No. 13-390

# In the Supreme Court of the United States

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC.,
*Petitioner*,

*v.*

STEVEN C. MCGRAW, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE TEXAS DEPARTMENT OF PUBLIC SAFETY,
*Respondent*.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION


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## QUESTIONS PRESENTED

To lawfully carry a handgun in public, a Texas resident must obtain a concealed-handgun license. *See* TEX. GOV'T CODE §§ 411.171–.208; TEX. PENAL CODE §§ 46.02(a), .035. And consistent with the concealed-carry laws of three-quarters of the States, Texas law generally restricts eligibility for concealed-handgun licenses to people 21 years of age or older. TEX. GOV'T CODE § 411.172(a)(2). Texas law lowers that minimum-age requirement to 18, however, for people who serve in or were honorably discharged from the United States armed forces. *Id.* § 411.172(g).

The questions presented are:

1. Whether the National Rifle Association ("NRA"), the sole petitioner in this case, has associational standing to challenge the Texas laws at issue.

2. Whether either the Second Amendment or the Equal Protection Clause of the Fourteenth Amendment prevents Texas from maintaining reasonable minimum-age requirements for carrying concealed handguns in public.

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## STATEMENT

1. Under Texas law, any person may carry a handgun "on the person's own premises or premises under the person's control . . . or . . . 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)(1)–(2). But to lawfully carry a handgun elsewhere, a Texas resident must obtain a concealed-handgun license, which generally may not be issued to a person under the age of 21. *Id.* §§ 46.02(a), .035; TEX. GOV'T CODE § 411.172(a)(2); *see* Pet. App. 2a. The minimum-age requirement is lowered to 18, however, for people who serve in or were honorably discharged from the United States armed forces. TEX. GOV'T CODE § 411.172(g); *see* Pet. App. 3a–4a.

An applicant for a Texas concealed-handgun license must also be "fully qualified under applicable federal and state law to purchase a handgun." TEX. GOV'T CODE § 411.172(a)(9). Texas law permits 18-year-olds to purchase handguns. *See* TEX. PENAL CODE § 46.06(a)(2). Federal law, however, prohibits federally licensed firearms dealers from selling handguns to anyone under 21. 18 U.S.C. § 922(b)(1). That federal law, which prevents satisfaction of Texas Government Code section 411.172(a)(9) by 18-to-20-year-olds without military service, *see* TEX. GOV'T CODE § 411.172(g)(3), is the target of the petitioners' challenge in *NRA v. Bureau of Alcohol, Tobacco, Firearms, & Explosives* (No. 13-137 in this Court) ("*ATF*"). *See* Pet. 3 n.1.

Although the Texas Legislature considered setting the generally applicable minimum-age

requirement for a concealed-handgun license at 18, H.J. of Tex., 74th Leg., R.S. 1588 (1995), a group of lawmakers rejected that proposal based on a conclusion that "18 year olds [a]ren't mature enough to handle a firearm." Debate on Tex. S.B. 60 on the Floor of the House, 74th Leg., R.S. (May 1, 1995) (on file at Texas State Legislature House Media Office) (Tape 2 Side B) (statement of Rep. Seidlits); *see id.* (Tape 2 Side A) (Rep. Wilson: "We certainly feel that at least early out that we should keep the age of 21 so that there is some level of maturity attained hopefully by then."); *id.* (Rep. Wilson: "We found that looking at the 38 some odd other States that those that are best served are those that have the age at 21.").

The Texas law that set the lower age limit for people with military service was based on the "extensive training in handling weapons" that military personnel receive. Senate Comm. on Veterans Affairs and Military Installations, Bill Analysis, Tex. H.B. 322, 79th Leg., R.S. 1 (May 9, 2005). Although opponents of this law noted "the lack of maturity that young adults under the age of 21 invariably possess," its supporters countered that "[m]embers of the armed forces—even young members—are highly trained in the use of weapons." CA5 Record on Appeal ("R") 549 (bill analysis). The NRA was among the military-service exception's supporters. R.548.

2. This lawsuit was initially brought by James D'Cruz, an 18-year-old Texas resident who alleged a

desire to carry a concealed handgun in public. R.16, 19. D'Cruz further alleged that his youth and lack of military service were the only impediments to his obtaining a Texas concealed-handgun license. R.20. In an amended complaint, the NRA joined the suit as an additional plaintiff seeking to enjoin the relevant state official from enforcing Texas Penal Code section 46.02 and Texas Government Code subsections 411.172(a)(2), (a)(9), and (g) on the grounds that they violate the Second Amendment and the Equal Protection Clause of the Fourteenth Amendment. R.84–93.

After D'Cruz moved to Florida, *see* Pet. 6 n.2, the NRA sought permission to file a second amended complaint that would replace D'Cruz with three new individual plaintiffs—Rebekah Jennings, Brennan Harmon, and Andrew Payne. R.257–58. At the time, each of these replacement plaintiffs lived in Texas, was between the ages of 18 and 20, and had never served in the military. *See id.*

The district court permitted Jennings, Harmon, and Payne to replace D'Cruz as the NRA's individual co-plaintiffs. R.883. But after the court rejected the plaintiffs' constitutional challenges on the merits, R.970–84 (order granting the State's motion for summary judgment), and the plaintiffs appealed to the Fifth Circuit, Jennings and Harmon turned 21. *See* NRA CA5 Reply Br. 1 n.1. For that reason, the court of appeals ordered dismissal of their moot claims. Pet. App. 8a, 22a. Because Payne had not yet turned 21 and therefore still had a live claim of

his own, the court of appeals did not consider the unbriefed question of whether the NRA had associational standing. *See id.* at 7a n.3.

The court of appeals upheld the challenged laws before Payne turned 21, and Payne and the NRA petitioned for rehearing en banc. *Id.* at 22a; *see id.* at 43a–44a. While that petition was pending, and as Payne's birthday approached, the NRA asked the court of appeals to add Katherine Taggart, a younger individual plaintiff, to the suit and to supplement the record with her declaration. *See* Plaintiffs-Appellants' and Proposed Plaintiff-Appellant's Motion to Add a Party and to Supplement the Record on Appeal (5th Cir. June 11, 2013) ("NRA CA5 Motion"). The court of appeals denied both requests, leaving the NRA as the only plaintiff in the case whose claim is not moot. *See* Pet. 7 n.3.[1]

3. a. On the merits, the court of appeals began its analysis with the text of the Second Amendment and this Court's decision in *District of Columbia v. Heller*, which explained that "the right secured by the Second Amendment is not unlimited" and recognized the constitutionality of several "longstanding prohibitions on the possession of firearms." 554 U.S. 570, 626 (2008); Pet. App. 11a–13a. The court of appeals then explained that, based on *Heller* and *McDonald v. City of Chicago*, 130

[1] Unlike in *ATF*, the NRA did not ask the district court to add Taggart and supplement the record with her declaration before filing a petition for writ of certiorari. *Cf. ATF* Cert. Pet. 8.

S. Ct. 3020 (2010), it had developed the two-part test used to assess the NRA's challenge to the federal law at issue in *ATF*:

> [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.

Pet. App. 13a (quoting *id.* at 81a–82a).

In conducting the first inquiry, the court of appeals relied on *ATF* to conclude that the challenged Texas laws, like 18 U.S.C. § 922(b)(1), were consistent with the longstanding traditions recognized in *Heller*. *Id.* at 14a–15a. As in *ATF*, the court nevertheless proceeded to the second step of the analysis, subjecting the statutes to intermediate scrutiny. *Id.* at 15a–17a. Noting that the Texas laws have "only a temporary effect" and do "not prevent those under 21 from using guns in defense of hearth and home," *id.* at 17a, the court of appeals explained that "[t]he []*ATF* 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." *Id.* at 16a.

The court of appeals found that the challenged provisions of Texas law further "the same important government objective [of advancing public safety by curbing violent crime] as the [federal law] upheld in []*ATF*." *Id.* at 17a. And based on "[e]vidence in the record show[ing] that curbing gun violence by keeping handguns out of the hands of immature individuals was in fact the goal of the state legislature . . . [a]nd historical analysis in the record indicat[ing] that Texas implemented [Texas Penal Code section 46.02(a)] to keep its public spaces safe," the court concluded that "Texas's handgun carriage scheme is substantially related to this important government interest in public safety through crime prevention." *Id.* at 17a–18a; *see also id.* at 18a–20a (rejecting the NRA's arguments and observing that "the state scheme is in some ways more related to Texas's public safety objective tha[n] the law in []*ATF*, because the state laws only regulate those persons who carry guns in public").

b. Turning to the equal-protection claim, the court of appeals first rejected the NRA's contention that strict scrutiny, rather than rational-basis review, applied. *Id.* at 20a–21a; *see id.* at 21a n.7 (observing that "neither age nor military status is a suspect classification"). Noting that the NRA "did not attempt to carry [its] burden by showing that the

state scheme is irrational" and referencing the statute's constitutionality under the more stringent intermediate-scrutiny standard that it had applied in the Second Amendment context, the court of appeals rejected the NRA's equal-protection challenge. *Id.* at 21a.

c. Without dissent, the court of appeals denied the NRA's petition for rehearing en banc. *Id.* at 43a–44a. No circuit judge eligible to do so requested that the court be polled on the request for rehearing en banc. *Id.* at 44a. The NRA timely filed its petition for a writ of certiorari. *See id.* at 43a; Pet. 37. No amicus briefs were filed in support of the petition.

## REASONS TO DENY THE PETITION

### A. THERE IS NO CONFLICT WARRANTING FURTHER REVIEW, AND THE COURT OF APPEALS' JUDGMENT IS CORRECT.

1. Laws requiring concealed-handgun licensees to be at least 21 years old have existed for years, and continue to exist today, in three-quarters of the States.[2] Yet the NRA identifies no split of authority

[2] *See* ALASKA STAT. § 18.65.705; ARIZ. REV. STAT. § 13-3112; ARK. CODE § 5-73-309(3); COLO. REV. STAT. § 18-12-203(1); CONN. GEN. STAT. § 29-28; FLA. STAT. § 790.06(2); GA. CODE § 16-11-129(b); HAW. REV. STAT. § 134-2(d); IDAHO CODE § 18-3302(1); 430 ILL. COMP. STAT. § 66/25(1); IOWA CODE § 724.8; KAN. STAT. § 75-7c04; KY. REV. STAT. § 237.110(4); LA. REV. STAT. § 40:1379.3; MASS. GEN. LAWS ch. 140, § 131; MICH. COMP. LAWS § 28.425b(7); MINN. STAT. § 624.714; MISS. CODE § 45-9-101(2); MO. REV. STAT. § 571.101; NEB. REV. STAT. § 69-2433(1); NEV. REV. STAT. § 202.3657; N.J. STAT. § 2C:58-4; N.M. STAT.

on whether any of those laws violates the Second or Fourteenth Amendments. The court of appeals in this case upheld Texas's law, and the State is aware of no decision striking down a similar law.

The NRA does attempt to show lower-court disagreement about whether the Second Amendment applies outside of the home. Pet. i, 12–17. But that question is not implicated here; the court of appeals took no position on it.

In a final attempt to show a conflict warranting certiorari, the NRA argues that both the court of appeals in this case and several other courts have deviated from the analytical approach to Second Amendment questions that *Heller* dictates. *Id.* at 18–23. That argument fails as well. The use of different words to describe the Second Amendment analysis that this Court's precedent requires does not amount to conflict. In any event, use of the two-step approach that the court of appeals employed in this case is common, *see, e.g.*, *Woollard v. Gallagher*, 712 F.3d 865, 874–75 (4th Cir.), *cert. denied*, 134 S. Ct. 422 (2013); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir.), *cert. denied*, 133 S. Ct. 375

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§ 29-19-4; N.Y. PENAL LAW § 400.00; N.C. GEN. STAT. § 14-415.12(a); OHIO REV. CODE § 2923.125(D); OKLA. STAT. tit. 21, § 1290.9; OR. REV. STAT. § 166.291; 18 PA. CONS. STAT. § 6109; R.I. GEN. LAWS § 11-47-11; S.C. CODE § 23-31-215; TENN. CODE § 39-17-1351; TEX. GOV'T CODE § 411.172(a)(2); UTAH CODE § 53-5-704; VA. CODE § 18.2-308.02; WASH. REV. CODE § 9.41.070; WIS. STAT. § 175.60(3)(a); W. VA. CODE § 61-7-4; WYO. STAT. § 6-8-104.

(2012); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 958 (2011), and the Court has recently denied certiorari in other petitions raising similar arguments. *See, e.g.*, *Schrader v. Holder*, 134 S. Ct. 512 (2013) (No. 12-1443); *Kachalsky v. Cacace*, 133 S. Ct. 1806 (2013) (No. 12-845); *Skoien v. United States*, 131 S. Ct. 1674 (2011) (No. 10-7005).

2. a. The court of appeals correctly concluded not only that the challenged Texas laws were "part of a succession of 'longstanding prohibitions,' *Heller*, 554 U.S. at 626, that are permissible under the Second Amendment, but also that the laws survive intermediate scrutiny. Pet. App. 14a–20a. As the Seventh Circuit has noted, *Heller* reflects that "statutory prohibitions on the possession of weapons by some persons are proper—and . . . that the legislative role did not end in 1791. That *some* categorical limits are proper is part of the original meaning, leaving to the people's elected representatives the filling in of details." *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 1674 (2011). Here, the Texas Legislature, like a large majority of other state legislatures, engaged in the type of "'experimentation with reasonable firearms regulation'" that the Court approved of in *McDonald*. 130 S. Ct. at 3046 (quoting Texas's *McDonald* amicus brief)).

The NRA faults the court of appeals for paying insufficient attention to its view of the Framers'

understanding of the Second Amendment (and, in particular, to the Militia Act of 1792, which applied only to "able-bodied white male citizen[s]" who were between the ages of 18 and 45, unless state law set a different age range, 1 Stat. 271, 271, 272). Pet. 24–29. In *Heller*, of course, the Court not only considered a wide span of historical texts penned between the early 18th and the late 19th centuries, 554 U.S. at 581–619, but it also recognized the presumptive validity of "longstanding" restrictions first codified much later. *Id.* at 626–27 & n.26; *see Skoien*, 614 F.3d at 640–41.

The NRA also attacks the court of appeals' rationale for finding the challenged law consistent with the Second Amendment. Pet. 29–31. Targeting, for instance, the court of appeals' observation that the law has only the temporary effect of preventing people from obtaining concealed-handgun licenses until they turn 21, the NRA points out that restriction of 18-to-20-year-olds' First Amendment rights would not be permissible. *Id.* at 30–31. But neither would blanket restrictions on the First Amendment rights of felons or the mentally ill, yet the unique history of the Second Amendment has led the Court to countenance substantial restrictions on the rights of felons and the mentally ill to keep and bear arms. *See Heller*, 554 U.S. at 582–92, 603, 626.

More broadly, the NRA's criticisms merely reflect the range of factors that led the court of appeals to conclude that intermediate scrutiny applies to

restrictions, such as those at issue here, that do not infringe on what *Heller* described as the core of the Second Amendment right. *Id.* at 628–29. And once again, the Court has declined invitations to disturb numerous lower-court decisions employing a similar mode of analysis to conclude that other firearms restrictions are constitutional. *See supra* p. 8-9.

b. The court of appeals' equal-protection analysis was likewise correct. Because the challenged law is consistent with the Second Amendment and neither age nor military service is a suspect classification, the court of appeals correctly applied rational-basis review. Pet. App. 20a–21a; *see, e.g.*, *Vacco v. Quill*, 521 U.S. 793, 799 (1997). And because the Texas Legislature drew rational distinctions between people above and below the age of 21 and those with and without military service, the court of appeals rightly rejected the NRA's equal-protection claim. Pet. App. 21a; *see Plyler v. Doe*, 457 U.S. 202, 216 (1982) (explaining that the Equal Protection Clause does not require "'things which are different in fact or opinion to be treated in law as though they were the same'" (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940)).

With respect to the challenged law's age-based distinction, the NRA's equal-protection argument is based on the false premises that the court of appeals' Second Amendment analysis is erroneous and that strict scrutiny applies. Pet. 32–33; *see also id.* at 33–34 (making an *a fortiori* argument based on the intermediate-scrutiny analysis of *Craig v. Boren*, 429

U.S. 190 (1976)). The NRA's challenge to the military-service distinction likewise proceeds as though strict scrutiny applies. Pet. 34–36. And although the NRA claims that the military distinction eschews "the Founders' institutional distrust of government military forces," *id.* at 34, that distinction is consistent with the Militia Act of 1792, which the NRA trumpets in support of its primary Second Amendment claim. *See id.* at 25–26.

The NRA cannot show that either of the challenged distinctions is "wholly irrelevant to the achievement of the State's objective," *McGowan v. Maryland*, 366 U.S. 420, 425–26 (1961), of maintaining reasonable minimum-age requirements for carrying concealed handguns in public. For that reason, and because the NRA does not even claim that the court of appeals' equal-protection analysis gives rise to a conflict, this portion of the opinion likewise provides no basis for further review.

### B. A Question Of Associational Standing Unique To This Case Presents An Obstacle To Review Of The Merits.

As already noted, the claims of the three individual plaintiffs who replaced D'Cruz became moot before the petition for a writ of certiorari was filed, leaving the NRA as the only remaining plaintiff that could arguably present a live case or controversy. *See supra* pp. 3-4. The NRA avoided this problem in *ATF* by successfully asking the district court, between the time the court of appeals issued its mandate and the time the NRA filed its

certiorari petition, to add Taggart to the suit and to supplement the record with her declaration. *See ATF* Cert. Pet. 8. The NRA's failure to seek and obtain similar relief in this case means that, if the Court conducts further review, it will need to determine in the first instance whether the NRA has associational standing. *See* Pet. App. 7a n.3, 11a, 30a.

Although the court of appeals in *ATF* addressed the NRA's associational standing to challenge 18 U.S.C. § 922(b)(1), the NRA has always been careful to maintain, in that case, one or more individual co-plaintiff members with "standing to sue in their own right." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977); *see* Pet. App. 73a–75a. The question of whether the NRA can satisfy the first prong of the three-part *Hunt* test for associational standing after all of its individual co-plaintiffs' claims have become moot has not been addressed by the lower courts in either this case or *ATF*. *See* Pet. App. 9a–11a, 30a.

That question, however, is not one on which the NRA remained silent in the court of appeals. In its unsuccessful motion to add Taggart as a plaintiff and to supplement the record with her declaration, the NRA explained that

> while about a year ago the NRA had over 1,300 members in Texas aged fifteen to twenty, Ms. Jennings, Ms. Harmon, and Mr. Payne are the only specific NRA members that have been identified in this

> litigation. Thus, in the absence of Ms. Taggart's declaration attached to this motion, it is not clear whether the NRA's presence as a plaintiff will secure this Court's jurisdiction after Mr. Payne turns twenty-one. *See Munsell v. Dep't of Agric.*, 509 F.3d 572, 584 (D.C. Cir. 2007) (holding that when an association sues on behalf of its members, its claims become moot if its members' claims become moot); *NAACP v.* [*City of*] *Kyle*, 626 F.3d 233, 237 (5th Cir. 2010) (rejecting associational standing when there was "no evidence in the record showing that a specific member of the NAACP has been unable to purchase a residence in Kyle as a result of the revised ordinances that went into effect in 2003").

NRA CA5 Motion 12–13 (citation omitted).

Although the NRA now asserts that the Taggart declaration is part of the record, Pet. 7–8 n.3, the NRA's motion to include that declaration in the record on appeal was denied, and the rules the NRA cites do not allow the Court to overlook that denial or expand the record on its own. *See id.* (citing SUP. CT. R. 12.7, 26.1). Accordingly, whether the Taggart declaration can be given any force in this case is yet another question that may need to be resolved before the Court could reach the substantive questions the NRA presents, and it is a question the NRA could have avoided by asking the district court, as it successfully did in *ATF*, for the relief it

unsuccessfully sought in this case from the court of appeals alone.

Moreover, even if the NRA could satisfy the first prong of the *Hunt* test, it would still have to show that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt*, 432 U.S. at 343. The State argued below that the NRA could not satisfy that prong in light of the individualized proof needed to show NRA members' satisfaction of the other statutory requirements for obtaining concealed-handgun licenses. R.502–03 (noting that such proof would be needed to establish a causal link between the minimum-age requirement and NRA members' inability to obtain concealed-handgun licenses); *see* TEX. GOV'T CODE §§ 411.172(a), .177, .188. Consideration of that argument would likewise be left to this Court. *See* State CA5 Br. 22 (noting, at a time when at least one individual plaintiff still had a live claim, that the question of whether the NRA had associational standing was "sufficiently complex to warrant avoidance under *Massachusetts* [*v. EPA*, 549 U.S. 497, 518 (2007),] and similar precedents").

In short, although there are multiple reasons that this case does not warrant a grant of certiorari, the question of associational standing further undermines the NRA's petition. *See ATF* Cert. Pet. 34 (acknowledging that "[s]ignificant procedural hurdles" arise when individual plaintiffs "age out of the restrictions before litigation can conclude").

Accordingly, even if the Court were inclined to grant certiorari in *ATF*, it should deny certiorari here.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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