/20/13, 5 Cir., ___, ___, F.3d ___)

Before HIGGINBOTHAM, CLEMENT, and HAYNES, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Edith B. Clement
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

Appendix D

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 12-10091

D.C. Docket No. 5:10-CV-141

NATIONAL RIFLE ASSOCIATION OF AMERICA, INCORPORATED; REBEKAH JENNINGS; BRENNAN HARMON; ANDREW PAYNE,

Plaintiffs-Appellants

v.

STEVEN C. MCCRAW, in his official capacity as Director of the Texas Department of Public Safety,

Defendant-Appellee

Appeal from the United States District Court for the Northern District of Texas, Lubbock

Before HIGGINBOTHAM, CLEMENT, and HAYNES, Circuit Judges.

JUDGMENT

(Filed May 20, 2013)

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed in part, reversed in

part, rendered and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

Appendix E

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.

U.S. CONST. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TEX. PENAL CODE § 12.21
Class A Misdemeanor

An individual adjudged guilty of a Class A misdemeanor shall be punished by:

(1) a fine not to exceed $4,000;

(2) confinement in jail for a term not to exceed one year; or

(3) both such fine and confinement.

TEX. PENAL CODE § 46.02
Unlawful Carrying Weapons

(a) A person commits an offense if the person intentionally, knowingly, or recklessly carries on or about his or her person a handgun, illegal knife, or club if the person is not:

(1) on the person's own premises or premises under the person's control; or

(2) inside of or directly en route to a motor vehicle or watercraft that is owned by the person or under the person's control.

(a-1) A person commits an offense if the person intentionally, knowingly, or recklessly carries on or about his or her person a handgun in a motor vehicle or watercraft that is owned by the person or under the person's control at any time in which:

(1) the handgun is in plain view; or

(2) the person is:

(A) engaged in criminal activity, other than a Class C misdemeanor that is a violation of a law or ordinance regulating traffic or boating;

(B) prohibited by law from possessing a firearm; or

(C) a member of a criminal street gang, as defined by Section 71.01.

(a-2) For purposes of this section, 'premises' includes real property and a recreational vehicle that is being

used as living quarters, regardless of whether that use is temporary or permanent. In this subsection, 'recreational vehicle' means a motor vehicle primarily designed as temporary living quarters or a vehicle that contains temporary living quarters and is designed to be towed by a motor vehicle. The term includes a travel trailer, camping trailer, truck camper, motor home, and horse trailer with living quarters.

(a-3) For purposes of this section, 'watercraft' means any boat, motorboat, vessel, or personal watercraft, other than a seaplane on water, used or capable of being used for transportation on water.

(b) Except as provided by Subsection (c), an offense under this section is a Class A misdemeanor.

(c) An offense under this section is a felony of the third degree if the offense is committed on any premises licensed or issued a permit by this state for the sale of alcoholic beverages.

TEX. GOV'T CODE § 411.172
Eligibility

(a) A person is eligible for a license to carry a concealed handgun if the person:

(1) is a legal resident of this state for the six-month period preceding the date of application under this subchapter or is otherwise eligible for a license under Section 411.173(a);

(2) is at least 21 years of age;

(3) has not been convicted of a felony;

(4) is not charged with the commission of a Class A or Class B misdemeanor or equivalent offense, or of an offense under Section 42.01, Penal Code, or equivalent offense, or of a felony under an information or indictment;

(5) is not a fugitive from justice for a felony or a Class A or Class B misdemeanor or equivalent offense;

(6) is not a chemically dependent person;

(7) is not incapable of exercising sound judgment with respect to the proper use and storage of a handgun;

(8) has not, in the five years preceding the date of application, been convicted of a Class A or Class B misdemeanor or equivalent offense or of an offense under Section 42.01, Penal Code, or equivalent offense;

(9) is fully qualified under applicable federal and state law to purchase a handgun;

(10) has not been finally determined to be delinquent in making a child support payment administered or collected by the attorney general;

(11) has not been finally determined to be delinquent in the payment of a tax or other money collected by the comptroller, the tax collector of a political subdivision of the state, or any agency or subdivision of the state;

(12) is not currently restricted under a court protective order or subject to a restraining order affecting the spousal relationship, other than a restraining order solely affecting property interests;

(13) has not, in the 10 years preceding the date of application, been adjudicated as having engaged in delinquent conduct violating a penal law of the grade of felony; and

(14) has not made any material misrepresentation, or failed to disclose any material fact, in an application submitted pursuant to Section 411.174.

(b) For the purposes of this section, an offense under the laws of this state, another state, or the United States is:

(1) except as provided by Subsection (b-1), a felony if the offense, at the time the offense is committed:

(A) is designated by a law of this state as a felony;

(B) contains all the elements of an offense designated by a law of this state as a felony; or

(C) is punishable by confinement for one year or more in a penitentiary; and

(2) a Class A misdemeanor if the offense is not a felony and confinement in a jail other than a state jail felony facility is affixed as a possible punishment.

(b-1) An offense is not considered a felony for purposes of Subsection (b) if, at the time of a person's application for a license to carry a concealed handgun, the offense:

(1) is not designated by a law of this state as a felony; and

(2) does not contain all the elements of any offense designated by a law of this state as a felony.

(c) An individual who has been convicted two times within the 10-year period preceding the date on which the person applies for a license of an offense of the grade of Class B misdemeanor or greater that involves the use of alcohol or a controlled substance as a statutory element of the offense is a chemically dependent person for purposes of this section and is not qualified to receive a license under this subchapter. This subsection does not preclude the disqualification of an individual for being a chemically dependent person if other evidence exists to show that the person is a chemically dependent person.

(d) For purposes of Subsection (a)(7), a person is incapable of exercising sound judgment with respect to the proper use and storage of a handgun if the person:

(1) has been diagnosed by a licensed physician as suffering from a psychiatric disorder or condition that causes or is likely to cause substantial impairment in judgment, mood, perception, impulse control, or intellectual ability;

(2) suffers from a psychiatric disorder or condition described by Subdivision (1) that:

(A) is in remission but is reasonably likely to redevelop at a future time; or

(B) requires continuous medical treatment to avoid redevelopment;

(3) has been diagnosed by a licensed physician, determined by a review board or similar authority, or declared by a court to be incompetent to manage the person's own affairs; or

(4) has entered in a criminal proceeding a plea of not guilty by reason of insanity.

(e) The following constitutes evidence that a person has a psychiatric disorder or condition described by Subsection (d)(1):

(1) involuntary psychiatric hospitalization;

(2) psychiatric hospitalization;

(3) inpatient or residential substance abuse treatment in the preceding five-year period;

(4) diagnosis in the preceding five-year period by a licensed physician that the person is dependent on alcohol, a controlled substance, or a similar substance; or

(5) diagnosis at any time by a licensed physician that the person suffers or has suffered from a psychiatric disorder or condition consisting of or relating to:

(A) schizophrenia or delusional disorder;

(B) bipolar disorder;

(C) chronic dementia, whether caused by illness, brain defect, or brain injury;

(D) dissociative identity disorder;

(E) intermittent explosive disorder; or

(F) antisocial personality disorder.

(f) Notwithstanding Subsection (d), a person who has previously been diagnosed as suffering from a psychiatric disorder or condition described by Subsection (d) or listed in Subsection (e) is not because of that disorder or condition incapable of exercising sound judgment with respect to the proper use and storage of a handgun if the person provides the department with a certificate from a licensed physician whose primary practice is in the field of psychiatry stating that the psychiatric disorder or condition is in remission and is not reasonably likely to develop at a future time.

(g) Notwithstanding Subsection (a)(2), a person who is at least 18 years of age but not yet 21 years of age is eligible for a license to carry a concealed handgun if the person:

(1) is a member or veteran of the United States armed forces, including a member or veteran of the reserves or national guard;

(2) was discharged under honorable conditions, if discharged from the United States armed forces, reserves, or national guard; and

(3) meets the other eligibility requirements of Subsection (a) except for the minimum age required by federal law to purchase a handgun.

(h) The issuance of a license to carry a concealed handgun to a person eligible under Subsection (g) does not affect the person's ability to purchase a handgun or ammunition under federal law.

TEX. GOV'T CODE § 411.174
Application

(a) An applicant for a license to carry a concealed handgun must submit to the director's designee described by Section 411.176:

(1) a completed application on a form provided by the department that requires only the information listed in Subsection (b);

(2) one or more photographs of the applicant that meet the requirements of the department;

(3) a certified copy of the applicant's birth certificate or certified proof of age;

(4) proof of residency in this state;

(5) two complete sets of legible and classifiable fingerprints of the applicant taken by a person appropriately trained in recording fingerprints who is employed by a law enforcement agency or by a private entity designated by a law enforcement agency as an entity qualified to take fingerprints of an applicant for a license under this subchapter;

(6) a nonrefundable application and license fee of $140 paid to the department;

(7) evidence of handgun proficiency, in the form and manner required by the department;

(8) an affidavit signed by the applicant stating that the applicant:

(A) has read and understands each provision of this subchapter that creates an offense under the laws of this state and each provision of the laws of this state related to use of deadly force; and

(B) fulfills all the eligibility requirements listed under Section 411.172; and

(9) a form executed by the applicant that authorizes the director to make an inquiry into any noncriminal history records that are necessary to determine the applicant's eligibility for a license under Section 411.172(a).

(b) An applicant must provide on the application a statement of the applicant's:

(1) full name and place and date of birth;

(2) race and sex;

(3) residence and business addresses for the preceding five years;

(4) hair and eye color;

(5) height and weight;

(6) driver's license number or identification certificate number issued by the department;

(7) criminal history record information of the type maintained by the department under this chapter, including a list of offenses for which the applicant was arrested, charged, or under an information or indictment and the disposition of the offenses; and

(8) history, if any, of treatment received by, commitment to, or residence in:

(A) a drug or alcohol treatment center licensed to provide drug or alcohol treatment under the laws of this state or another state, but only if the treatment, commitment, or residence occurred during the preceding five years; or

(B) a psychiatric hospital.

(b-1) The application must provide space for the applicant to:

(1) list any military service that may qualify the applicant to receive a license with a veteran's designation under Section 411.179(e); and

(2) include proof required by the department to determine the applicant's eligibility to receive that designation.

(c) The department shall distribute on request a copy of this subchapter and application materials.

<Text of subsec. (d) effective Jan. 1, 2014 >

(d) The department may not request or require an applicant to provide the applicant's social security number as part of an application under this section.

TEX. GOV'T CODE § 411.188
Handgun Proficiency Requirement

(a) The director by rule shall establish minimum standards for handgun proficiency and shall develop a course to teach handgun proficiency and examinations to measure handgun proficiency. The course to teach handgun proficiency is required for each person who seeks to obtain or renew a license and must contain training sessions divided into two parts. One part of the course must be classroom instruction and the other part must be range instruction and an actual demonstration by the applicant of the applicant's ability to safely and proficiently use a handgun. An applicant must be able to demonstrate, at a minimum, the degree of proficiency that is required to effectively operate a handgun of .32 caliber or above. The department shall distribute the standards, course requirements, and examinations on request to any qualified handgun instructor.

(b) Only qualified handgun instructors may administer the classroom instruction part or the range instruction part of the handgun proficiency course. The classroom instruction part of the course must include not less than four hours and not more than six hours of instruction on:

(1) the laws that relate to weapons and to the use of deadly force;

(2) handgun use and safety;

(3) nonviolent dispute resolution; and

(4) proper storage practices for handguns with an emphasis on storage practices that eliminate the possibility of accidental injury to a child.

(c) Repealed by Acts 2013, 83rd Leg., ch. 156 (S.B. 864), § 3 and Acts 2013, 83rd Leg., ch. 1387 (H.B. 48), § 5.

(d) Only a qualified handgun instructor may administer the proficiency examination to obtain a license. The proficiency examination must include:

(1) a written section on the subjects listed in Subsection (b); and

(2) a physical demonstration of proficiency in the use of one or more handguns and in handgun safety procedures.

(e) Repealed by Acts 2013, 83rd Leg., ch. 1302 (H.B. 3142), § 14(4).

(f) The department shall develop and distribute directions and materials for course instruction, test administration, and recordkeeping. All test results shall be sent to the department, and the department shall maintain a record of the results.

(g) A person who wishes to obtain a license to carry a concealed handgun must apply in person to a qualified handgun instructor to take the appropriate course in handgun proficiency and demonstrate handgun proficiency as required by the department.

(h) Repealed by Acts 2013, 83rd Leg., ch. 1302 (H.B. 3142), § 14(4).

(i) A certified firearms instructor of the department may monitor any class or training presented by a qualified handgun instructor. A qualified handgun instructor shall cooperate with the department in the department's efforts to monitor the presentation of training by the qualified handgun instructor. A qualified handgun instructor shall make available for inspection to the department any and all records maintained by a qualified handgun instructor under this subchapter. The qualified handgun instructor shall keep a record of all information required by department rule.

(j) For license holders seeking to renew their licenses, the department may offer online, or allow a qualified handgun instructor to offer online, the classroom instruction part of the handgun proficiency course and the written section of the proficiency examination.

(k) A qualified handgun instructor may submit to the department a written recommendation for disapproval of the application for a license or modification of a license, accompanied by an affidavit stating personal knowledge or naming persons with personal knowledge of facts that lead the instructor to believe that an applicant does not possess the required handgun proficiency. The department may use a written recommendation submitted under this subsection as the basis for denial of a license only if the department determines that the recommendation is made in good faith and is supported by a preponderance of the evidence. The department shall make a determination

under this subsection not later than the 45th day after the date the department receives the written recommendation. The 60-day period in which the department must take action under Section 411.177(b) is extended one day for each day a determination is pending under this subsection.

Appendix F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 11-10959

NATIONAL RIFLE ASSOCIATION OF AMERICA, INCORPORATED; ANDREW M. PAYNE; REBEKAH JENNINGS; BRENNAN HARMON,

Plaintiffs-Appellants,

v.

BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES; B. TODD JONES, In His Official Capacity as Acting Director of the Bureau of Alcohol, Tobacco, Firearms, and Explosives; ERIC H. HOLDER, JR., U.S. ATTORNEY GENERAL,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas

Filed: October 25, 2012
Revised: April 29, 2013

Before KING, PRADO and HAYNES, Circuit Judges.

EDWARD C. PRADO, Circuit Judge:

This appeal concerns the constitutionality of 18 U.S.C. § 922(b)(1) and (c)(1), and attendant regulations, which prohibit federally licensed firearms dealers from selling handguns to persons under the age of 21. Appellants – the National Rifle Association and individuals who at the time of filing were over the age of 18 but under the age of 21 – brought suit in district court against several federal government agencies, challenging the constitutionality of the laws. The essence of their challenge is that the laws violate the Second Amendment and the equal protection component of the Fifth Amendment by preventing law-abiding 18-to-20-year-old adults from purchasing handguns from federally licensed dealers. The district court rejected their constitutional claims and granted summary judgment for the government. We AFFIRM.

I. Background

A. Procedural Background

Appellants filed suit in district court against the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF"), ATF's Acting Director, and the Attorney General of the United States, challenging the constitutionality of 18 U.S.C. §§ 922(b)(1) and (c)(1), as well as attendant regulations, 27 C.F.R. §§ 478.99(b)(1), 478.124(a), and 478.96(b). These provisions prohibit licensed dealers – i.e., federal firearms licensees ("FFLs") – from selling handguns to persons under the age of 21. Appellants include: (i) Andrew M. Payne, Rebekah Jennings, and Brennan Harmon,

who were between the ages of 18 and 21 when the suit was filed; and (ii) the National Rifle Association ("NRA") on behalf of (a) 18-to-20-year-old members who are prevented from purchasing handguns from FFLs, and (b) FFL members who are prohibited from making such sales. Appellants asserted that the federal laws are unconstitutional because they infringe on the right of 18-to-20-year-old adults to keep and bear arms under the Second Amendment and deny them equal protection under the Due Process Clause of the Fifth Amendment. Appellants sought a declaratory judgment that the laws are unconstitutional, as well as injunctive relief.

Before the district court, the government filed a motion for summary judgment, arguing that Appellants lacked standing to challenge the federal laws and that their constitutional claims failed on the merits. The district court concluded that Appellants had standing, but then determined that Appellants failed to make out either a viable Second Amendment claim or a viable equal protection claim. Appellants timely appealed.

B. Statutory Framework

The federal laws at issue – 18 U.S.C. §§ 922(b)(1) and (c)(1), 27 C.F.R. §§ 478.99(b)(1), 478.124(a), and 478.96(b) – were enacted as part of the Omnibus Crime Control and Safe Streets Act of 1968, Pub.L. No. 90-351, 82 Stat. 197. Together, the laws regulate the sale of firearms by FFLs and are part of a larger statutory package that prohibits persons from

"engag[ing] in the business of importing, manufacturing, or dealing in firearms," unless a person is a "licensed importer, licensed manufacturer, or licensed dealer." 18 U.S.C. § 922(a)(1)(A). To "engage[ ] in th[is] business" means to "devote[ ] time, attention, and labor" to the manufacture, sale, or importation of firearms or ammunition "as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms." *Id.* § 921(21)(A)-(E).

The first contested provision, 18 U.S.C. § 922(b)(1), provides that:

> It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver . . . any firearm or ammunition to any individual who the licensee knows or has reasonable cause to believe is less than eighteen years of age, and, if the firearm, or ammunition is other than a shotgun or rifle, or ammunition for a shotgun or rifle, to any individual who the licensee knows or has reasonable cause to believe is less than twenty-one years of age. . . .

This provision is paired with § 922(c)(1), which prevents an FFL from selling a firearm to a person "who does not appear in person at the licensee's business premises (other than another licensed importer, manufacturer, or dealer)" unless the person submits a sworn statement that "in the case of any firearm other than a shotgun or a rifle, [he or she is] twenty-one years or more of age."

These provisions are the statutory authority for several implementing regulations that Appellants also contest. First, 27 C.F.R. § 478.99(b)(1) provides that an FFL

> shall not sell or deliver . . . any firearm or ammunition to any individual who the importer, manufacturer, dealer, or collector knows or has reasonable cause to believe is less than 18 years of age, and, if the firearm, or ammunition, is other than a shotgun or rifle, or ammunition for a shotgun or rifle, to any individual who the importer, manufacturer, dealer, or collector knows or has reasonable cause to believe is less than 21 years of age.

Second, 27 C.F.R. §§ 478.96(b) and 478.124(a) prohibit FFLs from selling firearms unless they obtain a signed copy of Form 4473 from the purchaser. Form 4473 is used, among other purposes, to establish a purchaser's eligibility to possess a firearm by establishing his or her date of birth. *Id.* § 478.124(c)(1). It also requires the execution and dating of a sworn statement indicating that if "the firearm to be transferred is a firearm other than a shotgun or rifle, the transferee is 21 years or more of age." *Id.* § 478.124(f).

Congress later supplemented this regulatory scheme with the Violent Crime Control and Law Enforcement Act of 1994, which prohibits persons under the age of 18 from possessing handguns and bars the transfer of handguns to them, with limited exceptions. Pub. L. No. 103-322, § 110201, 108 Stat.

1796, 2010 (adding 18 U.S.C. § 922(x)). The parties agree that the network of federal laws amounts to the following. Eighteen-to-twenty-year-olds may possess and use handguns. Parents or guardians may gift handguns to 18-to-20-year-olds.[1] Those not "engaged in the business" of selling firearms – that is, non-FFLs – may sell handguns to 18-to-20-year-olds; put differently, 18-to-20-year-olds may acquire handguns through unlicensed, private sales.[2] Eighteen-to-twenty-year-olds

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[1] *See, e.g.,* S. Rep. No. 90-1097, at 79 (1968) ("[A] minor or juvenile would not be restricted from owning, or learning the proper usage of [a] firearm, since any firearm which his parent or guardian desired him to have could be obtained for the minor or juvenile by the parent or guardian."); *accord* S. Rep. No. 89-1866, at 58 (1966). As explained *infra,* Section III.B, "minor" in the 1968 Act refers to a person under the age of 21, while "juvenile" refers to a person under the age of 18.

The government also points the court to an ATF Chief Counsel Opinion, which advises – in response to a private inquiry – that an FFL may lawfully sell a firearm to a parent or guardian who is purchasing it for a minor provided that the minor is not otherwise prohibited from receiving or possessing a firearm. Letter from Daniel Hartnett, Asst. Dir., Criminal Enforcement, ATF, to Sig Shore, 23362 (Dec. 5, 1983).

[2] The term "engaged in the business" of dealing in firearms does "not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms." 18 U.S.C. § 921(a)(21)(C). Furthermore, 18 U.S.C. § 922(a)(6), which proscribes making a false statement to an FFL while purchasing a firearm, functions as an outer limit on the extent to which a person under 21 may use "straw men" to purchase a firearm. *See United States v. Bledsoe,* 334 F. App'x 711 (5th Cir. 2009) (unpublished) (affirming conviction of under-21 defendant who admitted to paying a third party to

(Continued on following page)

may possess and use long-guns, and may purchase long-guns from FFLs (or non-FFLs).[3] However, the parties also agree that 18-to-20-year-olds may not purchase handguns from FFLs. Appellants challenge 18 U.S.C. § 922(b)(1) and (c)(1), and corresponding regulations, only to the extent that these laws prohibit sales of handguns or handgun ammunition by FFLs to 18-to-20-year-olds.[4]

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purchase a handgun from FFL when third party stated to the FFL that he was the "actual buyer" of the gun).

[3] *See* 18 U.S.C. § 922(b)(1) (stating that FFL may sell "shotgun or rifle" to person under 21).

[4] Most of the States have gone beyond the federal floor. Today, all fifty States (and the District of Columbia) have imposed minimum-age qualifications on the use or purchase of particular firearms. Twenty-nine States (and the District of Columbia) impose a minimum-age qualification only on the purchase or use of handguns. Many States (and the District of Columbia) proscribe or restrict the sale of handguns to persons under 21 (by non-FFLs) or the possession of handguns by persons under 21. *See, e.g.,* California (Cal. Penal Code § 27505); Connecticut (Conn. Gen. Stat. §§ 29-34(b), 29-36f); Delaware (Del. Code Ann. tit. 24, §§ 901, 903); District of Columbia (D.C. Code Ann. §§ 7-2502.03, 22-4507); Hawaii (Haw. Rev. Stat. § 134-2(d)); Illinois (430 Ill. Comp. Stat. §§ 65/3(a), 65/4(a)(2)(i)); Iowa (Iowa Code Ann. § 724.22); Maryland (Md. Code Ann., Pub. Safety §§ 5-101(p), 5-133, 5-134); Massachusetts (Mass. Gen. Laws ch. 140, § 130); New Jersey (N.J. Stat. Ann. § 2C:58-6.1); Ohio (Ohio Rev. Code Ann. § 2923.211(B)); Rhode Island (R.I. Gen. Laws §§ 11-47-35(a)(1), 11-47-37); *see also* New York (N.Y. Penal Law § 400.00(1)(a)).

II. Standing

A. Applicable Law

We review questions of standing de novo. *Time Warner Cable, Inc. v. Hudson,* 667 F.3d 630, 635 (5th Cir. 2012). The parties seeking access to federal court bear the burden of establishing their standing. *Id.* "[T]he irreducible constitutional minimum of standing contains three elements." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). The first is an "injury in fact," which is a "concrete and particularized . . . invasion of a legally protected interest." *Id.* (citations omitted). The second is that "there must be a causal connection between the injury and the conduct complained of[;] the injury has to be fairly . . . trace[able] to the challenged action of the defendant." *Id.* (second alteration in original) (citation and quotation marks omitted). Third, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* (citation and internal quotation marks omitted). Only injury-in-fact is at issue in this appeal.

"While the proof required to establish standing increases as the suit proceeds, the standing inquiry remains focused on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed." *Davis v. Fed. Election Comm'n,* 554 U.S. 724, 734 (2008) (citations omitted). Mootness, however, is "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation

(standing) must continue throughout its existence (mootness)." *U.S. Parole Comm'n v. Geraghty,* 445 U.S. 388, 397 (1980) (citation omitted). When "named plaintiffs will not benefit from a favorable ruling on the question implicating injunctive relief, we hold that th[e] question is moot as to them." *Pederson v. La. State Univ.,* 213 F.3d 858, 874 (5th Cir. 2000).

Under the doctrine of associational standing, an association may have standing to bring suit on behalf of its members when:

> [1] its members would otherwise have standing to sue in their own right; [2] the interests it seeks to protect are germane to the organization's purpose; and [3] neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Ass'n of Am. Physicians & Surgeons, Inc. v. Tex. Med. Bd., 627 F.3d 547, 550 (5th Cir. 2010) (citation omitted). The first prong requires that at least one member of the association have standing to sue in his or her own right. *Tex. Democratic Party v. Benkiser,* 459 F.3d 582, 587-88 (5th Cir. 2006).

B. Application

Before oral argument in this case, counsel for Appellants notified us that Rebekah Jennings and Brendan Harmon had turned 21. Because they have aged out of the demographic group affected by the ban at bar, the issues on appeal are moot as to them.

See Pederson, 213 F.3d at 874. Andrew Payne, the third individual Appellant, will remain under the age of 21 throughout the appeal. Mootness does not affect his claim. In addition, the NRA has asserted associational standing on behalf of its members who are between the ages of 18 and 21. The NRA submitted a sworn declaration that it had over 11,000 members who would be covered by the ban, and NRA members between the ages of 18 and 21 submitted sworn declarations that they cannot purchase handguns from FFLs because of the ban. However, the government contends that Payne and the NRA's under-21 members have not suffered an injury-in-fact.

We disagree and hold that Payne and the NRA, on behalf of its under-21 members, have standing to bring this suit. The government is correct that the challenged federal laws do not bar 18-to-20-year-olds from possessing or using handguns. The laws also do not bar 18-to-20-year-olds from receiving handguns from parents or guardians. Yet, by prohibiting FFLs from selling handguns to 18-to-20-year-olds, the laws cause those persons a concrete, particularized injury – i.e., the injury of not being able to purchase handguns from FFLs. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.,* 425 U.S. 748, 750-57, 755 n.12 (1976) (finding standing for prospective customers to challenge constitutionality of state statute prohibiting pharmacists from advertising prescription drug prices, despite customers' ability to

obtain price quotes in another way – over the phone from some pharmacies).[5]

Standing may be satisfied by the presence of "at least one individual plaintiff who has demonstrated standing to assert the[ ] [contested] rights as his own." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.,* 429 U.S. 252, 264 (1977); *see also Horne v. Flores,* 557 U.S. 433, 446-47 (2009). Having established Payne's standing and the NRA's associational standing on behalf of its 18-to-20-year-olds members, we need not discuss the NRA's associational standing on behalf of its FFL members. We therefore proceed to the merits of this appeal.

III. Second Amendment Claim

The crux of Appellants' position on the merits is that the federal ban at bar violates their rights under

[5] This injury is fairly traceable to the challenged federal laws, and holding the laws unconstitutional would redress the injury. *See Lujan,* 504 U.S. at 560. Therefore, Payne has standing to challenge the laws, and the 18-to-20-year-old NRA members have standing to sue in their own right. The NRA, in turn, has associational standing to sue on behalf of these members because (i) they have standing to sue in their own right, (ii) challenging laws preventing 18-to-20-year-olds from purchasing handguns from FFLs is germane to the NRA's purpose of safeguarding the right of law-abiding, qualified adults to keep and bear arms, and (iii) no "factual development" about the 18-to-20-year-old NRA members is necessary to evaluate the claim asserted or the relief requested. *See Am. Physicians,* 627 F.3d at 550-53.

the Second Amendment, given the holding in *District of Columbia v. Heller,* 554 U.S. 570 (2008). Appellants urge that, by preventing an 18-to-20-year-old from purchasing handguns from FFLs, the laws impermissibly infringe on that individual's right under the Second Amendment to keep and bear arms. The district court granted summary judgment for the government, rejecting the Second Amendment claim. We review the constitutionality of federal statutes de novo. *United States v. Portillo-Munoz,* 643 F.3d 437, 439 (5th Cir. 2011).

No other circuit court has considered the constitutionality of the challenged federal laws in light of *Heller.* Only a single district court has considered the constitutionality of the ban, upholding it under intermediate scrutiny. *See United States v. Bledsoe,* No. SA-08-CR-13(2)-XR, 2008 WL 3538717, at *4 (W.D. Tex. Aug. 8, 2008). We affirmed the defendant's conviction in that case without reaching the constitutional issue. *See United States v. Bledsoe,* 334 F. App'x 711 (5th Cir. 2009) (unpublished). Consequently, this is an issue of first impression in this circuit. Because we – unlike some of our fellow circuit courts – have yet to establish a framework for evaluating post-*Heller* Second Amendment challenges, we sketch a framework here.

A. Analytical Framework

The Second Amendment provides: "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." In *Heller,* the Supreme Court made clear that the Second Amendment codified a pre-existing individual right to keep and bear arms. 554 U.S. at 592, 595. In *McDonald v. City of Chicago,* 130 S. Ct. 3020 (2010), the Court further clarified that "the right to keep and bear arms [is] among those fundamental rights necessary to our system of ordered liberty," and is incorporated against the States via the Fourteenth Amendment. *Id.* at 3042.

The precise question before the Court in *Heller* was whether Washington, D.C. statutes banning the possession of usable handguns in the home – in addition to requiring residents to keep their firearms either disassembled or trigger locked – violated the Second Amendment. 554 U.S. at 573-75. The Court invalidated the laws because they violated the central right that the Second Amendment was intended to protect – that is, the "right of law-abiding, *responsible* citizens to use arms in defense of hearth and home." *Id.* at 635 (emphasis added); *see also id.* at 628-30 (distilling the Second Amendment to its "core" interest of "self-defense" and the "protection of one's home and family"). Indeed, the ban on home handgun possession squarely struck the core of the Second Amendment – a rare feat, as the Court observed that "[f]ew laws in the history of our Nation have come close to the severe restriction of the District's handgun ban." *Id.* at 629. The Court thus noted that the ban "would fail constitutional

muster" under "any of the standards of scrutiny" applicable to "enumerated constitutional rights." *Id.* at 628-29.

In a critical passage, moreover, the Court emphasized that the "right secured by the Second Amendment is not unlimited." *Id.* at 626. As the Court explained:

> 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. For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues. . . . [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.*

Id. at 626-27 (emphases added) (citations omitted). The Court hastened to add that it had listed "these presumptively lawful regulatory measures only as

examples"; the list was illustrative, "not exhaustive." *Id.* at 627 n.26.[6]

Understandably, the Court did not undertake an "exhaustive historical analysis . . . of the full scope of the Second Amendment." *Id.* at 626; *see also id.* at 635 ("[T]here will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us."). Instead, the Court identified the Second Amendment's central right as the right to defend oneself in one's home, and concluded that an absolute ban on home handgun possession – a gun-control law of historic severity – infringed the Second Amendment's core. In so doing, *Heller* did not set forth an analytical framework with which to evaluate firearms regulations in future cases. Nor has this court, since *Heller,* explained how to determine whether the federal laws at bar comport with the Second Amendment.[7]

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[6] The Court's decision to repeat this passage in *McDonald* underscores its importance: "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." 130 S. Ct. at 3047 (citation and internal quotation marks omitted).

[7] Since *Heller,* we have upheld several federal statutes against Second Amendment challenges, but we have not established a

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But our fellow courts of appeals have filled the analytical vacuum. A two-step inquiry has emerged as the prevailing approach: the first step is to determine whether the challenged law impinges upon a right protected by the Second Amendment – that is, whether the law regulates conduct that falls within the scope of the Second Amendment's guarantee; the second step is to determine whether to apply intermediate or strict scrutiny to the law, and then to determine whether the law survives the proper level of scrutiny. *See United States v. Greeno,* 679 F.3d 510, 518 (6th Cir. 2012); *Heller v. District of Columbia,* 670 F.3d 1244, 1252 (D.C. Cir. 2011) (*Heller II*); *Ezell v. City of Chicago,* 651 F.3d 684, 701-04 (7th Cir. 2011); *United States v. Chester,* 628 F.3d 673, 680 (4th Cir. 2010); *United States v. Reese,* 627 F.3d 792, 800-01 (10th Cir. 2010) *United States v. Marzzarella,* 614 F.3d 85, 89 (3d Cir. 2010). *But see United States v. Skoien,* 614 F.3d 638, 641-42 (7th Cir. 2010) (en banc) (eschewing the two-step framework and resisting the "levels of scrutiny quagmire," but applying intermediate scrutiny to a categorical restriction). We adopt a version of this two-step approach and

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Second Amendment framework. *See, e.g., Portillo-Munoz,* 643 F.3d at 439-42 (upholding 18 U.S.C. § 922(g)(5), which prevents illegal aliens from possessing firearms); *United States v. Anderson,* 559 F.3d 348, 352 (5th Cir. 2009) (upholding § 922(g), which bars convicted felons from possessing firearms, based on circuit precedent); *United States v. Dorosan,* 350 F. App'x 874, 875-76 (5th Cir. 2009) (unpublished) (upholding regulation barring possession of handguns on U.S. Postal Service property).

sketch a skeleton of the framework here, leaving future cases to put meat on the bones.

We agree that the first inquiry is whether the conduct at issue falls within the scope of the Second Amendment right. *See, e.g., Chester,* 628 F.3d at 680. To determine whether a law impinges on the Second Amendment right, we look to whether the law harmonizes with the historical traditions associated with the Second Amendment guarantee. *See Heller,* 554 U.S. at 577-628 (interpreting Second Amendment based on historical traditions); *United States v. Masciandaro,* 638 F.3d 458, 470 (4th Cir. 2011) ("[H]istorical meaning enjoys a privileged interpretive role in the Second Amendment context."). *Heller* illustrates that we may rely on a wide array of interpretive materials to conduct a historical analysis. *See* 554 U.S. at 600-26 (relying on courts, legislators, and scholars from before ratification through the late 19th century to interpret the Second Amendment); *see also United States v. Rene E.,* 583 F.3d 8, 13-16 (1st Cir. 2009) (relying on wide-ranging materials, including late 19th- and early 20th-century cases, to uphold federal ban on juvenile handgun possession).[8]

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[8] In exploring the "historical understanding of the scope of the right," 554 U.S. at 625, the *Heller* Court looked to a "variety of legal and other sources to determine the public understanding of [the] legal text in the period after its enactment or ratification," *id.* at 605 (emphasis omitted). These sources included "analogous arms-bearing rights," *id.* at 600, adopted by states "[b]etween 1789 and 1820," *id.* at 602, and the interpretation of these provisions by "19th-century courts and commentators," *id.*

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If the challenged law burdens conduct that falls outside the Second Amendment's scope, then the law passes constitutional muster. *See, e.g., Marzzarella,* 614 F.3d at 89. If the law burdens conduct that falls within the Second Amendment's scope, we then proceed to apply the appropriate level of means-ends scrutiny. *See id.*

We agree with the prevailing view that the appropriate level of scrutiny "depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right." *See Chester,* 628 F.3d at 682 (observing that a "severe burden on the core Second Amendment right of armed self-defense should require a strong justification," but "less severe burdens on the right" and "laws that do not implicate the central self-defense concern of the Second Amendment[ ] may be more easily justified" (quotation and citation omitted)); *accord Heller II,* 670 F.3d at 1257 ("[A] regulation that imposes a substantial burden upon the core right of self-defense protected by the Second Amendment must have a strong justification, whereas a regulation that imposes a less substantial burden should be proportionately easier to justify."); *Masciandaro,* 638 F.3d at 470

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at 603. The *Heller* Court also looked to "[p]ost-Civil War [l]egislation," reasoning that because "those born and educated in the early 19th century faced a widespread effort to limit arms ownership by a large number of citizens[,] their understanding of the origins and continuing significance of the Amendment is instructive." *Id.* at 614.

(observing that the analysis turns on "the character of the Second Amendment question presented" – that is, "the nature of a person's Second Amendment interest [and] the extent to which those interests are burdened by government regulation"). A regulation that threatens a right at the core of the Second Amendment – for example, the right of a law-abiding, responsible adult to possess and use a handgun to defend his or her home and family, *see Heller,* 554 U.S. at 635 – triggers strict scrutiny. *See Heller II,* 670 F.3d at 1257; *Masciandaro,* 638 F.3d at 470; *Chester,* 628 F.3d at 682. A less severe regulation – a regulation that does not encroach on the core of the Second Amendment – requires a less demanding means-ends showing. *See Heller II,* 670 F.3d at 1257; *Masciandaro,* 638 F.3d at 470; *Chester,* 628 F.3d at 682. This more lenient level of scrutiny could be called "intermediate" scrutiny, but regardless of the label, this level requires the government to demonstrate a "reasonable fit" between the challenged regulation and an "important" government objective. *See Marzzarella,* 614 F.3d at 98; *accord Chester,* 628 F.3d at 683; *see also Masciandaro,* 638 F.3d at 471 (stating that intermediate scrutiny requires government to demonstrate that the regulation is "reasonably adapted to a substantial governmental interest"). This "intermediate" scrutiny test must be more rigorous than rational basis review, which *Heller* held "could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right" such as "the right to keep and bear arms." *See* 554 U.S. at 628 n.27; *see also id.* ("If all that was required

to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.").

We admit that it is difficult to map *Heller*'s "longstanding," *id.* at 626, "presumptively lawful regulatory measures," *id.* at 627 n.26, onto this two-step framework. It is difficult to discern whether "longstanding prohibitions on the possession of firearms by felons and the mentally ill, . . . or laws imposing conditions and qualifications on the commercial sale of arms," *id.* at 626-27, by virtue of their presumptive validity, either (i) presumptively fail to burden conduct protected by the Second Amendment, or (ii) presumptively trigger and pass constitutional muster under a lenient level of scrutiny. *See, e.g., Marzzarella,* 614 F.3d at 91 (recognizing that the designation – longstanding, presumptively lawful measure – is ambiguous). For now, we state that a longstanding, presumptively lawful regulatory measure – whether or not it is specified on *Heller*'s illustrative list – would likely fall outside the ambit of the Second Amendment; that is, such a measure would likely be upheld at step one of our framework. *See Heller II,* 670 F.3d at 1253 ("[A] regulation that is 'longstanding,' which necessarily means it has long been accepted by the public, is not likely to burden a constitutional right; concomitantly the activities covered by a longstanding regulation are

presumptively not protected from regulation by the Second Amendment.").[9] We further state that a longstanding measure that harmonizes with the history and tradition of arms regulation in this country would not threaten the core of the Second Amendment guarantee. Thus, even if such a measure advanced to step two of our framework, it would trigger our version of "intermediate" scrutiny. *See Masciandaro,* 638 F.3d at 470-71 (applying intermediate scrutiny to and upholding federal regulation banning possession of loaded handgun in motor vehicle within a national park, and reasoning that the "longstanding out-of-the-home/in-the-home distinction bears directly on the level of scrutiny applicable").

In addition, *Heller* demonstrates that a regulation can be deemed "longstanding" even if it cannot boast a precise founding-era analogue. *See Skoien,* 614 F.3d at 640-41 ("[W]e do take from *Heller* the message that exclusions need not mirror limits that were on the books in 1791."); *cf. Heller II,* 670 F.3d at 1253-54 (relying on early 20th-century state statutes to show that D.C. handgun registration requirement was "longstanding" and did not "impinge upon the

[9] The *Heller* Court assured that "nothing in [its] opinion should be taken to cast doubt on" longstanding, presumptively lawful measures. 554 U.S. at 626. The Court also compared its list of longstanding, presumptively lawful measures with the restriction on possessing dangerous and unusual weapons, which conduct – the Court explained – fell outside the scope of the Second Amendment right. *Id.* at 626-27.

right protected by the Second Amendment"). After all, *Heller* considered firearm possession bans on felons and the mentally ill to be longstanding, yet the current versions of these bans are of mid-20th century vintage. *See Booker,* 644 F.3d at 23-24 (explaining that the federal felony firearm possession ban, 18 U.S.C. § 922(g)(1), "bears little resemblance to laws in effect at the time the Second Amendment was ratified," as it was not enacted until 1938, was not expanded to cover non-violent felonies until 1961, and was not re-focused from receipt to possession until 1968); *Skoien,* 614 F.3d at 640-41 (explaining that 18 U.S.C. § 922(g)(4), which forbids firearm possession by a person who has been adjudicated to be mentally ill, was enacted in 1968); Carlton F.W. Larson, *Four Exceptions in Search of A Theory: District of Columbia v. Heller and Judicial Ipse Dixit,* 60 Hastings L.J. 1371, 1376-80 (2009) (showing that a strictly originalist argument for *Heller*'s examples – including bans on firearm possession by felons and the mentally ill, and laws imposing conditions on commercial arms sales – is difficult to make).

Having sketched our two-step analytical framework, we must emphasize that we are persuaded to adopt this framework because it comports with the language of *Heller.* As for step one, *Heller* itself suggests that the threshold issue is whether the party is entitled to the Second Amendment's protection. *See* 554 U.S. at 635 ("Assuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register

his handgun. . . ."); *see also id.* at 626-27 (providing a non-exhaustive list of longstanding, presumptively lawful regulatory measures). As for step two, by taking rational basis review off the table, and by faulting a dissenting opinion for proposing an interest-balancing inquiry *rather than* a traditional level of scrutiny, the Court's language suggests that intermediate and strict scrutiny are on the table. *See id.* at 628 n.27; *id.* at 634 ("[Justice Breyer] proposes . . . none of the traditionally expressed levels (strict scrutiny, intermediate scrutiny, rational basis), but *rather* a judge-empowering 'interest-balancing inquiry'. . . ." (emphasis added) (quoting *id.* at 689 (Breyer, J., dissenting))). The Court's use of the word "rather" demonstrates that, in the Court's view, the familiar scrutiny tests are not equivalent to interest balancing. In rejecting Justice Breyer's proposed interest-balancing inquiry, we understand the Court to have distinguished that inquiry from the traditional levels of scrutiny; we do not understand the Court to have rejected all heightened scrutiny analysis. *But see Heller II,* 670 F.3d at 1277-78 (Kavanaugh, J., dissenting) (arguing that the *Heller* Court's rejection of Justice Breyer's interest-balancing inquiry amounted to a rejection of all balancing tests).[10] At

[10] We are further convinced that intermediate and strict scrutiny are on the table by the Court's statement that the handgun ban in *Heller* would be unconstitutional "[u]nder any of the standards of scrutiny that [the Court has] applied to enumerated constitutional rights." *Heller,* 554 U.S. at 628-29. We reason that, had the Court so intended, it would have expressly

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the very least, the Court did not expressly foreclose intermediate or strict scrutiny, but instead left us room to maneuver in crafting a framework.

Furthermore, we are persuaded to adopt the two-step framework outlined above because First Amendment doctrine informs it. *See Marzzarella,* 614 F.3d at 89 n. 4 (looking toward the First Amendment for guidance in interpreting the Second Amendment and observing that "*Heller* itself repeatedly invokes the First Amendment in establishing principles governing the Second Amendment"). First, First Amendment doctrine supports commencing our analysis with a threshold inquiry into whether the Second Amendment protects the conduct at issue. Similar to the first step of our Second Amendment framework, the first step in analyzing a First Amendment challenge is to determine whether the conduct (i.e., speech) in question is protected. *See Ashcroft v. Free Speech Coal.,* 535 U.S. 234, 245-46 (2002) ("The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children."). Second, First Amendment doctrine demonstrates that, even with respect to a fundamental constitutional right, we can and should adjust the level of scrutiny according to the severity of the challenged regulation. *See Marzzarella,* 614 F.3d at 96-97 ("[T]he right to free

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rejected application of any form of heightened scrutiny. *See Heller II,* 670 F.3d at 1265.

speech, an undeniably enumerated fundamental right, is susceptible to several standards of scrutiny, depending upon the type of law challenged and the type of speech at issue. We see no reason why the Second Amendment would be any different." (citation omitted)); *Justice For All v. Faulkner,* 410 F.3d 760, 765-66 (5th Cir. 2005) (discussing different levels of scrutiny for traditional, nonpublic, and designated fora); *see also Bd. of Trs. of the State Univ. of N.Y. v. Fox,* 492 U.S. 469, 477 (1989) (applying intermediate scrutiny to commercial speech in light of its "subordinate position in the scale of First Amendment values"); *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989) (applying intermediate scrutiny to content-neutral time, place, and manner restrictions on speech); *Palmer ex rel. Palmer v. Waxahachie Indep. Sch. Dist.,* 579 F.3d 502, 510-12 (5th Cir. 2009) (reviewing school dress codes under intermediate scrutiny). Thus, even though the Second Amendment right is fundamental, *McDonald,* 130 S. Ct. at 3042, we reject the contention that every regulation impinging upon the Second Amendment right must trigger strict scrutiny. *See Heller II,* 670 F.3d at 1256 ("The [Supreme] Court has not said, however, and it does not logically follow, that strict scrutiny is called for whenever a fundamental right is at stake."); *Chester,* 628 F.3d at 682 ("We do not apply strict scrutiny whenever a law impinges upon a right specifically enumerated in the Bill of Rights."); Adam Winkler, *Scrutinizing the Second Amendment,* 105 Mich. L. Rev. 683, 697-98 (2007) (observing that "[i]t simply is not true that every right deemed 'fundamental'

triggers strict scrutiny," and that "[e]ven among those incorporated rights that do prompt strict scrutiny, such as the freedom of speech and of religion, strict scrutiny is only occasionally applied"). In harmony with well-developed principles that have guided our interpretation of the First Amendment, we believe that a law impinging upon the Second Amendment right must be reviewed under a properly tuned level of scrutiny – i.e., a level that is proportionate to the severity of the burden that the law imposes on the right.

B. Background of the Challenged Federal Laws

Before we apply the framework described above to the challenged federal laws, we place them in context. Congress passed the Omnibus Crime Control and Safe Streets Act of 1968 following a multi-year inquiry into violent crime that included "field investigation and public hearings." S. Rep. No. 88-1340, at 1 (1964). According to the preamble to the Act, Congress had found "that there is a widespread traffic in firearms moving in or otherwise affecting interstate or foreign commerce, and that the existing Federal controls over such traffic do not adequately enable the States to control this traffic within their own borders through the exercise of their police power." Pub. L. No. 90-351, § 901(a)(1), 82 Stat. 197, 225 (1968). The preamble further declares:

> [T]he ease with which any person can acquire firearms other than a rifle or shotgun

> (including criminals, juveniles without the knowledge or consent of their parents or guardians, narcotics addicts, mental defectives, armed groups who would supplant the functions of duly constituted public authorities, and others whose possession of such weapons is similarly contrary to the public interest) is a significant factor in the prevalence of lawlessness and violent crime in the United States.

Id. § 901(a)(2), 82 Stat. at 225; *see also Huddleston v. United States,* 415 U.S. 814, 824 (1974) (stating that the purpose of the 1968 Act was to curb crime by keeping "firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency" (quoting S. Rep. No. 90-1501, at 22 (1968))).

Moreover, in a section titled "Acquisition of firearms by juveniles and minors,"[11] the Senate Report accompanying the Act provides:

> [T]he title would provide a uniform and effective means through the United States for preventing the acquisition of the specified firearms by persons under such ages. However, under the title, a minor or juvenile

[11] Throughout the Act and accompanying legislative materials, the term "minor" refers to a person under the age of 21, while the term "juvenile" refers to a person under the age of 18. As explained *infra,* Section III.C.1, the age of majority at common law was 21, not 18. It was not until the 1970s that States lowered the age of majority to 18 for most purposes.

> would not be restricted from owning, or learning the proper usage of the firearm, since any firearm which his parent or guardian desired him to have could be obtained for the minor or juvenile by the parent or guardian.
>
> The clandestine acquisition of firearms by juveniles and minors is a most serious problem facing law enforcement and the citizens of this country. The controls proposed in the title are designed to meet this problem and to substantially curtail it.

S. Rep. No. 90-1097, at 79 (1968).

Congress's investigation confirmed a "causal relationship between the easy availability of firearms other than a rifle or a shotgun and . . . youthful criminal behavior." Pub. L. No. 90-351, § 901(a)(6), 82 Stat. at 225-26; *see also Federal Firearms Act: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Sen. Comm. on the Judiciary,* 90th Cong. 57 (1967) (testimony of Sheldon S. Cohen) ("The greatest growth of crime today is in the area of young people. . . . The easy availability of weapons makes their tendency toward wild, and sometimes irrational behavior that much more violent, that much more deadly."). Having found that concealable firearms had been "widely sold by federally licensed importers and dealers to emotionally immature, or thrill-bent juveniles and minors prone to criminal behavior," Pub. L. No. 90-351, § 901(a)(6), 82 Stat. at 226, Congress concluded that "only through adequate

Federal control over interstate and foreign commerce in these weapons, and over all persons engaging in the business of importing, manufacturing, or dealing in them, can this grave problem be properly dealt with, and effective State and local regulation of this traffic be made possible," *id.* § 901(a)(3), 82 Stat. at 225.

The legislative record makes clear that Congress's purpose in preventing persons under 21 – including 18-to-20-year-olds – from purchasing handguns from FFLs was to curb violent crime. Essentially, then, the federal laws at issue are safety-driven, age-based categorical restrictions on handgun access.

C. Whether the Challenged Federal Laws Burden Conduct Protected by the Second Amendment

Having placed the challenged federal laws in their proper context, we now consider whether the laws – which combine to prevent 18-to-20-year-olds from purchasing handguns from FFLs – burden conduct that is protected by the Second Amendment.

1. Founding-Era Attitudes

As the Supreme Court recognized in *Heller,* the right to keep and bear arms has never been unlimited. 554 U.S. at 626; *see also Robertson v. Baldwin,* 165 U.S. 275, 281 (1897) (observing that the right to keep and bear arms, like other rights "inherited from our English ancestors" and protected by the Bill of

Rights, has "from time immemorial, been subject to certain well-recognized exceptions, arising from the necessities of the case"). Since even before the Revolution, gun use and gun control have been inextricably intertwined. The historical record shows that gun safety regulation was commonplace in the colonies, and around the time of the founding, a variety of gun safety regulations were on the books; these included safety laws regulating the storage of gun powder, laws keeping track of who in the community had guns, laws administering gun use in the context of militia service (including laws requiring militia members to attend "musters," public gatherings where officials would inspect and account for guns), laws prohibiting the use of firearms on certain occasions and in certain places, and laws disarming certain groups and restricting sales to certain groups. *See* Adam Winkler, *Gunfight: The Battle over the Right to Bear Arms in America* 113-18 (2011); Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control,* 73 Fordham L. Rev. 487, 502-13 (2004). It appears that when the fledgling republic adopted the Second Amendment, an expectation of sensible gun safety regulation was woven into the tapestry of the guarantee.

Noteworthy among these revolutionary and founding-era gun regulations are those that targeted particular groups for public safety reasons. For example, several jurisdictions passed laws that confiscated weapons owned by persons who refused to

swear an oath of allegiance to the state or to the nation. *See* Cornell & DeDino, 73 Fordham L. Rev. at 507-08. Although these Loyalists were neither criminals nor traitors, American legislators had determined that permitting these persons to keep and bear arms posed a potential danger. *Id.* ("The law demonstrates that in a well regulated society, the state could disarm those it deemed likely to disrupt society."); *see also* Winkler, *Gunfight,* at 116 (concluding that "[t]he founders didn't think government should have the power to take away everyone's guns, but they were perfectly willing to confiscate weapons from anyone deemed untrustworthy," a group that included law-abiding slaves, free blacks, and Loyalists); Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations and Criminological Considerations,* 60 Hastings L.J. 1339, 1360 (2009) ("[F]rom time immemorial, various jurisdictions recognizing a right to arms have nevertheless taken the step of forbidding suspect groups from having arms. American legislators at the time of the Bill of Rights seem to have been aware of this tradition. . . ." (footnote omitted)).

In the view of at least some members of the founding generation, disarming select groups for the sake of public safety was compatible with the right to arms specifically and with the idea of liberty generally. *See* Saul Cornell, *Commonplace or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory,* 16 Const. Comment. 221, 231-36 (1999)

(discussing Pennsylvania Anti-Federalists' support for a high level of gun regulation). Shortly after the Pennsylvania ratifying convention for the original Constitution, for example, the Anti-Federalist minority recommended the following amendment: "That the people have a right to bear arms for the defense of themselves and their own state, or the United States . . . and no law shall be passed for disarming the people or any of them, unless for crimes committed, *or real danger of public injury from individuals.*" *Id.* at 233 (emphasis added) (quoting *The Address and Reasons of Dissent of the Minority, in The Documentary History of the Ratification of the Constitution* 588, 617-24 (St. Historical Soc'y of Wis., 1976)).[12]

These categorical restrictions may have been animated by a classical republican notion that only those with adequate civic "virtue" could claim the right to arms. Scholars have proposed that at the time of the founding, "the right to arms was inextricably and multifariously linked to that of civic virtu (i.e., the virtuous citizenry)," and that "[o]ne implication of this emphasis on the virtuous citizen is that

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[12] Additionally, William Rawle – "a prominent lawyer who had been a member of the Pennsylvania Assembly that ratified the Bill of Rights," *Heller,* 554 U.S. at 607 – maintained that although the Second Amendment restrained the power of Congress to "disarm the people," the right to keep and bear arms nonetheless "ought not, . . . in any government, to be abused to the disturbance of the public peace." William Rawle, *A View of the Constitution of the United States of America* 125-26 (William S. Hein & Co. 2003) (2d ed. 1829).

the right to arms does not preclude laws disarming the unvirtuous citizens (i.e., criminals) or those who, like children or the mentally imbalanced, are deemed incapable of virtue." Kates & Cramer, 60 Hastings L.J. at 1359-60.[13] This theory suggests that the Founders would have supported limiting or banning "the ownership of firearms by *minors,* felons, and the mentally impaired." *See* Don B. Kates, *Second Amendment, in* 4 *Encyclopedia of the American Constitution* 1640 (Leonard W. Levy et al. eds., 1986) (emphasis added); *see also United States v. Emerson,* 270 F.3d 203, 261 (5th Cir. 2001) (inferring from scholarly sources that "it is clear that felons, *infants* and those of unsound mind may be prohibited from possessing firearms" (emphasis added)).

Notably, the term "minor" or "infant" – as those terms were historically understood – applied to persons under the age of 21, not only to persons under the age of 18. The age of majority at common law was 21, and it was not until the 1970s that States enacted legislation to lower the age of majority to 18.

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[13] *See also* Robert E. Shalhope, *The Armed Citizen in the Early Republic,* 49 Law & Contemp. Probs. 125, 130 (Winter 1986) ("[T]he philosophers of republicanism were not blind to the desirability of disarming certain elements within their society. . . . Arms were 'never lodg'd in the hand of any who had not an Interest in preserving the publick Peace. . . .' ") (quoting J. Trenchard & W. Moyle, *An Argument Shewing, That a Standing Army Is Inconsistent with a Free Government, And Absolutely Destructive to the Constitution of the English Monarchy* (London 1697)).

See, e.g., Black's Law Dictionary 847 (9th ed. 2009) ("An infant in the eyes of the law is a person under the age of twenty-one years, and at that period . . . he or she is said to attain majority. . . ." (quoting John Indermaur, *Principles of the Common Law* 195 (Edmund H. Bennett ed., 1st Am. ed. 1878))); *id.* ("The common-law rule provided that a person was an infant until he reached the age of twenty-one. The rule continues at the present time, though by statute in some jurisdictions the age may be lower." (quoting John Edward Murray Jr., *Murray on Contracts* § 12, at 18 (2d ed. 1974))); *see generally* Larry D. Barnett, *The Roots of Law,* 15 Am. U. J. Gender Soc. Pol'y & L. 613, 681-86 (2007). If a representative citizen of the founding era conceived of a "minor" as an individual who was unworthy of the Second Amendment guarantee, and conceived of 18-to-20-year-olds as "minors," then it stands to reason that the citizen would have supported restricting an 18-to-20-year-old's right to keep and bear arms.

2. Nineteenth-Century Legislators, Courts, and Commentators

Arms-control legislation intensified through the 1800s, *see* Cornell & DeDino, 73 Fordham L. Rev. at 512-13, and by the end of the 19th century, nineteen States and the District of Columbia had enacted laws expressly restricting the ability of persons under 21 to purchase or use particular firearms, or restricting the ability of "minors" to purchase or use particular firearms while the state age of majority was set at

age 21.[14] *See, e.g., State v. Quail,* 92 A. 859, 859 (Del. 1914) (discussing indictment for "knowingly sell[ing] a deadly weapon to a minor other than an ordinary pocket knife"); *State v. Allen,* 94 Ind. 441 (1884) (discussing prosecution for "unlawfully barter[ing] and trad[ing] to Wesley Powles, who was then and there a minor under the age of twenty-one years, a certain deadly and dangerous weapon, to wit: a pistol, commonly called a revolver, which could be worn or carried concealed about the person"); *Tankersly v. Commonwealth,* 9 S.W. 702, 702 (Ky. 1888) (discussing indictment for selling a deadly weapon to a minor); *see also Rene E.,* 583 F.3d at 14 ("During this period and soon after, a number of states enacted similar statutes prohibiting the transfer of deadly weapons – often expressly handguns – to juveniles."). By the early 20th century, three more States restricted the purchase or use of particular firearms by persons under 21.[15] By 1923, therefore, twenty-two

[14] 1856 Ala. Acts 17; 16 Del. Laws 716 (1881); 27 Stat. 116-17 (1892) (District of Columbia); 1876 Ga. Laws 112; 1881 Ill. Laws 73; 1875 Ind. Acts 86; 1884 Iowa Acts 86; 1883 Kan. Sess. Laws 159; 1873 Ky. Acts 359; 1890 La. Acts 39; 1882 Md. Laws 656; 1878 Miss. Laws 175-76; Mo. Rev. Stat. § 1274 (1879); 1885 Nev. Stat. 51; 1893 N.C. Sess. Laws 468-69; 1856 Tenn. Pub. Acts 92; 1897 Tex. Gen. Laws 221-22; 1882 W. Va. Acts 421-22; 1883 Wis. Sess. Laws 290; 1890 Wyo. Sess. Laws 1253. Alabama, Georgia, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Tennessee, Texas, and Wyoming had Second Amendment analogues in their respective constitutions at the time they enacted these regulations.

[15] Okla. Stat. ch. 25, art. 47 §§ 1-3 (1890) (though not admitted as State until 1907); 1923 N.H. Laws 138, 139; 1923

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States and the District of Columbia had made 21 the minimum age for the purchase or use of particular firearms.[16]

Meanwhile, "19th-century courts and commentators," *Heller,* 554 U.S. at 603, maintained that age-based restrictions on the purchase of firearms – including restrictions on the ability of persons under 21 to purchase firearms – comported with the Second Amendment guarantee. To illustrate, Thomas Cooley – a "judge and professor" "who wrote a massively popular 1868 Treatise on Constitutional Limitations," *Heller,* 554 U.S. at 616 – agreed that "the State may prohibit the sale of arms to minors" pursuant to the State's police power. Thomas M. Cooley, *Treatise on Constitutional Limitations* 740 n.4 (5th ed. 1883) (citing *State v. Callicutt,* 69 Tenn. 714 (1878)). Cooley

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S.C. Acts 207, 221. Oklahoma and South Carolina have Second Amendment analogues in their respective constitutions.

[16] From the mid-19th century through the early 20th century, twenty-one other States imposed age qualifications on the purchase or use of certain firearms. As one early 20th century commentator wrote of the state legislation: "The acts are quite consistent in refusing to allow the issue of licenses to young persons or criminals, and in punishing persons who sell or put into possession of the forbidden classes the forbidden weapons." J.P. Chamberlain, *Legislatures and the Pistol Problem,* 11 A.B.A. J. 596, 598 (1925).

Today – as mentioned *supra,* Section I.B. – all fifty States (and the District of Columbia) have imposed minimum-age qualifications on the use or purchase of particular firearms. Thirty-five States have Second Amendment analogues in their respective constitutions.

recognized the validity of imposing age qualifications on arm sales, despite his acknowledgment that the "federal and State constitutions provide that the right of the people to bear arms shall not be infringed." *Id.* at 429.

In the 1878 case that Cooley referenced, the Tennessee Supreme Court upheld a conviction under a state law making it a misdemeanor to sell, give, or loan a pistol to a minor, *Callicutt,* 69 Tenn. at 714-15, when the age of majority was set at 21. The defendant argued that the law violated the state's Second Amendment analogue, reasoning that because "every citizen who is subject to military duty has the right 'to keep and bear arms,' . . . this right necessarily implies the right to buy or otherwise acquire, and the right in others to give, sell, or loan to him." *Id.* at 716. In rejecting the defendant's challenge, the court explained that the "wise and salutary" legislation was passed to "prevent crime" and suppress "the pernicious and dangerous practice of carrying arms," and was not "intended to affect, and [did] not in fact abridge," the right to keep and bear arms. *Id.* at 715-17. Likewise, in *Coleman v. State,* 32 Ala. 581, 582-83 (1858), the Alabama Supreme Court upheld a conviction for violating a state law making it a misdemeanor to sell, give, or lend a pistol to a male minor, when the age of majority was set at 21.

3. Conclusion

We have summarized considerable evidence that burdening the conduct at issue – the ability of 18-to-20-year-olds to purchase handguns from FFLs – is consistent with a longstanding, historical tradition, which suggests that the conduct at issue falls outside the Second Amendment's protection. At a high level of generality, the present ban is consistent with a longstanding tradition of targeting select groups' ability to access and to use arms for the sake of public safety. *See* Winkler, *Gunfight,* at 116; Cornell & DeDino, 73 Fordham L. Rev. at 507-08. More specifically, the present ban appears consistent with a longstanding tradition of age- and safety-based restrictions on the ability to access arms. In conformity with founding-era thinking, and in conformity with the views of various 19th-century legislators and courts, Congress restricted the ability of minors under 21 to purchase handguns because Congress found that they tend to be relatively immature and that denying them easy access to handguns would deter violent crime. *Compare* Kates & Cramer, 60 Hastings L.J. at 1360 (reflecting founding-era attitude that minors were inadequately virtuous to keep and bear arms), *and Callicutt,* 69 Tenn. at 716-17 (referring to prohibition on firearm sales to minors as "wise and salutary" legislation designed to "prevent crime"), *with* Pub. L. No. 90-351, § 901(a)(6), 82 Stat. 197, 226 (1968) (reflecting concern that handguns had been "widely sold by [FFLs] to emotionally immature,

or thrill-bent juveniles and minors prone to criminal behavior").

This reasoning finds support in *United States v. Rene E.,* in which the First Circuit canvassed sources similar to ours and upheld the constitutionality of 18 U.S.C. § 922(x), which prohibits persons under age 18 from possessing handguns and prohibits transfers of handguns to such persons, with exceptions. 583 F.3d at 16. The court inferred that "[t]here is some evidence that the founding generation would have shared the view that public-safety-based limitations of juvenile possession of firearms were consistent with the right to keep and bear arms," and that "[i]n this sense, the federal ban on juvenile possession of handguns is part of a longstanding practice of prohibiting certain classes of individuals from possessing firearms – those whose possession poses a particular danger to the public." *Id.* at 15. The court rested its holding that the statute was constitutional on "the existence of a longstanding tradition of prohibiting juveniles from both receiving and possessing handguns." *Id.* at 12. However, because the line between childhood and adulthood was historically 21, not 18, the First Circuit's conclusion that there is a "longstanding tradition" of preventing persons under 18 from "receiving" handguns applies with just as much force to persons under 21.

To be sure, we are unable to divine the Founders' specific views on whether 18-to-20-year-olds had a stronger claim than 17-year-olds to the Second Amendment guarantee. The Founders may not even

have shared a collective view on such a subtle and fine-grained distinction. The important point is that there is considerable historical evidence of age- and safety-based restrictions on the ability to access arms. Modern restrictions on the ability of persons under 21 to purchase handguns – and the ability of persons under 18 to possess handguns – seem, to us, to be firmly historically rooted.

Nonetheless, we face institutional challenges in conducting a definitive review of the relevant historical record. Although we are inclined to uphold the challenged federal laws at step one of our analytical framework, in an abundance of caution, we proceed to step two. We ultimately conclude that the challenged federal laws pass constitutional muster even if they implicate the Second Amendment guarantee.[17]

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[17] Before we scrutinize the challenged federal laws, however, we address one final scope issue: Appellants' contention that a right to purchase firearms from FFLs must *vest* at age 18. Appellants offer two arguments in favor of this contention. We reject both.

Appellants first argue that 18-to-20-year-olds have a Second Amendment right to purchase firearms from FFLs because, at the time of the founding, 18-to-20-year-olds were assigned to serve in the militia and militia duty necessarily implies the right to purchase firearms. The 1792 Militia Act provided that "each and every free able-bodied white male citizen of the respective States, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years (except as is herein after excepted) shall severally and respectively be enrolled in the militia." Militia Act § 1, 1 Stat. 271. But Appellants' militia-based attack on the federal laws at

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bar is unavailing. First, the right to arms is not co-extensive with the duty to serve in the militia. *See Heller,* 554 U.S. at 589-94 (decoupling the former from the latter). Second, if the right to arms and the duty to serve in the militia were linked in the manner that Appellants declare, then Appellants' argument proves too much. In some colonies, able-bodied sixteen-year-olds were obligated to serve in the militia, and yet, Appellants assure us that they are not challenging restrictions on handgun possession by or sales to persons under age 18. *E.g.,* Act of Apr. 3, 1778, ch. 33, 1778 N.Y. Laws 62 (assigning to militia "every able bodied male person [with exceptions] from sixteen years of age to fifty"). Third, in some colonies and States, the minimum age of militia service either dipped below age 18 or crept to age 21, depending on legislative need. *Compare* An Act for the Better Regulating [of] the Militia, ch. 20, §§ 1, 4, 1777 N.J. Acts 26 (setting minimum age at 16 in 1777), *with* An Act to embody, for a limited Time, One Thousand of the Militia of this State, for the Defence of the Frontiers thereof, ch. 24, §§ 3-4, 1779 N.J. Acts 58, 58-69 (setting minimum age at 21, but reserving right to accept age 16-21, in 1779). Such fluctuation undermines Appellants' militia-based claim that the right to purchase arms must fully vest precisely at age 18 – not earlier or later. Indeed, the 1792 Militia Act gave States discretion to impose age qualifications on service, and several States chose to enroll only persons age 21 or over, or required parental consent for persons under 21. *E.g.,* An Act to regulate the Militia, § 2, 1843 Ohio Acts 53, 53 (setting minimum age at 21). And this is all not to mention the anachronism at play: we no longer have a founding-era-style militia.

Appellants also argue that a Second Amendment right to purchase firearms from FFLs *vests* at age 18 because the age of majority is now 18. True, in the 1970s, States lowered the age of majority for most purposes from 21 to 18. But "majority or minority is a status," not a "fixed or vested right." Jeffrey F. Ghent, *Statutory Change of Age of Majority as Affecting Pre-existing Status or Rights,* 75 A.L.R. 3d 228 § 3 (1977). The terms "majority" and "minority" lack content without reference to the right at issue. Seventeen-year-olds may not vote or serve in the

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D. Whether to Apply a More or Less Demanding Level of Scrutiny

Assuming that the challenged federal laws burden conduct within the scope of the Second Amendment, we must evaluate the laws under a suitable standard of constitutional scrutiny. A law that burdens the core of the Second Amendment guarantee – for example, "the right of law-abiding, responsible citizens to use arms in defense of hearth and home," *Heller,* 554 U.S. at 635 – would trigger strict scrutiny, while a less severe law would be proportionately easier to justify. *See Heller II,* 670 F.3d at 1257; *Masciandaro,* 638 F.3d at 470; *Chester,* 628 F.3d at 682. The latter, "intermediate" standard of scrutiny requires the government to show a reasonable fit between the law and an important government objective.

Unquestionably, the challenged federal laws trigger nothing more than "intermediate" scrutiny. We have demonstrated that this federal scheme is not a salient outlier in the historical landscape of gun control. And unlike the D.C. ban in *Heller,* this ban does not disarm an entire community, but instead

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military, while 18-year-olds may. Twenty-year-olds may not purchase alcohol (by state statute), purchase lottery tickets in some States (*e.g.,* Ariz. Rev. Stat. § 5-515(a)), purchase handguns in some States (by state statute), or purchase handguns from FFLs (by federal statute) – while 21-year-olds may. Neither the Twenty-Sixth Amendment nor state law setting the age of majority at 18 compels Congress or the States to select 18 as the minimum age to purchase alcohol, lottery tickets, or handguns.

prohibits commercial handgun sales to 18-to-20-year-olds – a discrete category. The narrow ambit of the ban's target militates against strict scrutiny.

Indeed, *Heller*'s observation that longstanding prohibitions on firearm possession by felons and the mentally ill are presumptively valid, 554 U.S. at 626, 627 n.26, entails that the Second Amendment permits "categorical regulation of gun possession by classes of persons." *Booker,* 644 F.3d at 23; *see also Skoien,* 614 F.3d at 640, 641 (inferring from *Heller* that "statutory prohibitions on the possession of weapons by some persons are proper" and noting that "[c]ategorical limits on the possession of firearms would not be a constitutional anomaly"). Like the federal bans targeting felons and the mentally ill, the federal laws targeting minors under 21 are an outgrowth of an American tradition of regulating certain groups' access to arms for the sake of public safety. *Compare* Kates & Cramer, 60 Hastings L.J. at 1360 (arguing that the founding generation sought to disarm the unvirtuous, including minor children, felons, and the mentally ill), *with* S. Rep. No. 90-1501, at 22 (1968) (stating that the purpose of the 1968 Act was to curb crime by keeping "firearms out of the hands of those not legally entitled to possess them because of age, criminal background or incompetency"). To the extent that the ban on handgun sales to minors under 21 is analogous to longstanding, presumptively lawful bans on possession by felons and the mentally ill, *see Heller,* 554 U.S. at 626, 627 n.26, the ban at bar should trigger an "intermediate" level of scrutiny.

Cf. Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 358 (2009) ("Restrictions on speech based on its content are 'presumptively invalid' and subject to strict scrutiny.").

Moreover, as with felons and the mentally ill, categorically restricting the presumptive Second Amendment rights of 18-to-20-year-olds does not violate the central concern of the Second Amendment. The Second Amendment, at its core, protects "law-abiding, *responsible*" citizens. *See Heller,* 554 U.S. at 635 (emphasis added). Congress found that persons under 21 tend to be relatively irresponsible and can be prone to violent crime, especially when they have easy access to handguns. *See* Pub. L. No. 90-351, § 901(a)(6), 82 Stat. at 197, 225 (1968) (referring to "emotionally immature, or thrill-bent juveniles and minors prone to criminal behavior"); *cf. Chester,* 628 F.3d at 682-83 (applying intermediate scrutiny to 18 U.S.C. § 922(g)(9), the federal domestic-violence-misdemeanant firearm possession ban, and holding that misdemeanant-plaintiff's claimed "right to possess a firearm in his home for the purpose of self-defense" was "not within the core right identified in *Heller* – the right of a *law-abiding, responsible* citizen to possess and carry a weapon for self-defense").

Granted, 18-to-20-year-olds may have a stronger claim to the Second Amendment guarantee than convicted felons and domestic-violence misdemeanants have. Culpable criminal conduct has not put 18-to-20-year-olds in the cross-hairs of the ban at bar. Still, unlike bans on felons, the mentally ill, and

domestic-violence misdemeanants, this ban does not severely burden the presumptive Second Amendment rights of the targeted class's members. While the former bans extinguish the Second Amendment rights of the class members by totally preventing them from possessing firearms, this ban is not so extreme.

First, these federal laws do not severely burden the Second Amendment rights of 18-to-20-year-olds because they impose an age qualification on commercial firearm sales: FFLs may not sell handguns to persons under the age of 21. Far from a total prohibition on handgun possession and use, these laws resemble "laws imposing conditions and qualifications on the commercial sale of arms," which *Heller* deemed "presumptively lawful." *See* 554 U.S. at 626-27 & n.26. It is not clear that the Court had an age qualification in mind when it penned that sentence, but to the extent that these laws resemble presumptively lawful regulatory measures, they must not trigger strict scrutiny.

Second, these laws do not strike the core of the Second Amendment because they do not prevent 18-to-20-year-olds from possessing and using handguns "in defense of hearth and home." *See id.* at 628-30, 635; *cf. Heller II,* 670 F.3d at 1255-58 (applying intermediate scrutiny to D.C. registration requirements that "make it considerably more difficult for a person lawfully to acquire and keep a firearm, including a handgun, for the purpose of self-defense in the home – the 'core lawful purpose' protected by the

Second Amendment," but that do not "prevent[ ] an individual from possessing a firearm in his home or elsewhere, whether for self-defense or hunting, or any other lawful purpose"). Under this federal regulatory scheme, 18-to-20-year-olds may possess and use handguns for self-defense, hunting, or any other lawful purpose; they may acquire handguns from responsible parents or guardians; and they may possess, use, and purchase long-guns. Accordingly, the scheme is sufficiently bounded to avoid strict scrutiny.

Third, these laws demand only an "intermediate" level of scrutiny because they regulate commercial sales through an age qualification with temporary effect. Any 18-to-20-year-old subject to the ban will soon grow up and out of its reach. It is useful to compare this case with *United States v. Yancey,* in which the Seventh Circuit held that 18 U.S.C. § 922(g)(3), the illegal-drug-user firearm possession ban, was "far less onerous" than the firearm-possession bans on felons and the mentally ill because "unlike those who have been convicted of a felony or committed to a mental institution and so face a lifetime ban, an unlawful drug user like [the defendant] could regain his right to possess a firearm simply by ending his drug abuse." 621 F.3d 681, 686-87 (7th Cir. 2010). Similar logic applies here. The temporary nature of the burden reduces its severity. Consequently, we hold that these laws deserve what we have dubbed an "intermediate" level of scrutiny.

E. Whether These Laws Survive "Intermediate" Scrutiny

In applying "intermediate" scrutiny, we determine whether there is a reasonable fit between the law and an important government objective; that is, the government must show that the law is reasonably adapted to an important government interest. *See Marzzarella,* 614 F.3d at 98; *accord Chester,* 628 F.3d at 683; *see also Masciandaro,* 638 F.3d at 470. We conclude that the challenged ban passes constitutional muster under "intermediate" scrutiny.

The government has put forth evidence that, through the 1968 Act, Congress sought to manage an important public safety problem: the ease with which young persons – including 18-to-20-year-olds – were getting their hands on handguns through FFLs. As discussed *supra,* Section III.B, Congress conducted a multi-year investigation that revealed a causal relationship between the easy availability of firearms to young people under 21 and the rise in crime. *See* Pub. L. No. 90-351, § 901(a)(6), 82 Stat. 197, 225-26 (1968) (identifying a "causal relationship between the easy availability of firearms other than a rifle or shotgun and juvenile and youthful criminal behavior"); *id.* § 901(a)(2), 82 Stat. at 225 (identifying "ease with which" young persons could "acquire firearms other than a rifle or shotgun" as a "significant factor in the prevalence of lawlessness and violent crime in the United States"). Indeed, at a hearing held in connection with Congress's inquiry, a law enforcement official reported, "The greatest growth of crime today

is in the area of young people, juveniles, and young adults. The easy availability of weapons makes their tendency toward wild, and sometimes irrational behavior that much more violent, that much more deadly." *Federal Firearms Act: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Sen. Comm. on the Judiciary,* 90th Cong. 57 (1967) (testimony of Sheldon S. Cohen).

The legislative record illustrates that Congress was concerned not only with "juveniles" under the age of 18, but also with "minors" under the age of 21. *See* S. Rep. No. 90-1097, at 79 (1968) ("The clandestine acquisition of firearms by juveniles and minors is a most serious problem facing law enforcement and the citizens of this country.") Congress's investigation had shown that "juveniles account for some 49 percent of the arrests for serious crimes in the United States," while "minors account for 64 percent of the total arrests in this category." S. Rep. No. 90-1097, at 77. Specifically, "minors under the age of 21 years accounted for 35 percent of the arrests for the serious crimes of violence including murder, rape, robbery, and aggravated assault," and 21 percent of the arrests for murder. *See* 114 Cong. Rec. 12279, 12309 (1968) (statement of Sen. Thomas J. Dodd, Chairman, Sen. Subcomm. on Juvenile Delinquency).

The legislative record also demonstrates that Congress was particularly concerned with the FFL's role in the crime problem. The investigation had revealed that FFLs constituted the central conduit of handgun traffic to young persons. *See Federal*

Firearms Act: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Sen. Comm. on the Judiciary, 89th Cong. 67 (1965) (testimony of Sheldon S. Cohen) ("The vast majority, in fact, almost all of these firearms, are put into the hands of juveniles by importers, manufacturers, and dealers who operate under licenses issued by the Federal Government. . . . The way to end this dangerous practice is to stop these federal licensees from selling firearms to juveniles and this is one of the major things that [the proposed legislation] would do."); Pub. L. No. 90-351, § 901(a)(6), 82 Stat. at 226 (finding that concealable firearms had been "widely sold by federally licensed importers and dealers to emotionally immature, or thrill-bent juveniles and minors prone to criminal behavior"); *id.* § 901(a)(3), 82 Stat. at 225 (concluding that "only through adequate Federal control over interstate and foreign commerce in these weapons, and over all persons engaging in the business of importing, manufacturing, or dealing in them, can this grave problem be properly dealt with, and effective State and local regulation of this traffic be made possible").[18]

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[18] *See also Huddleston,* 415 U.S. at 825 ("From this outline of the Act, it is apparent that the focus of the federal scheme is the federally licensed firearms dealer, at least insofar as the Act directly controls access to weapons by users. Firearms are channeled through dealers to eliminate the mail order and the generally widespread commerce in them, and to insure that, in the course of sales or other dispositions by these dealers, weapons could not be obtained by individuals whose possession

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Additionally, the legislative record reflects Congress's concern with the "particular type of weapon that is predominantly used by the criminal" and that is "principally used in the commission of serious crime" – i.e., the "handgun." S. Rep. No. 89-1866, at 4-7 (1966). The handgun's size made it easy to carry and conceal, which in turn made it susceptible to "clandestine acquisition," S. Rep. No. 90-1097, at 79, and "criminal use," S. Rep. No. 89-1866, at 4.

Overall, the government has marshaled evidence showing that Congress was focused on a particular problem: *young persons under 21,* who are immature and prone to violence, easily accessing *handguns,* which facilitate violent crime, primarily by way of *FFLs.* Accordingly, Congress restricted the ability of *young persons under 21* to purchase *handguns* from *FFLs. See* 18 U.S.C. § 922(b)(1).

We find that the government has satisfied its burden of showing a reasonable means-ends fit between the challenged federal laws and an important government interest. First, curbing violent crime perpetrated by young persons under 21 – by preventing such persons from acquiring handguns from FFLs – constitutes an important government objective. *See, e.g., Schall v. Martin,* 467 U.S. 253, 264 (1984) ("The

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of them would be contrary to the public interest."); *United States v. Rybar,* 103 F.3d 273, 280 (3d Cir. 1996) ("[T]he Omnibus Act channelled [sic] all interstate traffic through licensees and prohibited licensees from transferring them to persons under 21 or living out-of-state.").

'legitimate and compelling state interest' in protecting the community from crime cannot be doubted.").

Second, Congress selected means that were reasonably adapted to achieving that objective. Congress found that the ease with which young persons under 21 could access handguns – as opposed to other guns – was contributing to violent crime, and also found that FFLs – as opposed to other sources – constituted the central conduit of handgun traffic to young persons under 21. Congress, in turn, reasonably tailored a solution to the particular problem: Congress restricted the ability of persons under 21 to purchase handguns from FFLs, while allowing (i) 18-to-20-year-old persons to purchase long-guns, (ii) persons under 21 to acquire handguns from parents or guardians, and (iii) persons under 21 to possess handguns and long-guns. *See* 18 U.S.C. § 922(b)(1), (c)(1); *see also supra,* Section I.B.[19]

Alternatively, Congress could have sought to prohibit all persons under 21 from possessing handguns – or all guns, for that matter. But Congress deliberately adopted a calibrated, compromise approach. *See* 114 Cong. Rec. at 12309 (Sen. Dodd) ("At the most [the relevant provisions] could cause minor inconveniences to certain youngsters . . . by requiring

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[19] As discussed, it was not until 1994 that Congress prohibited persons under 18 from possessing handguns and prohibited transfers of handguns to them, with exceptions. *See* Pub. L. No. 103-322, § 110201, 108 Stat. 1796, 2010 (1994) (adding 18 U.S.C. § 922(x)).

that a parent or guardian over 21 years of age make a handgun purchase for any person under 21."); *see also* S. Rep. 90-1097, at 79 (stating that "a minor or juvenile would not be restricted from owning, or learning the proper usage of [a] firearm, since any firearm which his parent or guardian desired him to have could be obtained for the minor by the parent or guardian"); *accord* S. Rep. No. 89-1866, at 58.

Since 1968, the means-ends fit between the ban and its objective has retained its reasonableness. The threat posed by 18-to-20-year-olds with easy access to handguns endures. In 1999, for example, one senator noted:

> Firearms trace data collected as part of the Youth Crime Gun Interdiction Initiative (YCGII) paint a disturbing picture of crime gun activity by persons under 21. In the most recent YCGII Trace Analysis Report, the age of the possessor was known for 32,653, or 42.8 percent, of the 72,260 crime guns traced. Of these 32,563 guns, approximately 4,840, or 14.8 percent, were recovered from 18-20 year-olds. Indeed, the most frequent age of crime gun possession was 19 years of age, and the second most frequent was 18 years of age.
>
> At the same time, according to the 1997 Uniform Crime Reports, the most frequent age arrested for murder was 18 years of age, and the second most frequent was 19 years of age. Those aged 18-20 accounted for 22 percent of all arrest[s] for murder in 1997.

145 Cong. Rec. 7503 (1999) (statement of Sen. Charles Schumer); *see also* 145 Cong. Rec. 18119 (1999) ("Studies show that one in four gun murders are committed by people aged 18 to 20.") (statement of Rep. Grace Napolitano).

Furthermore, a 1999 report by the U.S. Department of Treasury and the U.S. Department of Justice found that "[i]n 1997, 18, 19 and 20 year olds ranked first, second, and third in the number of gun homicides committed":

> Of all gun homicides where an offender was identified, 24 percent were committed by 18 to 20 year olds. This is consistent with the historical pattern of gun homicides over the past ten years.
>
> Among murderers, 18 to 20 year olds were more likely to use a firearm than adults 21 and over. More specifically, in 1997, 74 percent of the homicides committed by 18 to 20 year old offenders involved firearms. In contrast, only 61 percent of homicides committed by offenders 21 or over involved firearms. The under-21 offender age groups showed a significant shift toward the use of firearms in committing homicides by the mid-1980's. By the 1990's, these offender groups were using firearms to commit homicides more than 70 percent of the time. Although the proportion of 18 to 20 year olds who use firearms to commit homicides has declined since the 1994 peak, it remains higher than levels recorded before 1990. Similarly, in non-lethal

> crimes, including assault, rape, and robbery, 18 to 20 year old offenders were more likely to use guns than both younger and older offender age groups. For non-lethal crimes of violence from 1992 to 1997, in cases where the weapon and age of offender were identified, 15 percent of 18 to 20 year old offenders used a firearm, in contrast to 10 percent of adult offenders, and 5 percent of offenders 17 and under.

U.S. Dep't of the Treasury & U.S. Dep't of Justice, *Gun Crime in the Age Group 18-20,* at 2 (June 1999) (citations omitted); *see also id.* at 3 ("Handguns comprised 85 percent of the crime guns known to be recovered from 18 to 20 year olds" in twenty-seven cities participating in the study).

Recent data confirm that preventing handguns from easily falling into the hands of 18-to-20-year-olds remains critical to public safety. An FBI Uniform Crime Report for 2009 shows that persons aged 19, 18, and 20 accounted for the first, second, and third highest percentages of arrests, respectively, for any age up to age 24 (after which data are reported by age group). U.S. Dep't of Justice & Fed. Bureau of Investigation, *Crime in the United States 2009,* Table 38: Arrests by Age (Sept. 2010), http://www2.fbi.gov/ucr/cius2009/data/table_38.html (last visited Oct. 18, 2012) ("2009 CIUS Report") (reflecting: age 18 (4.8%); age 19 (5.0%); and age 20 (4.6%)). In 2009, 18-to-20-year-olds accounted for over 19% of all murder and non-negligent manslaughter arrests, 14% of all arrests for forcible rape, almost 24% of all robbery arrests, and

12% of all aggravated assault arrests, *see id.,* even though they comprised only about 4.3% of the population.[20, 21]

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[20] The government in its summary judgment brief calculated the population figure by dividing the total estimated population in December 2009 for ages 18,19, and 20 (4,344,942 + 4,484,666 + 4,415,714) by the total estimated population for all ages in that month (308,200,409). *See* U.S. Census Bureau, Dep't of Commerce, *Population Estimates: National Population Estimates for the 2000s* (June 2010), http://www.census.gov/popest/data/national/asrh/2009/2009-nat-res.html (last visited Oct. 18, 2012); *see also* U.S. Census Bureau, Dep't of Commerce, *Statistical Abstract of the United States: 2012,* Table 11: Resident Population by Race, Hispanic Origin, and Single Years of Age: 2009 (131 ed. 2012), http://www.census.gov/compendia/statab/2012/tables/12s0011.pdf (last visited Oct. 18, 2012) (estimating the total population – as of July 1, 2009 – as 307,007,000, and the population of persons aged 18, 19, and 20 as 4,389,000, 4,484,000, and 4,340,000, respectively, which yields a 4.3% population figure for 18-to-20-year olds).

The 2009 CIUS Report was not an aberration. Similar to the 2009 report, the 2010 CIUS Report shows that 18-, 19-, and 20-year-olds accounted for the three highest percentages of arrests for any age up to 24 (after which data are reported by age group); and, like the 2009 report, the 2010 report shows that 18-to-20-year-olds accounted for a disproportionately high percentage of arrests for violent crimes. *See* U.S. Dep't of Justice & Fed. Bureau of Investigation, *Crime in the United States 2010,* Table 38: Arrests by Age (Sept. 2011), http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10tbl39.xls (last visited Oct. 10, 2012) (reflecting: age 18 (4.6%); age 19 (4.9%); age 20 (4.7%)).

[21] We add that Congress's finding that minors under 21 are prone to violent crime, especially with guns-in-hand, is entitled to some deference. "Congress is far better equipped than the judiciary" to make "predictive judgments" and "amass and evaluate the vast amounts of data" bearing upon "complex" and

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Nonetheless, Appellants counter that the emergence of unlicensed, private gun owners who are selling handguns to young adults undermines the reasonableness of the fit between the federal scheme and its objective. We decline Appellants' invitation to strike down these laws, under intermediate scrutiny, on the ground that they do not completely prevent young adults from accessing handguns and committing violent crimes. It is well-settled that "a statute is not invalid under the Constitution because it might have gone farther than it did, that a legislature need not strike at all evils at the same time, and that reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Buckley v. Valeo,* 424 U.S. 1,

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"dynamic" issues. *See Turner Broad. Sys. Inc. v. FCC,* 512 U.S. 622, 665-66 (1994) (internal quotation marks omitted).

Furthermore, even putting aside deference, modern scientific research supports the commonsense notion that 18-to-20-year-olds tend to be more impulsive than young adults aged 21 and over. *See, e.g.,* Brief for the Am. Med. Ass'n et al. as Amici Curiae in Support of Neither Party, *Miller v. Alabama,* 132 S. Ct. 2455 (2012) (Nos. 10-9646, 10-9647), 2012 WL 121237, at 19-20 ("The brain's frontal lobes are still structurally immature well into late adolescence, and the prefrontal cortex is 'one of the last brain regions to mature.' This, in turn, means that 'response inhibition, emotional regulation, planning and organization . . . continue to develop between adolescence and young adulthood.' " (citations omitted)); Lawrence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting,* 80 Child Dev. 28, 40-41 (2009) ("[C]hanges in impulse control and planning are mediated by a 'cognitive control' network . . . which matures more gradually and over a longer period of time, into early adulthood.").

105 (1976) (citations and internal quotation marks omitted). Congress designed its scheme to solve a particular problem: violent crime associated with the trafficking of handguns from FFLs to young adults. Because Congress's intended scheme reasonably fits that objective, the ban at bar survives "intermediate" scrutiny.

* * *

We therefore hold that the challenged federal laws are constitutional under the Second Amendment. *Heller* does not cast doubt on them.

IV. Equal Protection Claim

We also reject Appellants' contention that the ban violates the equal protection component of the Fifth Amendment. "[E]qual protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar advantage of a suspect class." *Mass. Bd. of Ret. v. Murgia,* 427 U.S. 307, 312 (1976). First, we have demonstrated that the challenged laws do not impermissibly interfere with Second Amendment rights. Second, "age is not a suspect classification." *Kimel v. Fla. Bd. of Regents,* 528 U.S. 62, 83 (2000).

Unlike race- or gender-based classifications, which require a "tighter fit between the discriminatory means and the legitimate ends they serve," the government may "discriminate on the basis of age

without offending" the constitutional guarantee of equal protection "if the age classification in question is rationally related to a legitimate state interest." *Id.* at 83-84. "[W]hen conducting rational basis review," a court "will not overturn" the legislation "unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the government's actions were irrational." *Id.* at 84 (internal quotation marks and alterations omitted). "[B]ecause an age classification is presumptively rational, the individual challenging its constitutionality bears the burden of proving the facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Id.* at 84 (internal quotation marks omitted).

For the same reasons that the challenged laws are reasonably adapted to an important state interest, *see supra* Section III.E, the laws are rationally related to a legitimate state interest. Appellants have failed to show that Congress irrationally imposed age qualifications on commercial arms sales.

AFFIRMED.

Appendix G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 11-10959

NATIONAL RIFLE ASSOCIATION, INCORPORATED; ANDREW M. PAYNE; REBEKAH JENNINGS; BRENNAN HARMON,

Plaintiffs-Appellants

v.

BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES; B. TODD JONES, In His Official Capacity as Acting Director of the Bureau of Alcohol, Tobacco, Firearms, and Explosives; ERIC H. HOLDER, JR., U.S. ATTORNEY GENERAL,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING EN BANC
(Opinion October 25, 2012, 700 F.3d 185

(Filed Apr. 30, 2013)

Before KING, PRADO, and HAYNES, Circuit Judges.

PER CURIAM:

The court having polled at the request of a member of the court (*see* Internal Operating Procedure accompanying 5TH CIR. R. 35, "Requesting a Poll on Court's Own Motion"), and a majority of the judges who are in regular active service and not disqualified not having voted in favor (*see* FED. R. APP. P. 35(a) and 5TH CIR. R. 35.6), rehearing en banc is DENIED.

In the en banc poll, 7 judges voted in favor of rehearing (Judges Jolly, Jones, Smith, Clement, Owen, Elrod, and Higginson), and 8 judges voted against rehearing (Chief Judge Stewart and Judges King, Davis, Dennis, Prado, Southwick, Haynes, and Graves).

ENTERED FOR THE COURT:

/s/ Edward C. Prado
United States Circuit Judge

EDITH H. JONES, Circuit Judge, joined by JOLLY, SMITH, CLEMENT, OWEN, and ELROD, Circuit Judges, dissenting from denial of rehearing en banc.

By a one-vote margin, this court declined to consider en banc the constitutionality, under the Supreme Court's recent Second Amendment decisions, of federal laws barring licensed gun dealers from selling handguns or handgun ammunition to people less than 21 years old (and similar provisions). *See* 18

U.S.C. § 922(b)(1).[1] Effectively, these provisions bar law-abiding adults aged 18 to 20 from purchasing handguns in the highly regulated commercial firearms market.

I respectfully dissent. There are serious errors in the panel decision's approach to the *fundamental* right to keep and bear arms. *McDonald v. City of Chicago,* 130 S. Ct. 3020 (2010). Moreover, the implications of the decision – that a whole class of adult citizens, who are not as a class felons or mentally ill, can have its constitutional rights truncated because Congress considers the class "irresponsible" – are far-reaching.

I. The Panel Decision

Like other circuits,[2] the panel adopted a two-step approach to interpretation of the Second Amendment.

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[1] The related provisions include 18 U.S.C. § 922(c)(1) and the regulations that implement these statutes: 27 C.F.R. §§ 478.99(b)(1), 478.124(a), & 478.96(b).

[2] *See United States v. Greeno,* 679 F.3d 510, 518 (6th Cir. 2012); *Heller v. Dist. of Columbia,* 670 F.3d 1244, 1252 (D.C. Cir. 2011) (*Heller II*); *Ezell v. City of Chicago,* 651 F.3d 684, 701-04 (7th Cir. 2011); *United States v. Chester,* 628 F.3d 673, 680 (4th Cir. 2010); *United States v. Reese,* 627 F.3d 792, 800-01 (10th Cir. 2010); *United States v. Marzzarella,* 614 F.3d 85, 89 (3d Cir. 2010). *See also United States v. Skoien,* 614 F.3d 638, 641-42 (7th Cir. 2010) (*en banc*) (adopting a form of intermediate scrutiny but forgoing the two-step analysis). *But see Houston v. City of New Orleans,* 675 F.3d 441, 448 (5th Cir.) (Elrod, J., dissenting), *op. withdrawn and superseded on reh'g by* 682 F.3d 361

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The first consideration is whether "the conduct at issue falls within the scope of the Second Amendment right" as shown by "historical traditions." *NRA v. ATF,* 700 F.3d 185, 194 (5th Cir. 2012). The second level of consideration is to apply a type of intermediate scrutiny based on the panel's conclusion that "[a] less severe regulation – a regulation that does not encroach on the core of the Second Amendment – requires a less demanding means – ends showing." *Id.* at 195. The panel held that "a longstanding, presumptively lawful regulatory measure – whether or not it is specified on *Heller*'s illustrative list – would likely fall outside the ambit of the Second Amendment; that is, such a measure would likely be upheld at step one of our framework." *Id.* at 196. Such a measure "would not threaten the core of the Second Amendment guarantee." *Id.*

After conducting an overview of "Founding-Era Attitudes" and 19th century laws that allegedly regulated firearms use by people under 21, the panel was "inclined" to hold that the challenged federal laws are "historically rooted," and thus the conduct they regulate has no constitutional protection. *Id.* at 200, 204. "In an abundance of caution," however, the panel went on to uphold these provisions under a version of intermediate scrutiny. *Id.* at 204. The panel states, during that part of the discussion, that "Congress could have sought to prohibit all persons under

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(5th Cir. 2012); *Heller II,* 670 F.3d at 1271 (Kavanaugh, J., dissenting).

21 from possessing handguns – or all guns, for that matter." *Id.* at 209. Surely this is hyperbole? Never in the modern era has the Supreme Court held that a fundamental constitutional right could be abridged for a law-abiding adult class of citizens.

Three major points of the panel's opinion, in my view, are incorrect. First, the panel's treatment of pertinent history does not do justice to *Heller's* tailored approach toward historical sources. A methodology that more closely followed *Heller* would readily lead to the conclusion that 18- to 20-year old individuals share in the core right to keep and bear arms under the Second Amendment. Second, because they are partakers of this core right, the level of scrutiny required to assess the federal purchase/sales restrictions must be higher than that applied by the panel. Finally, even under intermediate scrutiny, the purchase restrictions are unconstitutional. I will address each of these concerns.

II. *Heller* and the Proper Role of History

A. The Supreme Court's Historical Inquiry

The panel decision purports to follow *Heller*'s originalist inquiry, but its first step does not take seriously *Heller*'s methodology and reasoning. *Heller*, of course, held that there is an individual Second Amendment right to keep and bear arms, and that the D.C. law banning handgun possession for self-defense in a person's home is accordingly unconstitutional.

To determine whether the Second Amendment conferred an individual right "to keep and bear arms," and to explain the meaning and implicit limits of that constitutional right, the Court majority embarked on a meticulous textual and historical review. Rather than generalizing about "founding era attitudes," as the panel did, Justice Scalia's review proceeded in precise stages, each of which addressed relevant historical materials. First, the text of the Constitution was interpreted in light of historical documents bearing on each phrase and clause of the Second Amendment *as those were understood at the time of its drafting*. Second, the conclusion, that the Second Amendment codified a pre-existing right of the people to bear arms for self defense, was then "confirmed by analogous arms-bearing rights in state constitutions that preceded and immediately followed adoption of the Second Amendment," covering the period from 1789 to 1820. *Dist. of Columbia v. Heller,* 554 U.S. 570, 600-01, 128 S. Ct. 2783, 2802 (2008). Finally, the Court examined interpretations of the Second Amendment from its adoption through the 19th century in "a variety of legal and other sources to determine the *public understanding* of [the] legal text." *Id.* at 605, 128 S. Ct. at 2805.

But these sources are not all equal. Text, structure, and contemporary drafting indications are the primary historical sources for originalist inquiry. After that, *Heller* devoted attention to pre-Civil War case law and commentators, whose intellectual foundations were close to those of the founding generation.

Post-Civil War sources, the Court noted, "do not provide as much insight into its original meaning as earlier sources." *Id.* at 614, 128 S. Ct. at 2810.

Significantly, the opinion stated that, "[l]ike most rights, the right secured by the Second Amendment is not unlimited. . . . [T]he right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 626, 128 S. Ct. at 2816. For example, bans on concealed carrying were common in the 19th century, and private ownership of military-type weapons and short-barreled shotguns was long forbidden. Further, listing "nonexclusive examples," the Court did not "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." *Id.* at 626-27, 128 S. Ct. at 2816-17.

Notably, in referring more than once to permissible historic limits on gun ownership, the Court never mentions a minimum age requirement for exercise of the right. On the contrary, to explain the "militia clause," the Court quoted the first federal Militia Act, which provided that "each and every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of eighteen years . . . shall . . . be enrolled in the militia." *Id.* at 596, 128 S. Ct. at 2800 (quoting Act of May 8, 1792, 1 Stat. 271). Further, the Court explained, the right of able-bodied citizens to keep and bear arms for self defense

was constitutionally codified "to prevent elimination of the militia," which some feared the newly created Federal Government, like past tyrants, might do by taking away the citizens' arms. *Id.* at 599, 128 S. Ct. at 2801. Those subject to militia duty are therefore a subset of citizens entitled to be armed, and for them the right is essential.

In another demonstration of the proper historical approach, the Court rejected Justice Breyer's isolated and irrelevant historical examples of founding era laws that did not come close to the banning of a class of useful weapons. Justice Breyer would have held that, assuming *arguendo* the existence of a personal constitutional right to keep and bear arms, the existence of various founding era regulations of "firearms in urban areas" – on gunpowder storage, firing weapons in public places, and one Massachusetts law designed to protect firefighters – are "compatible" with the D.C. ban on handgun possession. *Id.* at 683-86, 128 S. Ct. at 2848-50 (Breyer, J., dissenting). The Court rejected such examples, which were not germane to an outright ban on keeping weapons of self-defense. The Court noted, *inter alia,* how insignificant, in comparison to D.C.'s ban, were the penalties attached to violations of such local laws. The Court squarely rejected Justice Breyer's "freestanding 'interest balancing' approach" and it rejected the rational basis test for review of gun regulations. *Id.* at 634, 128 S. Ct. at 2821 (majority opinion).

B. Heller's Methodology

In sum, the Court's discussion leaves no doubt that the original meaning of the Second Amendment, understood largely in terms of germane historical sources contemporary to its adoption, is paramount. Further, the personal right to keep and bear arms stands on a par with the First Amendment's personal rights:

> 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*. . . . We would not apply an "interest-balancing" approach to the prohibition of a peaceful neo-Nazi march through Skokie. 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 wrongheaded views. The Second Amendment is no different. . . . 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 635, 128 S. Ct. at 2821 (citation omitted) (second emphasis added).

The Court's analogy between the scope of Second Amendment and First Amendment rights particularly illuminates how historical sources should be used and how lower courts should approach today's firearms regulations. Free speech, in the classic sense, is never subject to interest-balancing before it merits constitutional protection. "Speech" is protected categorically unless it fits within specifically defined classes, *e.g.,* obscenity, fraud, libel, and state secrets, that received no legal protection at the time of ratification of the Bill of Rights. Nevertheless, the exercise of free speech rights may be regulated by time/place/manner restrictions, all of which have evolved in the jurisprudence.

Applying these concepts to the Second Amendment, as *Heller* requires, we should presuppose that the fundamental right to keep and bear arms is not itself subject to interest balancing. The right categorically exists, subject to such limitations as were present at the time of the Amendment's ratification.[3]

Consequently, a government entity that seeks significantly to interfere with the Second Amendment rights of an entire class of citizens bears a heavy burden to show, with relevant historical materials, that the class was originally outside the scope of the

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[3] To repeat, however, according to *Heller*, those historical restrictions included at least certain types of military weapons, "longstanding" bans on possession by felons and the mentally ill, laws forbidding carrying weapons in sensitive places, and laws imposing conditions and qualifications on the commercial sale of arms. *Id.* at 626-27, 128 S. Ct. at 2816-17.

Amendment. It is not enough to contend that the existence of *some* founding-era firearms regulations shields all future regulations no matter how onerous; the historical record must bear on the issue at hand. Moreover, post-Civil War laws, enacted 75 years after the Amendment's ratification, "do not provide as much insight into its original meaning as earlier sources." *Id.* at 614, 128 S. Ct. at 2810.

C. The Historical Record Regarding the Right of 18- to 20-Year Olds to Keep and Bear Firearms

When we turn to the properly relevant historical materials, they couldn't be clearer: the right to keep and bear arms belonged to citizens 18 to 20 years old at the crucial period of our nation's history. The panel's error is in rummaging through random "gun safety regulations" of the 18th century and holding that these justify virtually any limit on gun ownership. If the panel is correct, then *Heller* had to be wrongly decided. The panel also relies on laws that "targeted particular groups for public safety reasons." *NRA,* 700 F.3d at 200. Laying aside that no such invidiously discriminatory laws would pass muster today, none of them specifically limits firearms possession or purchase by minors or 18 to 20 year old people. The panel's resort to generalized history is not only uninformative of the issue before this court, but it would render *Heller* valueless against most class-based legislative assaults on the right to keep and bear arms. The panel has employed Justice Breyer's

scattershot approach to history, while *Heller* rejected that in favor of a targeted study.

From a historical perspective, it is more than odd that the panel relegates militia service to a footnote.

History and tradition yield proof that 18- to 20-year olds had full Second Amendment rights. Eighteen year olds were required by the 1792 Militia Act to be available for service, and militia members were required to furnish their own weapons; therefore, eighteen year olds must have been allowed to "keep" firearms for personal use. Because they were within the "core" rights-holders at the founding, their rights should not be infringed today. As Tench Coxe said, "the powers of the sword are in the hands of the yeomanry of America from 16 to 60. . . . Their swords . . . are the birthright of an American."[4] The panel opinion presents a different history.

The panel questions inclusion of the 18- to 20-year old group in the "core" of the Amendment by reference to early sources and 19th and 20th Century laws restricting that age group's rights. As I have shown, the latter references are highly questionable. The original public meaning of the Second

[4] Tench Coxe, "A Pennsylvanian, No. 3," *Pennsylvania Gazette,* Feb. 20, 1788.

Amendment at the time of its ratification should be the norm for this initial scope question.[5]

Following *Heller*'s methodology correctly, the laws prior to and immediately surrounding passage of the Second Amendment illuminate its contemporary understanding. Sixteen was the minimum age for colonial militias almost exclusively for 150 years before the Constitution. In 1650, it was not just the right but the duty of all persons aged sixteen and above in Connecticut, for example, to bear arms.[6] The other colonies had similar militia laws, at least for males. Delaware was an exception, though, as the minimum militia age there was seventeen.[7]

At the time of the Second Amendment's passage, or shortly thereafter, the minimum age for militia

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[5] 1791 – the year the Second Amendment was ratified – is "the critical year for determining the amendment's historical meaning, according to *McDonald v. City of Chicago,* [130 S. Ct. 3020,] 3035 and n.14 [(2010)]." *Moore v. Madigan,* 702 F.3d 933, 935 (7th Cir. 2012). And *Heller* makes plain that 19th-century sources may be relevant to the extent they illuminate the Second Amendment's original meaning, but they cannot be used to construe the Second Amendment in a way that is inconsistent with that meaning. *See Dist. of Columbia v. Heller,* 554 U.S. 570, 634-35, 128 S. Ct. 2783, 2821 (2008) (enshrining the scope of the right as what was understood when the people ratified the Second Amendment).

[6] Clayton E. Cramer, *Colonial Firearm Regulation,* 16 J. ON FIREARMS & PUB. POL'Y 2004, 1, 3.

[7] *Id.* at 8.

service in every state became eighteen.[8] Almost every state adopted the federal Militia Act of 1792

[8] Alphabetically by state, these are the available minimum militia ages set around the time of ratification of the Second Amendment and the federal Militia Act of 1792:

Connecticut: 18 / Acts and Laws, 308 (*1792*) (following a reprint of the federal militia law, Connecticut provided that militia fines imposed on those who had not yet reached the age of twenty-one would be paid by their parents).

Delaware: 18 / Ch. XXXVI, An Act for Establishing the Militia In This State, 1134 (*1793*).

Georgia: 18 / An Act to Revise and Amend the Militia Law of This State, and to Adapt the Same to the Act of the Congress of the United States, Passed the Eighth Day of May, One Thousand Seven Hundred and Ninety-Two, Entitled "An Act More Effectually to Provide for the National Defence by Establishing and Uniform Militia Throughout the United States," as contained in Digest of the Laws of Georgia, 460 (*1792*).

Maryland: 18 / Ch. LIII, An Act to Regulate and Discipline the Militia of This State, Laws of Maryland (*1793*).

Massachusetts: 18 / Ch. 1, An Act for Regulating and Governing the Militia of the Commonwealth of Massachusetts, and for Repealing All Laws Heretofore Made for That Purpose; excepting an Act Entitled, "An Act for Establishing Rules and Articles for Governing the Troops Stationed in Forts and Garrisons, Within This Commonwealth, and Also the Militia, When Called Into Actual Service," 172 (*1793*).

New Hampshire: 18/ An Act for Forming and Regulating the Militia Within This State, and For Repealing All the Laws Heretofore Made for That Purpose, 251 (*1792*).

New Jersey: 18 / Ch. CCCCXIII, An Act for Organizing and Training the Militia of This State, Sec. 4, Acts of

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by reference and began using its age structure.[9] The duty range in the Militia Act, 18 to 45 years, was

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the General Assembly of the State of New Jersey, 825 (*1792*).

New York: 18 / Ch. 45, An Act to Organize the Militia of This State. Laws of New York 440 (*1793*).

North Carolina: 18 / Ch. XXII, An Act for Establishing a Militia in This State, Laws of North Carolina – 1786, 813 (amended by An Act to Carry Into Effect an Act of Congress, Entitled, "An Act More Effectually to Provide for the National Defence, by Establishing an Uniform Militia Throughout the United States," Also to Amend an Act, Passed at Fayetteville, in the Year One Thousand Seven Hundred and Eighty Six, Entitled, "An Act for Establishing the Militia in This State," (*1793*)).

Pennsylvania: 18 / Ch. MDCXCVI, An Act for Regulating the Militia of the Commonwealth of Pennsylvania, Statutes at Large of Pennsylvania, 455 (*1793*).

South Carolina: 18 / An Act to Organize the Militia Throughout the State of South Carolina, in Conformity with the Act of Congress, 21 (*1794*) (enrolling citizens turning eighteen and evidencing a shift from the former militia age of sixteen as seen in: No. 1154, An Act for the Regulation of the Militia of This State, 682 (1782-91)).

Virginia: 18 / Ch. CXLVI, An Act for Regulating the Militia of this Commonwealth, 182 & 184 (*1792*).

[9] The choice of eighteen as the militia age for the federal law owed, in large part, to George Washington's stated belief that the best soldiers were those aged eighteen to twenty-one. Further, it is likely, but not provable, that the right to bear arms was thought still to extend even to those sixteen to eighteen (enrollment in the militia was sufficient, but not necessary, to the right to own a gun), but appellants disclaim any intent to reduce the minimum age below 18.

based on what President Washington thought was the best age for soldiers. The historical data thus confirm that those eighteen and above had the right to keep and bear arms.

The panel cites "several States" that chose to enroll only those twenty-one and older in their militias. In fact, both of the examples offered for this proposition are wrong. One is New Jersey in 1779.[10] To begin, New Jersey's minimum age for serving in the militia at that time was sixteen[11] and, more importantly, New Jersey's militia age in 1792 was eighteen.[12] The

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[10] Ch. XXIV, An Act to Embody, For a Limited Time, One Thousand of the Militia of This State, for the Defence of the Frontiers Thereof, Sec. 3, Acts of the State of New Jersey, 59 (1779).

[11] *Compare* Ch. XIII, An Act for the Regulating, Training, and Arraying of the Militia, and For Providing More Effectually for the Defence and Security of the State, Sec. 10, Acts of the General Assembly of the State of New Jersey, 40 (1781) (affirming the age group to be enrolled in the state militia as sixteen to fifty), *with* Ch. XXIV, An Act to Embody, For a Limited Time, One Thousand of the Militia of This State, for the Defence of the Frontiers Thereof (using twenty-one as the cut-off age for a specific purpose act, but not ruling out the use of those between the ages of sixteen and twenty-one *who were still part of the militia*).

[12] *See* note 7, *supra*; *see also* Ch. CCCCXXXIII, A Supplement to the Act, Intitled, 'An Act for Organizing and Training the Militia of This State,' Sec. 6, Acts of the General Assembly of the State of New Jersey, 853 (1793) (enrolling free, white males from eighteen to forty-five in the state militia); Ch. DCCCXXII, An Act for the Regulation of the Militia of New-Jersey, Sec. 1, Acts of the General Assembly of the State of New Jersey, 609 (1799) (same); Ch. CLXXXVII, An Act for Establishing and

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1779 Act cited by the opinion was not a general militia act but, rather, a specific purpose act of the type states would enact from time to time as supplements to their overall militia structure.[13] These would address a specific need and sometimes only be in effect for a certain amount of time. Additionally, the 1779 Act did not say twenty-one was the minimum age; it said the officers would make lists of everyone above twenty-one, not exempted by some other duties. It laid out specific numbers of militiamen to be drafted from each county so that an even 1000 was reached. Unlike every general militia act, there was no top age listed because not everyone was being called in that Act – they only needed 1000 men. Finally, the Act stated that "nothing herein contained shall be construed to prevent employing Officers, and enlisting non-commissioned Officers and Privates between the Age of sixteen and twenty-one years." This, after all, is following a period of 140 years of setting the militia age at sixteen.

The other example given by the panel is an Ohio statute from 1843, which is not as probative for

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Conducting the Military Force of New-Jersey, Sec. 1, Acts of the General Assembly of the State of New Jersey, 536 (1806) (same).

[13] *See, e.g.,* Ch. XLII, An Act to Authorize the Governor of Commander in Chief of This State for the Time Being, to Call Out a Part of the Militia of This State, and to Continue Them in Service for Three Months, Acts of the General Assembly of the State of New Jersey, 112 (1781); Ch. XI, An Act to Establish a Company of Artillery, in the City of New-Brunswick, Acts of the General Assembly of the State of New Jersey, 11 (1782).

establishing the original meaning of the Second Amendment. In fact, though, the militia age in Ohio was eighteen at that time.[14] The 1843 law only exempted persons under twenty-one from duties during times of peace; eighteen to twenty year olds were still allowed in the militia.[15]

The right to keep and bear arms was not coextensive with militia service, of course, but it was intimately related. Gun ownership was necessary for militia service; militia service wasn't necessary for gun ownership. The panel notes that they were not strictly linked but never considers that the age at which citizens actually used guns was lower. Not only had the colonies employed sixteen year olds in the militia for a century and a half, but other gun laws in place at that time serve as indicia of the founders' mind set. Massachusetts, for example, required "all youth" from ten to sixteen to be trained in gun use.[16]

The panel opinion is correct in noting that, during the founding era, the common-law age of majority

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[14] An Act To Organize and Discipline the Militia, Sec. 1 (1837).

[15] Ohio's minimum age changed to twenty-one the following year, An Act To Regulate the Militia, Sec. 2 (1844), but sixteen year olds were still allowed to volunteer for the militia even after the shift, *id.* at Sec. 14.

[16] Nathaniel B. Shurtleff, *Records of the Governor and Company of the Massachusetts Bay in New England* (Boston: William White, 1853), 2:99 (noting the May 14, 1645 order).

was twenty-one.[17] This is confirmed by several of the state militia laws which required the parents of minors in the militia to pay any fines incurred by their sons.[18] But the point remains that those minors were in the militia *and, as such,* they were required to own their own weapons. What is *inconceivable* is any argument that 18- to 20-year olds were not considered, at the time of the founding, to have full rights regarding firearms.

Originalism is not without its difficulties in translation to the modern world. For example, deciding whether the use of a thermal heat imaging device violates the original public meaning of the Fourth Amendment is a hard question. *See Kyllo v. United States,* 533 U.S. 27, 121 S. Ct. 2038 (2001). In this case, however, the answer to the historical question is easy. The original public meaning of the Second Amendment included individuals eighteen to twenty: the same scenario at issue here. The members of the first Congress were ignorant of thermal heat imaging devices; with late teenage males, they were familiar. We have enough historical evidence to decide that 18- to 20-year olds can claim "core" Second Amendment protection.

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[17] This point does not help the panel opinion in consideration of the gun restrictions placed on many "minors" during the late 1800s. *See infra* notes 26-32 and accompanying text.

[18] *See, e.g.,* Connecticut Acts and Laws, 308 (1792).

Against this clear and germane evidence, the panel asserts that at the time of the founding and before, the colonies placed various regulations on the private use of firearms.[19] Like Justice Breyer's non-probative historical references, however, these give no support to an age-based ban on firearms purchases by 18- to 20-year olds. Some class-based firearms limits targeted Indians, blacks, and Catholics.[20] Other regulations operated against Loyalists to the Crown, but "Loyalty Test" regulations actually work against the panel's conclusion. A brief survey reveals that they were applicable to persons *above eighteen* and stated that those who did not swear allegiance would be *dis*armed – eighteen year olds were considered to have rights even if they were being restricted equally with other suspect class members.[21] Additionally, the Loyalty Tests were applied to individuals on a case-by-case basis. Individuals were not part of the suspect "group" unless they were considered disloyal by virtue of their conduct. Finally, while certain laws prevented discharging guns at certain times or using them in an especially dangerous manner such as "fire hunting" (where participants were likely to hurt

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[19] *See* Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control,* 73 FORDHAM L. REV. 487, 506-08 (2004) (detailing eighteenth-century gun laws).

[20] Cramer, *supra* note 6, at 16-23.

[21] In Massachusetts, for example, the age cut-off was sixteen in 1775. See Ch. VII, 1775-1776 Mass. Acts. at 31. In Pennsylvania, it was eighteen. *See* Penn. Test Act of 1777.

themselves needlessly),[22] such laws did not interfere with the self-defense "core" of the right. The panel's reference to gunpowder storage laws is also misplaced, as those regulations only applied to the amount that was in excess of what an individual could physically possess. Each person still kept a significant amount of powder.[23]

The panel also recites multiple, and wholly inapt, examples of gun restrictions against 18- to 20-year olds as "longstanding" regulations that detract from the core Second Amendment right of 18- to 20-year olds even though they do not "boast a precise founding-era analogue." *NRA,* 700 F.3d at 196. First, using the 1968 Omnibus Crime Control gun regulations against this age group to *contradict* the original meaning of the Second Amendment is contrary to *Heller*. Second, drawing analogies between this age group and felons and the mentally ill is not only offensive but proves too much. *Heller* acknowledged the "longstanding" prohibitions against firearms possession by these two groups, but it did *not* state or imply that such limited class-based restrictions could be projected on to other classes in order to limit their core Second Amendment right. Third, the truth is that prohibitions on felons are even more "longstanding" than the panel acknowledges. Until rather recently, historically speaking, felons incurred the

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[22] Cramer, *supra* note 6, at 30-34.

[23] Cornell & DeDino, *supra* note 19, at 510-12.

death penalty; regulations on gun ownership by felons was, therefore, a non-issue.[24] Indeed, early in the Republic, felons were stripped of their rights to own anything, even, and perhaps, especially, a gun.[25] Also simply wrong is the assumption that the Supreme Court's reference to "longstanding" gun regulations entitles a circuit court panel to evolve class-based Second Amendment restrictions contrary to the Amendment's original scope. If this is so, then *Heller* and *McDonald* have no point.

The panel's strongest case for narrowing core Second Amendment rights relates to "longstanding" limits on young adults' firearms access. In some states eighteen-to-twenty-year-olds have been prohibited from possessing, carrying, and purchasing certain types of weapons for over a century. The panel's argument is overstated, though. At footnote 14, the panel cites the laws of many different states and territories to bolster its claim that "arms-control legislation" affected late teenagers. This is accurate as to a

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[24] *See* Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment,* 82 MICH. L. REV. 204, 266 (1983) ("Felons simply did not fall within the benefits of the common law right to possess arms. That law punished felons with automatic forfeiture of all goods, usually accompanied by death. . . . All the ratifying convention proposals which most explicitly detailed the recommended right-to-arms amendment excluded criminals and the violent.").

[25] Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations and Criminological Considerations,* 60 HASTINGS L.J. 1339, 1360-62 (2009).

few states – D.C., Maryland, Mississippi, Wisconsin, and Wyoming each prohibited the sale of pistols specifically to those under twenty-one – but there are significant problems in the treatment of other states' laws. The earliest law cited is from Alabama in 1856, where the state prohibited pistol and other weapon sales to male minors only.[26] The Nevada statute cited by the panel only prohibits those under twenty-one from *concealed* carry of pistols.[27] Other state statutes reveal a clear bias during the late 1800s against teenage males. In Illinois,[28] Iowa,[29] Kansas,[30] and Missouri,[31] the age of majority was twenty-one for males but was eighteen for females. Additionally, in Texas, for example, a female was not a minor once married[32] and in Iowa any married person was of age (and this in a time when the average age of marriage was quite

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[26] 1856 Ala. Acts 17 ("That any one who shall sell or give or lend, to any male minor, a bowie knife, or knife or instrument of the like kind or description, by whatever name called, or air gun or pistol, shall, on conviction, be fined. . . .").

[27] 1885 Nev. Stat. 51. Like many laws against concealed carry promulgated in the past, the law must be understood in the context of a society where open carry was permitted and practiced; a prohibition on concealed carry was a minuscule burden on the right to bear arms.

[28] 1881 Ill. Revised Stat. 766 (Ch. 64, § I).

[29] 1884 Revised & Annotated Code of Iowa 595 (Ch. 4, § 2237).

[30] 1885 Laws of Kan. 558 (Ch. 67, § 3476).

[31] 1879 Miss. Revised Stat. 430 (Ch. 37, § 2559).

[32] Batts' Annotated Civil Statutes of Texas, Title LI, Chapter One, Art. 2552 (1895).

young). Such gender and marital bias, which cannot stand in today's society, undermines the conclusion reached by the panel.

With its merely general references to firearms regulations at the founding and its only support in regulations against 18- to 20-year olds late in the 19th century, the panel is unable to prove that banning commercial firearms sales to late teens has any analogue in the founding era. Contrary to the panel's equivocation about the existence of a right of self-defense for 18- to 20-year olds during the historical period most critical to *Heller*, the record is clear: the right belonged (at least) to those the federal government decreed should serve in the militia. Eighteen to forty-five year old white males fit this description. It is untenable to argue that the core of the Second Amendment right to keep and bear arms did not extend to 18- to 20-year olds at the founding.

III. The Appropriate Level of Scrutiny

Had the panel correctly applied *Heller*'s historical analysis, it would have concluded that prohibiting a class of law-abiding adult citizens from purchasing "the quintessential self-defense weapon," *Heller,* 554 U.S. at 628, 128 S. Ct. at 2818, interferes with core Second Amendment rights. Whether the interference is unconstitutional depends on further comparison of the goals and means of the government's regulations with the limitations imposed on 18- to 20-year olds. We know from *Heller* that rational basis analysis

cannot apply, and we further know that the D.C. ban on handgun possession by all law-abiding adults fails under any conventional standard of scrutiny. *Id.* at 628, 128 S. Ct. at 2817. We have here a class-wide, age-related ban on the purchase of handguns from federally licensed firearms dealers. This is not an outright ban on the age group's access to guns, or even handguns, but it is a serious impediment to their participating in the lawful market and, for 18- to 20-year olds not living at home, it may effectively ban lawful possession of handguns. Denying access to handguns in this manner must be viewed as coming close to banning their legal possession by the age group in question, contrary to the rights they possessed at the founding.

Because the panel struck an agnostic pose toward the historical rights of this age group, and because the panel inappropriately considered as "longstanding" the regulations that have existed since 1968, *i.e.* for less than twenty percent of our history, the panel instead placed the weight of its analysis on the level of scrutiny to apply and then applied "intermediate scrutiny" of a very weak sort. The panel's level of scrutiny is based on an analogy between young adults and felons and the mentally ill, as if any class-based limitation on the possession of firearms justifies any other, so long as the legislature finds the suspect "discrete" class to be "dangerous" or "irresponsible." On such reasoning, a low level of scrutiny could be applied if a legislature found that other groups – *e.g.* aliens, or military veterans with

PTSD – were "dangerous" or "irresponsible." In any event, it is circular reasoning to adopt a level of scrutiny based on the assumption that the legislature's classification fits that level.

Even when taken at face value, the panel's reasons for adopting its "intermediate scrutiny" test are flawed. First, contrary to the panel's approach, these federal laws cannot be shoehorned into the "conditions and qualifications on the commercial sale of firearms," a category of regulations presumptively approved by *Heller*. That they affect commercial sales is not the point, because nearly every regulation will affect commercial sales. These laws prohibit a class of adults from purchasing a class of firearms, just as was the case in *Heller*. Second, restating the Second Amendment right in terms of what IS LEFT after the regulation rather than what EXISTED historically, as a means of lowering the level of scrutiny, is exactly backward from *Heller*'s reasoning. Thus, the panel erroneously says this is a "bounded regulation"; we would not say a content-based speech restriction is "bounded" just because it only barred speech on one topic. Third, stating that young adults will "grow out of" their disability from purchasing firearms cannot limit the scope of infringement on their pre-existing constitutional rights. This is no different than saying they may be disabled from exercising constitutionally protected speech until they've attained a "responsible" age; this cannot be the law for 18- to 20-year olds. *Cf. Brown v. Entm't Merchs. Ass'n,* 131 S. Ct. 2729, 2736 n.3 (2011).

Despite these systemic flaws in the panel's logic, there is currently a debate about how to assess the level of scrutiny courts apply to regulations that infringe on gun ownership.[33] I need not stake out a definitive position on the conflicting views, however, because under "intermediate scrutiny" as it has conventionally been applied in the First Amendment context, these regulations do not fulfill their purpose in relation to the burdens they manifestly impose on adult, law-abiding citizens.

IV. Applying the Proper Level of Scrutiny

The panel uses a rather rough means-ends calculation to uphold these federal regulations. The panel recites at length Congress's determinations that violent crimes are disproportionately perpetrated by young adults, that young adults often use handguns in the crimes, and therefore young adults should be excluded from the commercial handgun market. QED. As the panel notes, Congress need not address every problem in a statute – *e.g.,* by also outlawing unregulated legal sales of handguns to minors – when it legislates. *Buckley v. Valeo,* 424 U.S. 105 (1976). Nevertheless, under a First Amendment analogy, which *Heller* seems clearly to support, the legislature's objective must be narrowly tailored to achieve

[33] *Compare* Judge Ginsburg and Judge Kavanaugh in *Heller II,* 670 F.3d 1244; Judge Sykes in *Ezell,* 651 F.3d 684; and Judge Posner in *Moore,* 702 F.3d 933.

its constitutional purpose. Real scrutiny is different from parroting the government's legislative intentions. The First Amendment test for intermediate scrutiny allows a "content-neutral regulation" of speech to be sustained if it "advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Turner Broad. Sys. Inc. v. FCC,* 520 U.S. 180, 189, 117 S. Ct. 1174 (1997) (citing *United States v. O'Brien,* 391 U.S. 367, 88 S. Ct. 1673 (1968)).

Transposing the First Amendment standard to this case, heightened scrutiny can be conducted in the following, somewhat abbreviated, manner. First, the young adults from 18 to 20 are within the originalist core protection of the Second Amendment's right to keep and bear arms. As far as possible, their rights should be equal to those of fellow citizens 21 and older. Because there is no originalist support for reducing their rights, the government's regulations must be closely tailored to address a real need with a real potential solution.

Congress passed a ban on commercial market sales to young adults in order to address the perceived greater likelihood that such firearms would be used in criminal activity. There is an important governmental interest in reducing violent crime. Congress's ban, however, fails to achieve its goals in two respects. Factually, with forty years of data on these regulations, it is known that the sales ban has not actually advanced this government interest. In fact,

as the panel concedes, the share of violent crime arrests among the 18- to 20-year age group has increased, and the use of guns by that group is still disproportionately high. Further, the ban perversely assures that when such young adults obtain handguns, they do not do so through licensed firearms dealers, where background checks are required, *see* 18 U.S.C. § 922(t), but they go to the unregulated market. Legally, the ban does not square with *Craig v. Boren,* 429 U.S. 190, 97 S. Ct. 451 (1976), in which the Supreme Court invalidated, as discriminatorily overbroad, Oklahoma's law that treated young males and females differently in the ability to purchase 3.2% beer. The state justified the distinction based on an alleged connection between young males' (under 21) drinking and their DUI arrests. The Court derided the state's most persuasive statistics, which showed only 2% of males in the affected age group had been arrested: "Certainly if maleness is to serve as a proxy for drinking and driving, a correlation of 2% must be considered an unduly tenuous 'fit.'" *Id.* at 202-03, 97 S. Ct. at 459. NRA's Petition for Rehearing En Banc here recites that only 0.58% of 18- to 20-year olds were arrested for violent crimes in 2010. *See* NRA Pet., fn. 1. If the "fit" of 2% was so inaccurate as to be unconstitutional in *Craig,* how can a "fit" of less than 1% be upheld in regard to the alleged criminality of 18- to 20-year olds?

CONCLUSION

Congress has seriously interfered with this age group's constitutional rights because of a class-based determination that applies to, at best, a tiny percentage of the lawbreakers among the class. Of course, the lawbreakers obtain handguns, but the law-abiding young adults are prevented from doing so, which adds an unusual and perverse twist to the constitutional analysis. I stress again the panel's incredibly broad language approving these restrictions. The class is "irresponsible"; the Second Amendment protects "law-abiding *responsible* adults"; the Second Amendment permits "categorical regulation of gun possession by classes of persons" (citing *Booker,* 644 F.3d at 23) irrespective of their being within the core zone of rights-holders; and finally, "Congress could have sought to prohibit all persons under 21 from possessing handguns – or all guns, for that matter."

If any of these phrases were used in connection with a First Amendment free speech claim, they would be odious. Free speech rights are not subject to tests of "responsible adults," speakers are not age-restricted, and class-based abridgement of speech is unthinkable today. Even if it is granted that safety concerns exist along with the ownership of firearms, they exist also with regard to incendiary speech.

Some reasonable regulations are surely permissible,[34] but the panel's approval of banning young adults from the commercial and federally regulated market for "the quintessential self-defense weapon" is class-based invidious discrimination against a group of largely law-abiding citizens.

I respectfully dissent from the denial of rehearing en banc.

[34] There are alternatives. Background checks occur when firearms are purchased in the licensed market. Other conceivable restrictions might include assuring responsible use of handguns, or prescribing parental notification of purchases.

Appendix H

Early State Militia Laws

State	**Relevant Statutory Text**	**Source**
Connecticut	Be it Enacted . . . That all male Persons, from sixteen Years of Age to Forty-five, shall constitute the Military Force of this State . . . And be it further Enacted, That all such as belong to the Infantry Companies, and Householders under fifty-five Years of Age, shall, at all Times be furnished at their own Expence, with a well fixed Musket, the Barrel not less than three Feet and an Half long, and a Bayonet fitted thereto, with a Sheath and Belt or Strap for the same, with a Ram-rod, Worm, Priming-wire and Brush, one Cartouch-box carrying fifteen rounds of Cartridges, made with good Musket Powder and Ball, fitting his Gun, six good Flints, and each Militia Man	An Act for Forming, Regulating, and Conducting the Military Force of this State (Conn. 1786) *in* ACTS AND LAWS OF THE STATE OF CONNECTICUT IN AMERICA 144, 150 (1786).

	one Canteen holding not less than three Pints, upon Penalty of forfeiting and paying a Fine of Three Shillings for want of such Arms and Ammunition as is hereby required, and One Shilling for each Defect, and the like Sum or Sums for every four Weeks he shall remain unprovided. . . . And be it further enacted, That every Light-Dragoon shall always be provided with . . . a Case of good Pistols . . . one Pound of good Powder, three Pounds of sizable Bullets, twelve Flints, a good pair of Boots and Spurs, on Penalty of Three Pounds for want of such Horse, and the Value of each other Article in which he shall be deficient.	
Delaware	§7 And be it enacted, That every person between the ages of eighteen and fifty, or who may hereafter attain to the age of	An Act for Establishing a Militia, §§7-8, 1785 Del. Laws 59.

	eighteen years, except as before excepted, whose public taxes may amount to twenty shillings a year, shall at his own expence, provide himself; and every apprentice, or other person of the age of eighteen and under twenty-one years, who hath an estate of the value of eighty pounds, or whose parent shall pay six pounds annually towards the public taxes, shall by his parent or guardian respectively be provided with a musket or firelock, with a bayonet, a cartouch box to contain twenty three cartridges, a priming wire, a brush and six flints, all in good order, on or before the first day of April next, under the penalty of forty shillings, and shall keep the same by him at all times, ready and fit for service, under the penalty of two shillings and six pence for each neglect or default thereof		

on every muster day, to be paid by such person if of full age or by the parent or guardian of such as are under twenty-one years, the same arms and accoutrements to be charged by the guardian to his ward, and allowed at settling the accounts of his guardianship.

. . . .

§8 And be it enacted, That every male white person within this state, between the ages of eighteen and fifty, or who shall hereafter attain to the age of eighteen years, except as before excepted, shall attend at the times and places appointed in pursuance of this act for the appearance of the company or regiment to which he belongs, and if any non-commissioned officer or private, so as aforesaid required to be armed and accoutered with his firelock and accoutrements aforesaid

	in good order, or if any male white person between the ages aforesaid although not required to be so armed and accoutered, shall neglect or refuse to appear on the parade and answer to his name when the roll is called over. . . . shall forfeit and pay the sum of four shillings for every such neglect or refusal.	
Georgia	[A]ny male free inhabitant, between the age of sixteen and fifty years, who shall refuse or neglect to attend such company muster, shall be liable to a fine of two dollars. . . . And any private who shall attend such company muster without a gun, in good order, or shall misbehave or disobey while under arms, shall be liable to a fine of six dollars, and shall have powder and lead equal to six common cartridges, or be liable to a fine not exceeding one dollar.	An Act for Regulating the Militia of the State, and for Repealing the Several Laws Heretofore Made for that Purpose, 1786 Ga. Laws.

Maryland	§II Be it enacted, by the General Assembly of Maryland, That a lieutenant in each county of this state, of undoubted courage, zeal and attachment to the liberties and independence of America. . . . within ten days after the receipt of their several and respective commissions, shall, by warrant under their hand and seal, appoint fit and proper persons in every county, to make a true and exact list of the names of all able bodied white male persons, between sixteen and fifty years of age. . . . . §VI And be it enacted, That the whole of the militia, so enrolled as aforesaid, shall be subject to be exercised in companies . . . on each of which days every militia man, so enrolled, shall duly attend, with his arms and accoutrements in good order . . .	An Act to Regulate the Militia, ch. XVII., §§ II, VI, 1777 Md. Laws 361-62.

Massachusetts	Whereas the laws now in force for regulating the militia of the Commonwealth, are found to be insufficient for the said purpose: I. Be it therefore enacted by the Senate and House of Representatives, in General Court assembled, and by the authority of the same, That the several laws heretofore made for regulating the militia aforesaid, be and herby are repealed. Provided nevertheless, That all actions and processes commenced and depending in any Court within this Commonwealth, upon or by force of the said laws, shall, and may be sustained and prosecuted to final judgment and execution; and that all officers elected, appointed and commissionated agreeably to law, shall be continued in commission, and hold their respective commands in	An Act for Regulating and Governing the Militia of the Commonwealth of Massachusetts, and for Repealing All Laws Heretofore Made for That Purpose (Mass. 1785) *in* THE PERPETUAL LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, 338, 340-41, 346-47 (1789).

the militia, in the same manner as they would in case the said laws were still in force.

II. And be it further enacted by the authority of the aforesaid, That the said militia shall be formed into a train-band, and alarm-lift; the train-band to contain all able-bodied men, from sixteen to forty years of age, and the alarm-list all other men under fifty years of age, excepting in both cases such as shall be hereafter by this act exempted.

. . . .

XIII. And be it further enacted by the authority aforesaid, That every non-commissioned officer and private folder of the said militia, not under the control of parents, masters or guardians, and being of sufficient ability therefore in the judgment of the selectmen of the town in which he shall

dwell, shall equip himself, and be constantly provided with a good fire-arm, with a steel or iron ramrod, a spring to retain the same, a worm, priming wire and brush, a bayonet fitted to his fire-arm, and a scabbard and belt for the fame, a cartridge-box that will hold fifteen cartridges at least, six flints, one pound of powder, forty leaden balls suitable for this firearm, a haversack, blanket, and canteen; and if any non-commissioned officer or private soldier shall neglect to keep himself so armed and equipped, he shall forfeit and pay a fine not exceeding three pounds, is proportion to the value of the article or articles in which he shall be deficient, at the direction of the Justice of the Peace before whom trial shall be at hand.

XIV. And be it further enacted by the authority

aforesaid, That all parents, masters and guardians, shall furnish those of the said militia who shall be under their care and command, with the arms and equipments aforementioned, under the like penalties for any neglect.

XV. And be it further enacted by the authority aforesaid, That whenever the selectmen of any town shall judge any inhabitant thereof, belonging to the said militia, unable to arm and equip himself in manner as aforesaid, they shall, at the expense of the town, provide for and furnish such inhabitant [sic] with the aforesaid arms and equipments, which shall remain the property of the town at the expence of which they shall be provided; and if any soldier shall embezzle or destroy the arms and equipments, or any part thereof, with which

	he shall be to furnished, he shall upon conviction before some Justice of the Peace in the county where such offender shall live, be adjudged to replace the article or articles which shall be by him so embezzeled or destroyed, and to pay the cost arising from the process against him; and in [case] he [shall] not within fourteen days after such adjudication against him perform the same, it shall be in the power of the selectmen of the town to which he shall belong, to bind him out to service or labour, for such term of time as shall in the discretion of the said Justice, be sufficient to procure a sum of money equal to the amount of the value of the article or articles embezzeled or destroyed, and to pay the cost arising as aforesaid		

XXXV. And be it further enacted by the authority aforesaid, That the non-commissioned officers and private soldiers belonging to the said corps of artillery, shall be armed and equipped in the same manner as the train-band of the said militia are in this act directed to arm and equip themselves.

. . . .

XXXVIII. And be it further enacted by the authority aforesaid, That every officer, non-commissioned officer and private, belonging to the said cavalry, shall keep himself provided with a good horse, not less than fourteen hands and a half high, a saddle, bridle, holsters, pistols, sword, boots and spurs, carbine with a spring and sling, a cartouch-box, with twelve rounds of cartridge and ball for his carbine, and fix for each

	pistol, nine flints, a cloak and canteen. . . . . XL. And be it further enacted by the authority aforesaid, That the officers, non-commissioned officers and privates belonging to the said corps of artillery and cavalry, shall be subject to the same rules and regulations as are by this act provided for the train-band in the militia aforesaid; and the several companies belonging to the said corps shall be subject to the immediate orders of the [M]ajor [Ge]neral commanding the division within which the same shall be raised.	
New Hampshire	Whereas it is the duty and interest of every State, to have the militia thereof properly armed, trained, and in complete readiness to defend against every violence or invasion whatever: And Whereas	An Act for Forming and Regulating the Militia within this State, and for Repealing All the Laws Heretofore

	the laws now in force respecting the regulation of the militia are insufficient for those purposes: Be it therefore enacted . . . That the training band, so called, shall consist of all the able bodied male persons within the State, from sixteen years old to forty . . . . And be it further enacted by the authority aforesaid, That every non-commissioned officer and soldier, both in the alarm list and training band, shall be provided and have constantly in readiness, a good musquet and bayonet fitted thereto, with a good scabbard and belt, a worm, priming-wire and brush, a cartridge-box that will hold, at least twenty-four rounds, six flints, and a pound of powder, forty leaden balls fitted to his gun, a knap-sack, a blanket, and a canteen	Made for that Purpose (N.H. 1786) *in* THE LAWS OF THE STATE OF NEW HAMPSHIRE 356-57, 359-60 (1792).	

	that will hold one quart. Such of the training band as are under the care of parents, masters, or guardians, are to be furnished by them with such arms and accoutrements; and such of the training band, or alarm list, as shall be unable to furnish themselves, shall make application to the selectmen of the town, who are to certify to his captain, or commanding officer, that he is unable to equip himself; and the said selectmen shall, at the expense of the town, provide for, and furnish such person with arms and equipments; which arms and equipments shall be the property of the town at whose expense they are provided . . .	
New Jersey	And Be It Enacted, That the Captain or Commanding Officer of each Company shall keep a true and perfect List or Roll of all effective Men	An Act for the Regulating, Training, and Arraying of the Militia

	between the Ages of sixteen and fifty Years, residing within the District of such Company. . . . And Be It Enacted, That every Person enrolled as aforesaid shall constantly keep himself furnished with a good Musket, well fitted with a Bayonet, a Worm, a Cartridge-Box, twenty-three Rounds of Cartridges sized to his Musket, a Priming-Wire, Brush, six Flints, a Knapsack and Canteen, under the Forfeiture of Seven Shillings and Sixpence for Want of a Musket, and One Shilling for Want of any other of the aforesaid Articles, whenever called out to Training or Service. . . . Provided always, That if any Person be furnished as aforesaid with a good Rifle-Gun, the Apparatus necessary for the same, and a Tomahawk, it shall be accepted in Lieu of the Musket and the Bayonet and other	and for Providing More Effectually for the Defence and Security of the State, ch. XIII, §§10-11 1781 N.J. Acts 39, 42-43.	

	Articles belonging thereto.	
New York	Be it enacted by the people of the State of New-York, represented in Senate and assembly, and it is hereby enacted by the authority of the same, That every able-bodied male person, being a citizen of this state, or of any of the United States, and residing in this state . . . and who are of the age of sixteen, and under the age of forty-five years, shall, by the captain or commanding officer of the beat in which such citizens shall reside, within four months after the passing of this act, be enrolled in the company of such beat. That every captain or commanding officer of a company, shall also enroll every citizen as aforesaid, who shall, from time to time, arrive at the age of sixteen years, or come to reside within his beat,	An Act to Regulate the Militia (N.Y. 1786) *in* Thomas Greenleaf, ed., 1 LAWS OF THE STATE OF NEW YORK 227-28 (1792).

	and without delay notify such enrolment to such citizen so enrolled, by some non-commissioned officer of the company, who shall be a competent witness to prove such notice. . . . That every citizen so enrolled and notified, shall within three months thereafter, provide himself, at his own expence, with a good musket or firelock, a sufficient bayonet and belt, a pouch, with a box therein to contain not less than twenty-four cartridges suited to the bore of his musket or firelock, each cartridge containing a proper quantity of powder and ball, two spare flints, a blanket and knapsack; and shall appear so armed, accoutered and provided when called out to exercise or duty, as herein after directed.	
North Carolina	§2 Be it therefore enacted by the General Assembly of the State of	An Act to Establish a Militia in

	North Carolina, and it is hereby enacted by the authority of the same, that the Militia of this State be divided into six Brigades, viz.: One in each of the Districts of Edenton, New Bern, Wilmington, Halifax, Salisbury and Hillsborough. And each Brigade to be commanded by a Brigadier General. And the Militia of every County shall consist of all the effective men from sixteen to fifty years of age inclusive. . . . . §4. And be it further enacted, that each Militia soldier shall be furnished with a good Gun, shot bag and powder horn, a Cutlass or Tomahawk, and every Soldier neglecting to appear at any muster, accoutered as above, shall forfeit for every such offence two shillings and six pence (unless he can make it	this State, ch. 1, §§2, 4, 1777 Laws of N.C. 1-2.	

	appear that they were not to be procured) to be recovered as other fines. And where any person shall appear to the Field Officers not possessed of sufficient property to afford such arms and accouterments, the same shall be procured at the expence of the County, and given to such persons on muster Days, or when ordered into service, which Guns and Accouterments after such service, shall be returned to the Captain of the Company, and by him carefully preserved for future occasions.	
Pennsylvania	§ I. Whereas a militia law upon just and equitable principles hath ever been regarded as the best security of liberty and the most effectual means of drawing forth and exerting the natural strength of a state . . . . §III. Be it enacted . . . , and it is hereby enacted	An Act to Regulate the Militia of the Commonwealth of Pennsylvania, ch. DCCL, §§I, III-IV, X, 1776-77 Penn. Stat. 75-78, 80.

by the Representatives of the Freemen of the Commonwealth of Pennsylvania in the General Assembly met, and by the authority of the same, That the president or in his absence [the] vice-president of the supreme executive council of this commonwealth shall commissionate one reputable freeholder in the city of Philadelphia and one in each county within this state to serve as lieutenant of the militia for the said city and counties respectively.

. . . .

§ IV. And be it further enacted. . . . That the said lieutenant or sub-lieutenants as aforesaid shall issue his or their warrant to the constable of each township, borough, ward, or district in the said city and counties respectively or to some other suitable person, commanding

	him in the name of this commonwealth to deliver to him or them . . . a true and exact list of the names and surnames of each and every male white person usually inhabiting or residing within his township, borough, ward, or district between the ages of eighteen and fifty-three years capable of bearing arms. . . . . § X. And be it further enacted . . . That the whole of the militia so enrolled as aforesaid shall be subject to be exercised in companies under their respective officers . . . and on each of which days every militia-man so enrolled shall duly attend with his arms and accoutrements in good order.	
Rhode Island	[A]ll effective Males between the Ages of Sixteen and Fifty . . . shall constitute and make the military Force of this State. . . . And be	An Act for the Better Forming, Regulating and Conducting the

	it further Enacted by the Authority aforesaid, That each and every effective Man as aforesaid shall provide, and at all times be furnished, at his own Expense (excepting such persons as the Town-Councils of the Towns in which they respectively dwell or reside shall adjudge unable to purchase the same) with one good Musquet, and a Bayonet fitted thereto. . . . Be it further enacted that every Person who shall at any Time be found deficient in any of the Arms, Accoutrements and Equipage, as by this act prescribed and directed, excepting those before excepted, such Delinquent shall forfeit and pay a Fine for every such delinquency. . . . All Male Persons between the Ages of Fifty and Sixty, if able in the Judgment of the respective Town-Councils, shall be at all Times	Military Force of this State, 1780 R.I. Acts 29, 31-32, 35.	

	armed, accoutered and equipped, in Manner aforesaid upon the same Penalty as though they were held to military Duty.	
South Carolina	[I]t shall be lawful for the Governor, or Commander in Chief of this State, to order the Militia of this State to assemble once in every six months in the City of Charleston, and once in every twelve months in the other districts throughout the state . . . That every person who, on being summoned, shall willfully neglect to turn out at a regimental muster, properly armed and accoutered . . . shall be fined in a sum not exceeding four dollars. . . . And be it enacted by the authority aforesaid, that the following persons shall be excused from militia duty . . . all persons under the age of eighteen years, or above the age of fifty years.	An Act for the Regulation of the Militia in this State, 1784 S.C. Acts 6869.

Vermont	And that every able-bodied male person, being a citizen of this state, or of any of the united states and resiading in this state . . . who are of the age of sixteen and under the age of fortyfive [sic] years, shall by the captain or commanding officer of the beat in which such citizen shall reside, within four months after passing of this act, be enrolled in the company of such beat. . . . And every citizen, so enrolled and notified, shall within nine months there after, provide himself, at his own expence with a good musket or firelock, with a priming wire and brush, a sufficient bayonet and belt, with a cartouch box, with three pounds of lead bullets suitable to the bore of his musket or firelock, a good horn containing one pound of powder, and four spare flints; and shall appear so	An Act Regulating the Militia of the State of Vermont. for Regulating the Militia of this State (Vt. 1787) *in* STATUTES OF THE STATE OF VERMONT REVISED AND ANNOTATED, 107 (1791).

	armed, accoutred and provided, when called out to exercise or duty, if thereto required.	
Virginia	Be it enacted, That all free male persons between the ages of eighteen and fifty years . . . shall be enrolled or formed into [militia] companies. . . . Every Officer and soldier shall appear . . . armed, equipped, and accoutered as follows: The County Lieutenants, Lieutenant Colonels Commandant and Majors with a sword: the Captains, Lieutenants, and Ensigns, with a sword and espontoon; every non-commissioned officer and private, with a good clean musket carrying an ounce ball, and three feet eight inches long in the barrel, with a good bayonet and iron ramrod well fitted thereto, a cartridge box properly made, to contain and secure twenty cartridges	An Act for Amending the Several Laws for Regulating and Disciplining the Militia, and Guarding against Invasions and Insurrections, ch. LXVII, 1784 Va. Acts 16.

	fitted to his musket, a good knapsack and canteen; and moreover, each non-commissioned officer and private shall have at every muster, one pound of good powder and four pounds of lead; including twenty blind cartridges.	

Appendix I

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS LUBBOCK DIVISION

JAMES D'CRUZ; NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., [ ]	
Plaintiffs,	
v.	**Case No. 5:10-cv-00141-C**
STEVEN MCCRAW, in his official capacity as Director of the Texas Department of Public Safety,	**Judge Sam R. Cummings**
Defendant.	

DECLARATION OF ROBERT MARCARIO

I, Robert Marcario, make the following declaration pursuant to 28 U.S.C. § 1746:

1. I am a resident of Virginia and am over eighteen years of age. My statements herein are based upon personal knowledge and experience.

2. I am the Managing Director of Membership for the National Rifle Association. I have held this position since 1991. In this capacity, I have access to, and personal knowledge of, the NRA's membership information and practices.

3. Founded in 1871, the NRA is America's foremost and oldest defender of Second Amendment rights. Among other things, the NRA promotes the safe and responsible possession and carriage of firearms by law-abiding adults for lawful purposes, such as self-defense, target practice, marksmanship competition, and hunting. The NRA is America's leading provider of firearms marksmanship and safety training for both civilians and law enforcement. The NRA also collects and publishes real-life examples of citizens of all ages and from all walks of life whose lawful possession and carriage of firearms enabled them to protect themselves and others from violent criminals.

4. The NRA has approximately four million members.

5. The NRA does not ask or know the age of all of its members, but for members who joined as Junior Life Members (15 years of age or younger at the time of application), the NRA does ask their age at the time of the membership application. Thus, the NRA can report a minimum number of members who, based on their age at the time of acquiring Junior Life Memberships, are now 18 to 20 years of age. Likewise, the NRA can also report the number of members who, based on their age at the time of acquiring Junior Life Membership, are now 15 to 17 years of age and will thus turn 18 during the likely pendency of this litigation. It is important to stress, however, that these numbers are merely a minimum. Thousands of NRA members do not acquire life membership, but instead renew at regular intervals. Based on my personal observation and

experience in the NRA, I can report that there are members between 18 and 20 years of age (and between 15 and 17 years of age) who do not report their age as part of their membership information.

6. In Texas, the NRA has at least 710 members who are currently 18, 19, or 20 years of age, and at least 671 members who are currently 15, 16, or 17 years of age.

7. Within the geographic region that is covered by the United States District Court for the Northern District of Texas, the NRA has at least 190 members who are currently 18, 19, or 20 years of age, and at least 194 members who are currently 15, 16, or 17 years of age.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

Executed on 5/3, 2011

/s/ Robert Marcario
Robert Marcario

Appendix J

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS LUBBOCK DIVISION

JAMES D'CRUZ; NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., [ ]	)	
Plaintiffs,	)	
v.	)	**Case No. 5:10-cv-00141-C**
STEVEN MCCRAW, in his official capacity as Director of the Texas Department of Public Safety,	)	**Judge Sam R. Cummings**
Defendant.	)	

DECLARATION OF BRENNAN HARMON

I, Brennan Harmon, make the following declaration pursuant to 28 U.S.C. § 1746:

1. I am a resident of the State of Texas and am over eighteen years of age. My statements herein are based upon personal knowledge and experience.

2. I am a nineteen year old female and I attend college in San Antonio, Texas. I live in an off-campus apartment in San Antonio during the school year. In the summer, I live with my parents in Dallas, Texas.

3. I am a member of the National Rifle Association.

4. My father and other members of my family have owned firearms, including long guns and handguns, for my entire life. They have owned these firearms for several purposes, including self-defense, hunting, and sport.

5. Through my father's instruction, and through personal study, I am well acquainted with the proper and safe handling, use, and storage of firearms and ammunition.

6. I am the owner of a rifle and a shotgun. I do not find either the rifle or the shotgun sufficient for armed self-defense outside the home. First, unlike a long gun, a handgun cannot be easily redirected or wrestled away by an attacker. Second, I find a handgun easier to use and load, as the long guns require significant upper body strength and are not ideal for fast loading or accurate shooting in emergency situations. Third, a long gun requires two hands for operation, whereas a handgun would leave one hand free to call the police while pointing the gun at an assailant. Fourth, neither long gun is suitable for carriage outside the home (they are cumbersome and conspicuous), whereas a handgun is suitable for this purpose because of its size.

7. Texas law generally prohibits a person from carrying a handgun outside of that person's premises or motor vehicle. *See* Tex. Penal Code § 46.02(a). While there is an exception to this prohibition for persons who have a Texas Concealed Handgun License (CHL),

see id. § 46.15(b)(6), because I am under 21 and not a member of or honorably discharged from the armed forces I am not eligible to obtain a Texas CHL, *see* Tex. Gov't Code § 411.172(a)(2), (g).

8. Because of these Texas laws, and because of my fear of being prosecuted for violating them, I currently do not carry a handgun outside of the home or motor vehicle for self-defense purposes. If Texas law did not prohibit me from doing so, I would carry a handgun outside of the home for self-defense and other lawful purposes.

9. For example, when visiting or staying with my parents, I sometimes meet friends at night in and around downtown Dallas. I would carry a handgun for self-protection on such occasions if it was lawful for me to do so, and my father has indicated that he would lend me a handgun for that purpose.

10. Aside from the age requirement, I meet all the requirements for obtaining a Texas CHL.

11. On February 24, 2011, I completed a handgun safety course taught by a CHL instructor licensed by the Texas Department of Public Safety (DPS). The course consisted of a total of approximately 8 hours of classroom instruction and approximately 2 hours of range instruction. The course culminated with administration of the written and range tests that are given to applicants for a CHL. I passed the tests on my first attempt.

12. On March 9, 2011, I visited the DPS website, which provides an electronic CHL application. *See* https://www.texasonline.state.tx.us/txapp/txdps/chl/. The website stated that to apply, I "must be at least 21 years of age or at least 18 years of age if currently serving in or honorably discharged from the military." Solely because of my failure to meet the age requirement, I was thus unable to apply for and obtain a Texas CHL. But for the age requirement, I would have obtained a Texas CHL and occasionally would carry a handgun as permitted by the license.

13. Indeed, because Texas law requires CHL applicants to submit an affidavit "stating that the applicant . . . fulfills all the eligibility requirements" for obtaining a CHL, including the age requirement, Tex. Gov't Code § 411.174(a)(8)(B), Texas law prohibits me from even applying for a CHL.

14. I have also completed a Texas CHL application form and attached it as an exhibit to this declaration.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

Executed on May 5, 2011

/s/ Brennan Harmon
Brennan Harmon

Appendix K

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS LUBBOCK DIVISION

JAMES D'CRUZ; NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., [ ] **Plaintiffs,** **v.** **STEVEN MCCRAW, in his official capacity as Director of the Texas Department of Public Safety,** **Defendant.**	**Case No. 5:10-cv-00141-C Judge Sam R. Cummings**

DECLARATION OF REBEKAH JENNINGS

I, Rebekah Jennings, make the following declaration pursuant to 28 U.S.C. § 1746:

1. I am a resident of the State of Texas and am over eighteen years of age. My statements herein are based upon personal knowledge and experience.

2. I am a twenty-year-old female and reside in Boerne, Texas. I attend college in San Antonio, Texas

3. I am a member of the National Rifle Association.

4. At the age of 13, I began competitive pistol shooting. I have been a member of the U.S. Olympic Development Team for pistol shooting and a member of the Texas State Rifle Association Junior National Team. Every year since 2005, I have attended the NRA National Shooting Championship as a member of the TSRA Junior Team. Either I, or the relay team of which I am a part, has broken seven national shooting records.

5. Because I engage in competitive shooting, I have spent thousands of hours practicing the safe and effective use of handguns. I have spent hundreds of hours discussing proper pistol technique with experts in the field. I have also taken a firearms course in home safety and defense. Given this background, I can confidently state that I am extremely well-trained and well-versed in the responsible, proper, safe, and proficient use of handguns for self-defense and other lawful purposes.

6. Although I do not own any firearms of my own, I use my father's pistols to practice my shooting.

7. I believe handguns are a useful tool for self-defense, and I desire to carry a handgun outside of the home for self-defense and other lawful purposes.

8. Texas law generally prohibits a person from carrying a handgun outside of that person's premises or motor vehicle. *See* Tex. Penal Code § 46.02(a). While there is an exception to this prohibition for persons who have a Texas Concealed Handgun License (CHL), *see id.* § 46.15(b)(6), because I am under 21 and am

neither a member of nor honorably discharged from the armed forces I am not eligible to obtain a Texas CHL, *see* Tex. Gov't Code § 411.172(a)(2), (g).

9. Because of these Texas laws, and because of my fear of being prosecuted for violating them, I currently do not carry a handgun outside of the home or motor vehicle for self-defense purposes. If Texas law did not prohibit me from doing so, I would carry a handgun outside of the home for self-defense and other lawful purposes.

10. For example, I would like to carry a handgun when attending open-air art shows held in downtown San Antonio on Friday evenings. To reach the streets where the shows are held, I must walk from where I park through downtown San Antonio, and I must do the same to return to the car after leaving the show. For safety reasons, I typically do not attend the shows alone. If it was lawful for me to do so, I would borrow one of my father's handguns and carry it for self-protection when attending the art shows. My father has agreed to lend me a handgun for such purposes.

11. Aside from the age requirement, I meet all the requirements for obtaining a Texas CHL.

12. On February 27, 2011, I completed a handgun safety course taught by a CHL instructor licensed by the Texas Department of Public Safety (DPS). The course consisted of a total of at least 10 hours of classroom instruction and range instruction. The course culminated with administration of the written and range tests that are given to applicants for a

CHL. I passed the tests on my first attempt, scoring 98% on the written examination and 100% on the range examination.

13. On March 9, 2011, I visited the DPS website, which provides an electronic CHL application. *See* https://www.texasonline.state.tx.us/txapp/txdps/chl/. The website stated that to apply, I "must be at least 21 years of age or at least 18 years of age if currently serving in or honorably discharged from the military." Solely because of my failure to meet the age requirement, I was thus unable to apply for and obtain a Texas CHL. But for the age requirement, I would have obtained a Texas CHL and occasionally would carry a handgun as permitted by the license.

14. Indeed, because Texas law requires CHL applicants to submit an affidavit "stating that the applicant . . . fulfills all the eligibility requirements" for obtaining a CHL, including the age requirement, Tex. Gov't Code § 411.174(a)(8)(B), Texas law prohibits me from even applying for a CHL.

15. I have completed a Texas CHL application form and attached it as an exhibit to this declaration.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

Executed on 5/08, 2011

/s/ Rebekah Jennings
Rebekah Jennings

Appendix L

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS LUBBOCK DIVISION

JAMES D'CRUZ; NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., [ ] **Plaintiffs,** **v.** **STEVEN MCCRAW, in his official capacity as Director of the Texas Department of Public Safety,** **Defendant.**	**Case No. 5:10-cv-00141-C Judge Sam R. Cummings**

DECLARATION OF ANDREW PAYNE

I, Andrew Payne, make the following declaration pursuant to 28 U.S.C. § 1746:

1. I am a resident of Lubbock, Texas and am eighteen years of age. My statements herein are based upon personal knowledge and experience.

2. I am a member of the National Rifle Association.

3. I regularly accompany my father on visits to a shooting range. We also hunt together. These experiences have provided me with training in the proper

and safe handling of firearms, including handguns. I take firearms safety seriously and I understand the appropriate uses of firearms. I do not, and would not, use a firearm for an inappropriate or illegal purpose.

4. I believe that I have the right to self-defense, and that use of arms is the most effective method of self-defense in some circumstances.

5. Although I own two long guns, I do not carry them outside the home for self-defense. Long guns are cumbersome and conspicuous and thus not suitable for carriage outside the home for this purpose.

6. Texas law generally prohibits a person from carrying a handgun outside of that person's premises or motor vehicle. *See* Tex. Penal Code § 46.02(a). While there is an exception to this prohibition for persons who have a Texas Concealed Handgun License (CHL), *see id.* § 46.15(b)(6), because I am under 21 and not a member of or honorably discharged from the armed forces I am not eligible to obtain a Texas CHL, *see* Tex. Gov't Code § 411.172(a)(2), (g).

7. Because of these Texas laws, and because of my fear of being prosecuted for violating them, I currently do not carry a handgun outside of the home or motor vehicle for self-defense purposes. If Texas law did not prohibit me from doing so, I would carry a handgun outside of the home for self-defense and other lawful purposes.

8. For example, I sometimes go to a Wal-Mart store located in an area of town where I would feel safer

carrying a handgun for self-protection. If legally permitted to do so, I would carry my father's handgun when patronizing this Wal-Mart.

9. Aside from the age requirement, I meet all the requirements for obtaining a Texas CHL.

10. On February 13, 2011, I completed a handgun safety course taught by a CHL instructor licensed by the Texas Department of Public Safety (DPS). The course consisted of a total of approximately 8.5 hours of classroom instruction and 1.5 hours of range instruction. The course culminated with administration of the written and range tests that are given to applicants for a CHL. I passed the tests on my first attempt, scoring 100% on the written examination and 96.8% on the range examination.

11. On February 17, 2011, I visited the DPS website, which provides an electronic CHL application. *See* https://www.texasonline.state.tx.us/txapp/txdps/chl/. The website stated that to apply, I "must be at least 21 years of age or at least 18 years of age if currently serving in or honorably discharged from the military." Solely because of my failure to meet the age requirement, I was thus unable to apply for and obtain a Texas CHL. But for the age requirement, I would have obtained a Texas CHL and occasionally would carry a handgun as permitted by the license.

12. Indeed, because Texas law requires CHL applicants to submit an affidavit "stating that the applicant . . . fulfills all the eligibility requirements" for obtaining a CHL, including the age requirement, Tex.

Gov't Code § 411.174(a)(8)(B), Texas law prohibits me from even applying for a CHL.

13. I have also completed a Texas CHL application form and attached it as an exhibit to this declaration.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

Executed on May 10, 2011

/s/ Andrew Payne
Andrew Payne

Appendix M

No. 12-10091

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NATIONAL RIFLE ASSOCIATION OF AMERICA, INCORPORATED; REBEKAH JENNINGS; BRENNAN HARMON; ANDREW PAYNE,

Plaintiffs-Appellants,

v.

STEVEN C. MCCRAW, in his official capacity as Director of the Texas Department of Public Safety,

Defendant-Appellee.

DECLARATION OF KATHERINE TAGGART

I, Katherine Taggart, make the following declaration pursuant to 28 U.S.C. § 1746.

1. I am a resident of College Station, Texas; am nineteen years of age; and am a college student. My statements herein are based upon personal knowledge and experience.

2. I was born on December 29, 1993.

3. I am a member of the National Rifle Association, and I work as a martial arts instructor.

4. I have grown up going to the shooting range and know of several people who have defended their families and themselves by the use of a firearm,

particularly a handgun. I believe that I have the right to self-defense and that the use of a handgun is the most effective method of self-defense in some circumstances.

5. I desire to carry a handgun outside of the home for self-defense. Although I do not own a handgun of my own, my parents have lent me two handguns that I could carry if it were lawful for me to do so.

6. Texas law generally prohibits a person from carrying a handgun outside of that person's premises, motor vehicle, or watercraft (*i.e.*, in public). *See* TEX. PENAL CODE § 46.02(a). While there is an exception to this prohibition for persons who have a Texas Concealed Handgun License (hereinafter "CHL"), *see id.* § 46.15(b)(6), because I am under 21 and am neither a member of nor honorably discharged from the armed forces, I am not eligible to obtain a Texas CHL, *see* TEX. GOV'T CODE § 411.172(a)(2), (g).

7. Because of these Texas laws, and because of my fear of being prosecuted for violating them, I currently do not carry a handgun in public for self-defense purposes. If Texas law did not prohibit me from doing so, I would carry a handgun in public for self-defense purposes.

8. As a woman who is often alone in public, there are many situations in which I would carry a handgun to protect myself if it were lawful for me to do so. For example, I sometimes take the two dogs I own for walks or runs in the evening. I would like to carry a handgun to protect myself and my dogs on these outings. I also frequently

walk or bicycle home late at night after studying at a coffee shop or similar place of business. These trips can be as long as five miles, and I would like to carry a handgun for my protection when making them.

9. In my view, carrying a long gun is not an acceptable substitute for carrying a handgun for self-defense in public. Because of its smaller size, a handgun is a more practical and effective self-defense weapon than a long gun. A handgun, for example, is more conducive to quick and accurate use in an emergency situation, and, unlike a long gun, it can readily be pointed at an assailant with one hand, leaving the other hand free to dial the police. And because a handgun is less cumbersome and conspicuous than a long gun, it is better suited for carrying in public.

10. Aside from the age requirement, I meet all the requirements for obtaining a Texas CHL.

11. On December 14 and 15, 2012, I successfully completed a handgun safety course taught by a CHL instructor licensed by the Texas Department of Public Safety (DPS). The course consisted of a total of 10 hours of classroom time and 2 hours of range time, and I passed both the classroom and proficiency tests that are given to applicants for a CHL. Attached as Exhibit A to this Declaration is a true and correct copy of the Certificate of Training Form that demonstrates my successful completion of the course.

12. I have also completed a Texas CHL application form; that form is attached as Exhibit B to this Declaration.

13. On June 10, 2013, I visited the DPS website, which provides an electronic CHL application. *See* https://txapps.texas.gov/txapp/txdps/chl/. The website stated that to apply, I "must be at least 21 years of age or at least 18 years of age if currently serving in or honorably discharged from the military." Furthermore, after starting the application process by, among other things, submitting my date of birth, the website gave me a further "[w]arning" that "[p]ersons between the ages of 18 and 21 are only eligible to apply for license under the Active Military or Veteran conditions." Because of my failure to meet the age requirement, I was unable to apply for and obtain a Texas CHL.

14. Indeed, because Texas law requires CHL applicants to submit an affidavit "stating that the applicant . . . fulfills all the eligibility requirements" for obtaining a CHL, TEX. GOV'T CODE § 411.174(a)(8), (8)(B), including the age requirement, Texas law prohibits me from even applying for a CHL. But for the age requirement, I would apply for a Texas CHL.

15. I desire to join this lawsuit as a plaintiff in order to vindicate my Second Amendment right to carry a handgun in public, to ensure that this case remains live until a final decision can be reached, and to avoid the burden to me, the defendants, and the court system that would result from the filing of a new suit in district court.

16. I desire to assert the same claims and seek the same relief as the current plaintiffs. *See* Second

Amended Complaint, Count I, Count II, and Prayer for Relief, USCA5 274-76.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

Executed on 10 June, 2013 in College Station, Texas

/s/ Katherine Taggart
Katherine Taggart