NO. 13-137

In the
Supreme Court of the United States

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC.; ANDREW M. PAYNE; AND KATHERINE TAGGART,

Petitioners,

v.

BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

CHARLES J. COOPER
DAVID H. THOMPSON
HOWARD C. NIELSON, JR.
PETER A. PATTERSON
COOPER & KIRK, PLLC
1523 New Hampshire Avenue NW
Washington, DC 20036

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
BANCROFT PLLC
1919 M Street NW
Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

Counsel for Petitioners

December 3, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF 1

I. The Government's Insistence That This Case Is Not About Whether 18-to-20-Year-Olds Possess Second Amendment Rights Only Underscores The Need For Review 3

II. The Minimalist Form Of Scrutiny Advanced By The Government And Adopted By Many Lower Courts Would Justify Virtually Any Restriction On Second Amendment Rights 8

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

Clark v. Jeter,
486 U.S. 456 (1988) 11

District of Columbia v. Heller,
554 U.S. 570 (2008) 1, 11

Ezell v. City of Chicago,
651 F.3d 684 (7th Cir. 2011) 3

Kachalsky v. Cnty. of Westchester,
701 F.3d 81 (2d Cir. 2012) 12

McDonald v. City of Chicago,
130 S. Ct. 3020 (2010) 1, 4

Osterweil v. Bartlett,
706 F.3d 139 (2d Cir. 2013) 12

Woollard v. Gallagher,
712 F.3d 865 (4th Cir. 2013) 12

Statute

Act of May 8, 1792, 1 Stat. 271 6

Other Authorities

FBI, *Crime in the United States 2012*,
Table 38: Arrests by Age,
http://1.usa.gov/18btuA0 10

FBI, *Crime in the United States 2012*,
Table 42: Arrests by Sex,
http://1.usa.gov/1cNZutU 10

S. Rep. No. 90-1097,
reprinted in 1968 U.S.C.C.A.N. 2112
(1968) 9

REPLY BRIEF

The laws at issue here preventing individuals 18 to 20 from purchasing handguns through federally regulated channels were enacted at a time when individuals under 21 could not exercise other constitutional rights and the "collective right" view of the Second Amendment held sway. Since the laws were enacted, the Twenty-Sixth Amendment became law and this Court issued its watershed decisions holding that the Second Amendment protects individual and fundamental rights. *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010). Any fair assessment of those subsequent developments makes clear that a law preventing adults under 21 from purchasing the quintessential mechanism for exercising a fundamental constitutional right through federally regulated channels is manifestly unconstitutional, if not outright irrational. That the panel below nonetheless upheld the law as if nothing relevant had occurred since 1968 is reason enough for this Court's review. The government's strained effort to defend this law only underscores that the decision below squarely conflicts with this Court's precedents.

The government disclaims any notion that the decision below stands for the proposition that 18-to-20-year-olds have no Second Amendment rights. But that leaves only two possibilities: either a complete prohibition on purchasing handguns through federally regulated channels is constitutional as to everyone who enjoys Second Amendment rights, or the Second Amendment, unlike every other fundamental right, allows legal adults to be denied

generally available constitutional rights simply because they are close to the age of majority. Neither proposition is remotely compatible with this Court's precedents. The notion that a comparable prohibition could be applied to all law-abiding citizens (even for three years) is a non-starter after *Heller*, and the government does not appear to embrace it. But the notion that the same relatively young adults who could not be denied generally available First and Fourth Amendments rights could be denied Second Amendment rights—a proposition the government very much embraces—is just as squarely foreclosed by *McDonald*. In the end, the government cannot escape the problem that whatever scope a government might have for treating minors differently, there is no coherent basis for denying young adults who can freely contract and acquire a hearth in need of protection the same fundamental Second Amendment rights enjoyed by other adults.

While the government can perhaps be excused for attempting to defend a regulatory scheme that is clearly unconstitutional in light of subsequent developments, the panel's acceptance of the government's arguments confirms that this Court's intervention is sorely needed. *Heller* and *McDonald* were watershed constitutional decisions, yet many lower courts have treated them as an invitation to preserve the status quo ante. It simply cannot be that countless laws passed on the assumption that the Second Amendment did no more than facilitate the militia not only are all constitutional, but all satisfy heightened scrutiny. These provisions, passed before *Heller* and before the age of majority was 18,

are exhibit A of restrictions that are unconstitutional in a world in which *Heller* is the law of the land. This Court should grant review to correct the decision below and underscore that *Heller* and *McDonald* are consequential decisions that need to be honored not only in the breach.

I. The Government's Insistence That This Case Is Not About Whether 18-to-20-Year-Olds Possess Second Amendment Rights Only Underscores The Need For Review.

The government insists that this case "does not present the question whether 18-to-20-year-olds may be 'den[ied] fundamental constitutional rights.'" Br.Opp.11. But that could be true only if application of the challenged prohibitions to all adults would be constitutional, or if the protections of the Second Amendment, unlike those of every other constitutional right, may be selectively denied to a subset of law-abiding adults solely because of their age.

The former proposition is a complete non-starter. The government cannot seriously mean to suggest that the Second Amendment protects the right to keep and bear arms but not to purchase them. That is akin to arguing that a ban on selling books does not implicate the "core" of the First Amendment so long as individuals remain free to read whatever books they manage to obtain. Just like any other fundamental constitutional right, the Second Amendment necessarily secures a corresponding right to access the means to exercise it. *Cf. Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011) ("The right to possess firearms for protection implies a corresponding right to acquire and maintain

proficiency in their use; the core right wouldn't mean much without the training and practice that make it effective.").

Indeed, any effort to apply this prohibition to all adults would expose not just its blatant unconstitutionality, but its irrationality. Once it is accepted that the Second Amendment guarantees the right of the people to, *inter alia*, possess handguns for self-defense, a federal law prohibiting the purchase of handguns from all but the most opaque and least regulated channels (even if for just three years) would be both irrational and unconstitutional. The only goal such a prohibition rationally could further is minimizing the number of handgun purchases, but that cannot be a permissible government interest in the wake of *Heller* and *McDonald*. Yet, remarkably, that is precisely the government interest the panel accepted when it came to adults under 21.

The proposition the government does embrace—that it can lawfully impose on young adults restrictions that it cannot constitutionally impose on older adults—is equally foreclosed by this Court's precedents. The government readily admits that such age-based restrictions on the exercise of any other constitutional right would be inconceivable. Br.Opp.15 n.8. That concession really should be the end of the matter, as this Court has already emphatically rejected the notion that the Second Amendment may be "singled out for special—and specially unfavorable—treatment." *McDonald*, 130 S. Ct. at 3043 (plurality opinion). As with other constitutional rights, the only constitutional line that this Court has accepted and that makes any sense is

the line between adults and those who have not yet reached the age of majority. In the context of the Second Amendment, ample history warns against any effort to limit its protections for the very individuals who would make up the militia. *See* Pet.24. And there is no valid basis for providing lesser protection for certain adults who have the same ability as other adults to contract and acquire a dwelling in need of protection. The government's suggestion that these emancipated adults should get permission from their parents is a non-sequitur that ignores that the challenged restriction denies legal adults the ability to purchase a handgun.

Ultimately, the government's position appears to be that while adults under 21 enjoy some Second Amendment rights, those rights are still circumscribed by their relatively young age. The most obvious problems with this contention are its novelty and incompatibility with *McDonald*. No other constitutional right works this way, and this Court has already rejected the notion that the Second Amendment is a second-class right.

The government nonetheless attempts to buttress its argument by pointing to late nineteenth and twentieth century laws that restricted the Second Amendment rights of 18-to-20-year-olds when the age of majority was 21. Br.Opp.15–17. But that only underscores the basic incompatibility of the government's position with this Court's holding that the Second Amendment secures a *fundamental* right. Whatever the case may have been for restricting the Second Amendment rights of 18-to-20-year-olds back when they were considered minors for all sorts of

other purposes and constitutional rights, the government does not—and cannot—explain why it may continue to do so now that 18-year-olds are emancipated adults with a full complement of constitutional rights and homes of their own to protect. Neither the panel nor the government has identified any other fundamental enumerated constitutional right that individuals do not possess equally with other adults upon reaching the age of majority. Indeed, usually the question is whether *minors* possess constitutional rights notwithstanding their age (and they often do), *see* Pet.21–22, not whether adults somehow lack constitutional rights because of theirs.

Nor is there any historical basis for making the Second Amendment the sole enumerated right 18-to-20-year-olds lack. To the contrary, as the detailed analysis of Judge Jones and her dissenting colleagues confirms, "the properly relevant historical materials … couldn't be clearer: the right to keep and bear arms belonged to citizens 18 to 20 years old at the crucial period in our nation's history." Pet.App.67. That much is evident from the very first federal militia act, which required 18-year-old males not only to enroll in the militia, but to keep their own arms for doing so. Act of May 8, 1792, 1 Stat. 271. Every state in the Nation likewise required able-bodied men to enroll in the militia at no later than 18. Pet.App.69–70 n.8 (collecting laws). The government's only response is to repeat the same faulty rejoinders as the panel, without even pausing to acknowledge—let alone answer—the dissent's thorough refutation of those arguments.

See Pet.App.71–78; *Amicus* Br. of Alabama and 21 States 6–8.

For instance, the government makes much of a few founding-era laws that "assumed that enrollees under 21 lacked independent access to firearms" and therefore required their parents to ensure they had arms for militia service. Br.Opp.17. But, if anything, those laws cut against the government. The government identifies no founding-era laws specifically restricting the ability of 18-to-20-year-olds to purchase firearms, so presumably any access concerns resulted because, unlike the right to keep and bear arms, the right to contract was not one 18-year-olds universally possessed. Pet.App.33. At best, then, the government demonstrates only that 18-to-20-year-olds possessed Second Amendment rights at the founding *even though* they were still considered "minors" for other purposes.

Of course, the Twenty-Sixth Amendment was ratified in large part to rectify the anomaly that 18-to-20-year-olds *were* entrusted with the responsibility of bearing arms in defense of their country, yet *were not* entrusted with many of the other rights their fellow citizens possessed. Yet the government continues to defend laws enacted *before* the Twenty-Sixth Amendment was ratified on the ground that 21 *used* to be the age of majority in many states. Thus, in the government's view, 18-to-20-year-olds are somehow entitled to less protection under the Second Amendment than under every other provision of the Bill of Rights—even though their historical possession of Second Amendment rights was the very impetus for rendering them legal adults for other

purposes in the first place. That perverse result cannot plausibly be reconciled with this Court's holding that the fundamental right secured by the Second Amendment is not a second-class right.

II. The Minimalist Form Of Scrutiny Advanced By The Government And Adopted By Many Lower Courts Would Justify Virtually Any Restriction On Second Amendment Rights.

Unfortunately, the government and the panel are not alone in refusing to "take seriously" this Court's landmark Second Amendment opinions. Pet.App.61. This is just the latest—albeit perhaps most blatant—in a string of recent decisions applying a form of "heightened scrutiny" to the Second Amendment that would be unrecognizable in any other constitutional context. *See* Pet.18–19, 28–29. The government itself readily acknowledges that the panel's deeply flawed reasoning "is consistent with that adopted by other courts of appeals to have considered Second Amendment challenges." Br.Opp.7. But that is the problem. It is one thing to give the lower courts an opportunity to apply *Heller* and *McDonald*, but it is another thing to watch lower courts treat watershed constitutional decisions as non-events. When the latter occurs, it is time for intervention, not further percolation.

And the case for this Court's intervention is particularly acute here because two intervening developments have combined to make the challenged scheme manifestly unconstitutional. This restriction might be defensible if the age of majority were still 21 and if the collective right view of the Second Amendment that Congress explicitly invoked when

enacting it were still good law. *See* S. Rep. No. 90-1097, *reprinted in* 1968 U.S.C.C.A.N. 2112, 2169 (1968) ("[I]t is clear that no body of citizens other than the organized State militia, or other military organization provided for by law, may be said to have a constitutional right to bear arms."). But the decision below, upholding the regulatory scheme despite both consequential changes, comes perilously close to rendering *Heller* and *McDonald* nullities.

Indeed, the panel's conclusion that this scheme satisfies "heightened scrutiny" underscores that courts are draining that term of all meaning when it comes to Second Amendment claims. If the panel's and the government's view of the world after *Heller* and *McDonald* were correct, courts could "justify virtually any limit on gun ownership," while still professing fealty to Second Amendment rights and heightened scrutiny. Pet.App.67. Here, the panel determined that this restriction satisfied heightened scrutiny because—not despite the fact that—it keeps the means for exercising Second Amendment rights out of the hands and homes of 18-to-20-year-olds. The panel was not bothered by the absurdity of pushing 18-to-20-year-olds out of federally regulated channels and into gray markets. In fact, presumably a complete ban on any ability of 18-to-20-year olds to purchase or obtain handguns would have been more perfectly tailored to the government's professed interest in keeping 18-to-20-year olds and handguns separated.

In truth, the government interest asserted here is so antithetical to the Second Amendment that it should not be cognizable at all. But to satisfy

heightened scrutiny, one would at least expect it to be backed by robust social science. Instead, the government's justification is incompatible with any form of meaningful constitutional review. Even now, the only support the government has offered for its class-based discrimination are statistics suggesting that a significant percentage of *those who commit violent crimes* are ages 18 to 20. *See* Br.Opp.20–21. If that alone were enough to justify curtailing Second Amendment rights, surely Congress would have an equally—if not more—legitimate basis for curtailing the rights of other classes of law-abiding adults as well. For example, in 2012, the percentage of individuals arrested for violent crimes who were 21 to 23 years old was almost identical to the percentage who were 18 to 20, and a whopping 80.1 percent of individuals arrested for such crimes were male. *See* FBI, *Crime in the United States 2012*, Table 38: Arrests by Age, http://1.usa.gov/18btuA0; *id.* Table 42: Arrests by Sex, http://1.usa.gov/1cNZutU.

Of course, the far more relevant metric is how likely 18-to-20-year-olds are to commit violent crimes, not how likely those who commit violent crimes are to be 18 to 20 years old. But that metric does not help the government either, as barely one half of one percent of 18-to-20-year-olds were arrested for violent crimes in 2012. Pet.App.83. Rather than respond directly to petitioners' argument that 0.58% is far too "'tenuous'" a correlation to render age "'a proxy for'" propensity to commit violent crimes, Pet.31 (quoting *Craig v. Boren*, 429 U.S. 190, 201–02 (1976)), the government insists that it need not substantiate its discrimination because "[a]ge … is a permissible

means of classifying individuals"—apparently even if that classification has no basis in fact. Br.Opp.23. But age is often an arbitrary basis for discrimination even when it comes to non-fundamental rights, and when it comes to fundamental rights, discrimination affecting the ability to exercise them triggers strict scrutiny. *Heller*, 554 U.S. at 628 n.27; *cf. Clark v. Jeter*, 486 U.S. 456, 461 (1988) (requiring strict scrutiny of "classifications affecting fundamental rights"). Once again, when it comes to constitutional rights, the only permissible place to draw a line is at the age of majority—and even then minors enjoy substantial constitutional rights. The denial of fundamental constitutional rights to legal adults is not something our Constitution countenances.*

The government's attempts to defend the panel's analysis only confirm the fatal flaws in the approach pervading the lower courts. Courts have continued to use *Heller*'s disinclination to expound upon "the full scope" of the Second Amendment, 554 U.S. at 626, as an invitation to confine that decision to its facts and to approve all manner of laws that treat access to firearms no differently from access to items that do not implicate a fundamental constitutional right. *See* Br.Opp.21 n.10 (comparing challenged restrictions to restrictions on purchasing alcohol); Pet.App.39 n.17

---

* While the government continues to advance its dubious argument that a burden on the Second Amendment rights of 18-to-20-year-olds passes constitutional muster because it is only "temporary," Br.Opp.13, the government at least appears to have dropped its astonishing contention that 18-to-20-year-olds do not even have standing to challenge this restriction because they eventually will be old enough to purchase handguns without resorting to garage sales or willing third parties.

(same); *cf. Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 98 (2d Cir. 2012), *cert. denied*, No. 12-845 (describing near-total ban on carrying handguns outside the home as a "moderate approach" because it left open possibility of proving "an actual and articulable—rather than merely speculative or specious—need for self-defense"); *Woollard v. Gallagher*, 712 F.3d 865, 881 (4th Cir. 2013), *cert. denied*, No. 13-42 (same); *cf. Osterweil v. Bartlett*, 706 F.3d 139, 144 (2d Cir. 2013) (describing whether Second Amendment applies to a summer home as a "serious and very difficult question").

In the end, either *Heller* and *McDonald* were watershed constitutional decisions or they were cases about a handful of outlying ordinances. *Heller* made clear that it did not imperil every regulation of firearms, any more than the First Amendment prohibits every regulation of speech. But nothing in *Heller* intimated that every federal, state, and local law enacted on the belief that the Second Amendment was an anachronism is nonetheless constitutional. Supreme Court decisions have consequences. One consequence of *Heller* and *McDonald* is that the regulatory scheme challenged here is unconstitutional. Another consequence is that laws that restrict firearm possession must satisfy meaningful constitutional scrutiny. This Court should grant review to make both consequences clear.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

CHARLES J. COOPER
DAVID H. THOMPSON
HOWARD C. NIELSON, JR.
PETER A. PATTERSON
COOPER & KIRK, PLLC
1523 New Hampshire Avenue NW
Washington, DC 20036

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
BANCROFT PLLC
1919 M Street NW
Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

Counsel for Petitioners

December 3, 2013