No. 13-390

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

REPLY BRIEF FOR PETITIONER

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ARGUMENT

The State of Texas categorically prohibits responsible, law-abiding 18-to-20-year-old adults from carrying a handgun for self-defense outside the home ("Texas Carry Ban"). One would think that this outright ban can be sustained against a Second Amendment challenge only if (1) the Second Amendment's protection does not extend outside the home or (2) the Second Amendment's protection does not extend to responsible, law-abiding adults under the age of 21.

Both of these propositions are demonstrably wrong, at least if it is still true that "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them …." *District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008). The plain language of the Second Amendment guarantees a right to keep and *bear* arms, and "one doesn't have to be a historian to realize that a right to keep and bear arms for personal self-defense in the Eighteenth Century *could not rationally have been limited to the home*." *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012) (emphasis added). And the notion that the people who framed and ratified the Second Amendment understood that 18-to-20-year-olds were excluded from its protection is wholly foreclosed by the inconvenient historical truth that in 1792, a scant five months after the Second Amendment's ratification, Congress *required* virtually all able-bodied 18-to-20-year-old males to keep and bear arms. Thus, measuring the Texas Carry Ban against the text and history of the Second Amendment, as

Heller prescribed, resolves this case in the space of this paragraph.

The court of appeals, however, upheld the Texas Carry Ban. Although the panel determined that "the conduct burdened by the Texas scheme *likely* 'falls outside the Second Amendment's protection,'" App.14a-15a (emphasis added), it could not actually bring itself to say that the Second Amendment does not extend beyond the home (the holding of the district court below, App.5a) or that the constitutional right to armed self-defense does not apply to law-abiding 18-to-20-year-old adults. Instead, the panel took the long road to reach its result, selecting and then applying a serviceable balancing test. App.15a. Concluding that intermediate scrutiny applies because the Texas law "does not burden the core of the Second Amendment right," App.16a, the panel emphasized both that Texas's age "restriction … has only a temporary effect" (a tautology) and that the ban applies "only outside a home or vehicle." App.17a. The panel thus turned the law's vices into its virtues. From here, upholding the ban was an easy lift, given the State's important interest in "keep[ing] its public spaces safe" and federal statistics showing that "those under 21 years of age are more likely to commit violent crimes with handguns than other groups." App.18a. The panel did not address the glaring reality that this rationale would justify similar restrictions along gender and many other lines.

Texas assures this Court that the "approach that the court of appeals employed in this case is common." Opp.8. That is true, and that is the problem. It is through widespread application of such

contrived and toothless judicial balancing tests—expressly rejected in *Heller* and again in *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010)—that many lower courts have sought, with scarcely disguised hostility, to strangle *Heller* in its crib. We urge this Court to grant review in this case both to reaffirm that the Second Amendment's guaranty is not a "second-class" fundamental right and to establish that responsible, law-abiding 18-to-20-year-old adults are not second-class citizens.

1. Texas insists that the circuit split over the question "whether the Second Amendment applies outside of the home … is not implicated here" because "the court of appeals took no position on it." Opp.8. But the public-carry issue was pivotal to the court of appeals' holding that intermediate scrutiny is the appropriate standard of review "even if 18-20-year-olds' gun rights are at the core of the Second Amendment." App.17a. As noted above, because the Texas Carry Ban is "temporary" and "does not prevent those under 21 from using guns in defense of hearth and home," App.17a, the panel held that it is not within the "core" of the Second Amendment and thus does not warrant the strict scrutiny given to other fundamental enumerated constitutional rights.

The panel's decision joins a growing line of court of appeals decisions that, while stopping short of holding that there is no Second Amendment right outside the home, consistently reach the same result by deeming any right to bear arms in public to be, at best, outside the Second Amendment's "core" and then balancing it away under an anemic form of intermediate scrutiny. *See* Pet.18-19. While the premise of these decisions is wrong on its own

terms—*Heller* "held that … 'the central component' of the Second Amendment right" is simply "individual self-defense," *McDonald*, 130 S.Ct. at 3036 (emphasis omitted), not individual self-defense only in one's parlor—their true significance lies in their adoption of a balancing test that (1) was specifically rejected by this Court in *Heller* and *McDonald*[1] and (2) places the Second Amendment under house arrest no less surely than if the courts had just said so.

In contrast, both the Seventh Circuit and the Illinois Supreme Court have correctly decided that Illinois's flat ban on carrying firearms for self-defense outside the home violated the text and history of the Second Amendment. *Moore v. Madigan*, *supra*; *People v. Aguilar*, 2013 IL 112116 (Ill. Sept. 12, 2013). Indeed, the Seventh Circuit emphasized that "a distinction between keeping arms for self-defense in the home and carrying them outside the home would … have been irrational" to the founding generation. *Moore*, 702 F.3d at 937. The Court should grant certiorari to resolve this circuit split and to make clear that Second Amendment rights are not confined to the home.

2. When Texas appeared as amicus curiae in *Heller*, it advised the Court that

> [u]nder statute and contemporary understanding, the militia was all able-bodied male citizens from eighteen to

[1] Texas emphasized below that *Heller* "measure[d] the constitutionality of gun regulations by the criterion of history, rather than by tiers of scrutiny" and agreed that the court "should not apply 'a tiers of scrutiny analysis.'" Appellee's Brief 13, 27 (May 23, 2012).

> forty-five, *whether they were organized into a state-sponsored fighting force or not*. … Therefore, the individual right to bear arms ensures a ready "Militia" consisting of *each and every able-bodied male between the ages of eighteen to forty-five*.

Brief of State of Texas, *et al.* 14, *Heller*, No. 07-290 (U.S. Feb. 11, 2008) (emphasis added).

Texas has changed its mind and now argues that it is free to strip its 18-to-20-year-old citizens of their Second Amendment rights. (The State appears to have backed away from its remarkable assertion below that 18-to-20-year-olds can be stripped of *all* constitutional rights incorporated against the States. *See* Appellee's Brief 29 (May 23, 2012).) Texas was right the first time.

The Second Amendment is "enshrined with the scope [it was] understood to have when the people adopted [it]." *Heller*, 554 U.S at 634-35. "Historical analysis," to be sure, "can be difficult." *McDonald*, 130 S.Ct. at 3057 (Scalia, J., concurring). But as six Judges of the Fifth Circuit concluded, here "the answer to the historical question is easy" because "[i]t 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." *National Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 714 F.3d 334, 342, 344 (5th Cir. 2013) (Jones, J., dissenting) ("*BATF*").

Texas does not offer any founding-era evidence supporting its contrary conclusion. Rather, the State argues that "*Heller* … not only considered a wide

span of historical texts penned between the early 18th and the late 19th centuries, but it also recognized the presumptive validity of 'longstanding' restrictions first codified much later." Opp.10 (citation omitted). But a constitutional right "must provide at a minimum the degree of protection it afforded when it was adopted." *United States v. Jones*, 132 S.Ct. 945, 953 (2012). Thus, *Heller* emphasized that courts must examine "legal and other sources to determine *the public understanding* of a legal text *in the period after its enactment or ratification*." 554 U.S. at 605 (second emphasis added). The Court, accordingly, looked primarily to founding-era historical sources to illuminate the Second Amendment's original meaning. *See, e.g.*, *id.* at 614 (acknowledging that post-Civil War sources "do not provide as much insight into … original meaning as earlier sources"). Here, those sources leave no doubt at all that Second Amendment rights extend in full to 18-to-20-year-old citizens.

3. Nor do the contemporary laws of other States support the constitutionality of the Texas Carry Ban. Texas asserts, misleadingly, that "[l]aws 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." Opp.7 & n.2 (emphasis added); *see also* Appellee's Brief 39-40 (5th Cir. May 23, 2012) ("many of [these provisions] were enacted in the 1980s and 90s"). But this case is about the right to carry a handgun in public *at all*, not mere eligibility for a *concealed* handgun license. And 20 of the 38 States cited by Texas do *not* generally prohibit law-abiding citizens—including 18-to-20-year-olds—from carrying handguns in public in some manner (openly, concealed, or both)

without a license.[2] Texas is thus among a distinct minority of States that flatly bar law-abiding 18-to-20-year-old adults from carrying handguns in public.

4. Texas's principal response to Petitioner's equal-protection claim is that its carry ban passes rational basis review. Opp.11-12. But the classification at issue does not concern a mere state-created privilege like driving a car or consuming alcohol. Rather, the Texas Carry Ban "jeopardizes exercise of a fundamental right" and therefore must be subject to "heightened review." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). And Texas offers no substantive answer at all to the charge that the decision below cannot be squared with even the intermediate scrutiny analysis applied in *Craig v. Boren*, 429 U.S. 190 (1976), which struck down a gender-based restriction on the sale of 3.2 percent beer. *See* Opp.11-12.

At any rate, the rationality of the distinctions drawn by the Texas Carry Ban is undermined by the broader sweep of the State's laws. Texas's ban is based solely on an alleged concern that "18 year olds [a]ren't mature enough to handle a firearm." Opp.2. Yet at the age of 18, law-abiding adults in Texas may (a) possess long guns and handguns in the home; (b) carry long guns and concealed handguns in their vehicles; (c) carry long guns in public; (d) carry long guns and handguns while hunting, fishing, or engaged in another sporting activity; and (e) carry

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[2] Those States are: Alaska, Arizona, Arkansas, Colorado, Idaho, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Nebraska, Nevada, North Carolina, Oregon, Pennsylvania, Virginia, West Virginia, Wisconsin, and Wyoming.

long guns and handguns while traveling. TEX. PENAL CODE §§ 46.02(a)-(a-1); 46.06(a)(2), 46.15(b)(2)-(3).

The credibility of Texas's "maturity" rationale is further strained by the Texas Carry Ban's military exception, which is based not on any notion that 18-to-20-year-old members and former members of the military are generally more mature than are civilian Texans of the same age, but on the "training in handling weapons" they received in the military. Opp.2. Joining the military is not the only way in which 18-to-20-year-olds can obtain training in handling firearms. Nor is joining the military the only way to secure the Second Amendment right to carry a handgun: "the phrase [bear arms] … in no way connotes participation in a structured military organization." *Heller*, 554 U.S. at 584.

5. In its effort to shield the decision below from this Court's review, Texas argues that concern about the NRA's associational standing to represent its 18-to-20-year-old members "presents an obstacle to review on the merits." Opp.12 (capitalization omitted). Texas's concern is based on the fact that the claims of the individual NRA members who were, along with the NRA, plaintiffs in this action were mooted when they reached the age of 21 while the case was on appeal. The mooting of their claims, however, had no effect on the associational standing of the NRA.

In the seminal decision on associational standing, *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), this Court held that the Commission had associational standing to represent its constituent apple growers in a Commerce Clause action seeking to enjoin a

North Carolina statute prohibiting the display of apple grades on closed containers shipped into the State. In finding that the "prerequisites to 'associational standing' … are clearly present here," the Court emphasized: "The Commission's complaint alleged, and the District Court found as a fact, that the North Carolina statute had caused some Washington apple growers" to conform their conduct to the statute's requirements in various ways. *Id.* at 343. Here, likewise, the NRA's complaint seeking to enjoin the Texas Carry Ban alleged, and the District Court found as a fact, as follows:

> 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 [Concealed Handgun License] and would carry a handgun for self-defense outside of the home or automobile.

App.27a.[3]

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[3] Such 18-to-20-year-old NRA "members would otherwise have standing to sue in their own right." *Hunt*, 432 U.S. at 343. Texas does not dispute the NRA's allegation—or, as noted above, the district court's *finding*—that at all times throughout this litigation the NRA has had hundreds of members in Texas between the ages of 18 and 20. App.182a-183a (Declaration of NRA Membership Director Robert Marcario) (as of May 5, 2011, NRA in Texas had over 700 life members between the ages 18 and 20, over 600 life members between the ages of 15 and 17, and untold numbers of members of like ages who have annual renewable memberships). The Texas Carry Ban applies to *all* such 18-to-20-year-old members

The panel below had no difficulty finding that the NRA has associational standing to challenge the Texas Carry Ban on behalf of its members who are barred by the law from carrying a handgun for self defense outside their homes. App.8a ("The court [in *BATF*] then concluded that 'Payne and the NRA, on behalf of its under-21 members, have standing.' We reach the same conclusion." (citation omitted)); App.11a ("Plaintiffs, therefore, have standing to challenge both laws together, because together they bar 18-20-year-olds from carrying handguns in public in Texas.").[4]

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without military experience, and thus *all* such members are injured by the Ban. Furthermore, throughout the course of this litigation the NRA consistently has demonstrated its ability to identify specific members (including the former individual plaintiffs) otherwise qualified to obtain a Texas concealed-carry license who would carry a handgun for self-protection but for the minimum age requirement imposed by the Texas Carry Ban. See App.184a-200a. All of this is more than sufficient to satisfy "[t]he purpose of the first part of the *Hunt* test," which "is simply to weed out plaintiffs who try to bring cases, which could not otherwise be brought, by manufacturing allegations of standing that lack any real foundation." *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 9 (1988).

[4] The clarity of the NRA's associational standing in this case is presumably the reason why the panel below summarily denied the NRA's motion to add then-19-year-old NRA member Katherine Taggart as an individual party plaintiff to this action, before the only remaining individual plaintiff, Andrew Payne, turned 21 on July 30, 2013, while the case was still pending before the court of appeals. This motion was expressly made as a prophylactic measure, to remove any possible doubt about "the federal courts' jurisdiction over this case by mitigating the risk of it becoming moot pending the resolution of [Plaintiffs'] en banc petition and any potential subsequent proceedings before the Supreme Court." Motion To Add a

6. Finally, several features of this case make it especially attractive for providing further guidance to lower courts on the scope of the Second Amendment and the meaning of this Court's decisions in *Heller* and *McDonald*. First, it squarely presents the question whether the right to bear arms extends beyond the home, an issue on which the lower courts have divided. Second, it presents the issue in the context of a flat ban, rather than in the context of "may issue" laws that give licensing officials discretion to determine whether law-abiding citizens have adequate justification for seeking to carry a handgun for self-defense. *See Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012), *cert. denied*, 133 S.Ct. 1806 (2013); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013), *cert. denied*, 134 S.Ct. 422. Third, it involves a decision that exemplifies the growing trend in the lower courts to depart from *Heller* by ignoring the Second Amendment's text and history and instead subjecting

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Plaintiff and To Supplement the Record on Appeal 6 (June 11, 2013).

Texas attempts to attach significance to the fact that the NRA made a similar motion, successfully, before the district court in the *BATF* case. Opp.12, 14-15. But the motion to add Ms. Taggart in *BATF* was made in the district court because that case had by then been finally decided by the court of appeals and its mandate had issued, thus returning jurisdiction to the district court. In this case, however, the motion to add Ms. Taggart as a plaintiff was made just weeks before Mr. Payne was to turn 21, while the case was still pending before the court of appeals and thus before jurisdiction over it had been returned to the district court.

Second Amendment rights to the very judicial interest-balancing tests that this Court has condemned.

CONCLUSION

The Court should grant the petition.

February 3, 2014

Respectfully submitted,

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