No. 13-137

In the Supreme Court of the United States

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., *et al.*,
Petitioners,
v.
BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, *et al.*,
Respondents.

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

BRIEF OF ALABAMA AND 21 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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August 30, 2013

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INTEREST OF *AMICI CURIAE*[1]

The amici States want their citizens to have a liberty that is guaranteed to them by the federal Constitution but currently denied to them by the federal government. Adults who are 18, 19, and 20 honorably defend our country when it is at war. These same Americans should be able to defend themselves and their families when they are at home. Yet Congress has chosen to preclude the States from fostering their citizens' freedom in this way. Concern about precisely this kind of congressional incursion on individual liberty was what prompted state leaders at the Founding to "insist[] on the adoption of the Bill of Rights as a condition for ratification of the Constitution." *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3037 (2010). At that crucial moment, federal and state officials "agreed that the right to bear arms was fundamental." *Id.* But in the present day, congressional intrusions on the right to bear arms have become all too common. This statute is a prime example. Each day it remains in effect will further entrench the misconception that Congress may treat the Second Amendment as a second-class right. And each day it stays in place will perpetuate a congressional policy of disregarding States' determinations that this group of citizens deserves

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[1] In accordance with Rule 37.2(a), on August 20, 2013, counsel for the lead *amicus* timely informed counsel of record for the parties of its intent to file this brief 10 days before it was due. The parties' consent to the filing of this brief is not necessary because the *amici* are States.

equal liberty. The States have a vital interest in vindicating their citizens' rights in this case.

SUMMARY OF THE ARGUMENT

Three considerations make this Court's review imperative from the amici States' perspective.

1. First, the federal statute at issue disregards numerous States' decisions that adults aged 18, 19, and 20 should have this right. Conflicts between the federal government and the States over the scope of citizens' liberties are at the very core of disputes this Court was created to resolve. Even States that agree with Congress's policy have an interest in a speedy resolution of this question.

2. Second, the Fifth Circuit misunderstood the role state law and practice plays in the Second Amendment analysis. The lower court focused on state laws from the 19th and 20th centuries, but those laws evince nothing about what the Second Amendment means. The more pertinent reference point is the consensus state governments have reached that persons aged 18, 19, and 20 are entitled to the same fundamental rights society bestows on other adults.

3. Third, the question presented has a logically antecedent relationship to other important Second Amendment issues that courts soon will need to address. It may be difficult for courts to determine those issues, which concern the scope of the Second Amendment right, unless they first know who possesses the right. By supplying the answer, this Court can make the path forward more certain for the States and the federal government alike.

ARGUMENT

Federalism principles cement the case for certiorari. In current times, it is the States, not the federal government, that are showing proper respect for the Second Amendment.[2] Nowhere is the disconnect more evident than in the context of this case. Multiple States have determined that their adult citizens, aged 18, 19, and 20, possess and are capable of exercising the right to keep and bear arms in a responsible way. Yet through 18 U.S.C. §§922(b)(1) and (c)(1), Congress has second-guessed the States' judgment in this regard. Several federalism-related concerns thus underscore the urgent need for review.

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[2] Almost all the States guarantee a right to bear arms in their own constitutions. *See* ALA. CONST. art. I, §26; ALASKA CONST. art. I, §19; ARIZ. CONST. art. II, §26; ARK. CONST. art. II, §5; COLO. CONST. art. II, §13; CONN. CONST. art. I, §15; DEL. CONST. art. I, §20; FLA. CONST. art. I, §8; GA. CONST. art. I, §1, para. 8; HAW. CONST. art. I, §17; IDAHO CONST. art. I, §11; ILL. CONST. art. I, §22; IND. CONST. art. I, §32; KAN. CONST., BILL OF RIGHTS, §4; KY. CONST. §1(7); LA. CONST. art. I, §11; ME. CONST. art. I, §16; MASS. CONST. pt. I, art. XVII; MICH. CONST. art. I, §6; MISS. CONST. art. III, §12; MO. CONST. art. I, §23; MONT. CONST. art. II, §12; NEB. CONST. art. I, §1; NEV. CONST. art. I, §11, cl. 1; N.H. CONST. pt. I, art. 2-a; N.M. CONST. art. 2, §6; N.C. CONST. art. I, §30; N.D. CONST. art. I, §1; OHIO CONST. art. I, §4; OKLA. CONST. art. II, §26; OR. CONST. art. I, §27; PA. CONST. art. I, §21; R.I. CONST. art. I, §22; S.C. CONST. art. I, §20; S.D. CONST. art. VI, §24; TENN. CONST. art. I, §26; TEX. CONST. art. I, §23; UTAH. CONST. art. I, §6; VT. CONST. ch. I, art 16; VA. CONST. art. I, §13; WASH. CONST. art. I, §24; W. VA. CONST. art. III, §22; WIS. CONST. art. I, §25; WYO. CONST. art. I, §24.

A. Immediate review is essential because this statute denies a liberty that States recognize as entitled to protection.

As an initial matter, it is noteworthy that multiple States, and indeed *all* the States signing on to this brief, believe their citizens are entitled to more liberty in this sphere than the federal government is willing to allow. A large majority of States currently authorizes 18-, 19-, and 20-year-olds to own and use handguns.[3] But Congress has taken virtually all decisionmaking in this area away from the States. Congress has thus regulated this area in a manner that is in derogation of States' traditional authority and constitutionally protected individual rights.

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[3] *See* ALA. CODE §13A-11-76; ALASKA STAT. ANN. §11.61.210(a)(6); ARIZ. REV. STAT. ANN. §§1-215 & 13-3109; ARK. CODE ANN. §§5-73-101(9) & -109; COLO. REV. STAT. §18-12-108.7; FLA. STAT. ANN. §790.17; GA. CODE ANN. §16-11-101.1; IDAHO CODE ANN. §18-3302A; IND. CODE ANN. §35-47-2-7(a); KAN. STAT. ANN. §21-6301(a)(7); LA. REV. STAT. ANN. tit. 14 §91; ME. REV. STAT ANN. tit. 17-A, §554-B; MINN. STAT. §§609.66.1b & 609.663; MISS. CODE ANN. §97-37-13; MO. REV. STAT. §571.060.1(2); MONT. CODE ANN. §45-8-344; NEB. REV. STAT. ANN. §§28-1201(4), 28-1204(1), 28-1204.01(1); NEV. REV. STAT. ANN. §202.310; N.H. REV. STAT. ANN. §§21:44 & 159:12; N.C. GEN. STAT. ANN. §§14-315, 48A-2; N.D. CENT. CODE §§14-10-01, 62.1-03-02; OKLA. STAT. ANN. tit. 21, §1273; OR. REV. STAT. ANN. §166.470; PA. CONS. STAT. ANN. tit. 14 §6110.1; S.C. CODE ANN. §16-23-30(A)(3); S.D. CODIFIED LAWS §§23-7-44 & -46; TENN. CODE ANN. §§39-17-1319 & -1320; TEX. PENAL CODE ANN. §46.06(a)(2); UTAH CODE ANN. §76-10-509.4 & -509.9; VT. STAT. ANN. tit. 13, §4007; VA. CODE ANN. §§1-204 & 18.2-309; WASH. REV. CODE ANN. §§9.41.040(1)(b)(iii), 9.41.042, 9.41.080; W. VA. CODE ANN. §61-7-8; WISC. STAT. ANN. §948.60(2)(b).

Conflicts between the federal government and States on questions of this sort are at the core of disputes this Court was meant to resolve. The Court has not hesitated to review the federal government's claims that States were unduly restricting individual freedom in a sphere where the federal government's interests were uniquely strong. *See, e.g.*, *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012). The need for review is even more compelling when the shoe is on the other foot. Fear of the newly minted federal government's potential to trample liberty was what prompted the Bill of Rights in the first place. *See McDonald*, 130 S. Ct. at 3037 (citing 1 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 327-331 (2d ed. 1854)). This Court frequently grants review to consider whether Commerce Clause enactments unduly interfere with liberties States desire to protect even when those liberties are not explicitly grounded in the Constitution. *See Nat'l Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2580 (2012); *Gonzales v. Raich*, 545 U.S. 1, 5-6 (2005). When, as here, a Commerce Clause enactment undermines state laws that preserve freedoms with express foundation in the Bill of Rights, the need for this Court's review is paramount.

Congress's disagreement with these States' policies serves not only as a compelling ground for this Court's review, but also a strong indicator of the statute's invalidity on the merits. Subject to constitutional constraints that are not at issue here, this Court has typically left the task of drawing "[t]he line between childhood and adulthood" to the States. *Thompson v. Oklahoma*, 487 U.S. 815, 824

(1988) (opinion of Stevens, J.). In various contexts, States are entrusted to decide how old a person must be to "assume the full responsibilities of an adult." *Id.* at 825. In this particular sphere, most States have decided that 18-, 19-, and 20-year-olds ought to be allowed to exercise this aspect of their fundamental right to bear arms. Yet Congress has sought to withdraw this liberty from the same class of people. In doing so it has disparaged, as "emotionally immature" and "prone to criminal behavior," the very persons these States seek to protect. Pub. L. No. 90-351, §901(a)(6), 82 Stat. at 226, 1968 U.S.C.C.A.N. 2112, 2197-98. Congress was obliged to revisit these matters in the wake of *District of Columbia v. Heller*, 554 U.S. 570 (2008), and its failure to do so makes this Court's intervention imperative. As is true of other congressional overrides of States' decisions to recognize their citizens' liberty, this Court's "careful consideration" must follow "to determine whether" Congress's decision is "obnoxious to the federal [constitutional] provision." *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013) (internal quotation marks omitted).

Even States with policies similar to the federal government's have a strong interest in this Court's swift resolution of this particular issue.[4] Some States

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[4] *See* CAL. PENAL CODE §27505; CONN. GEN. STAT. §29-34(b); DEL. CODE ANN. tit. 24, §§901, 903; HAW. REV. STAT. §134-2(d); ILL. COMP. STAT. ch. 430 §65/4(a)(2)(i); IOWA CODE ANN. §724.22(2); MD. CODE ANN. PUB. SAFETY §5-134(b)(1); MASS. GEN. LAWS ch. 140, §130; N.J. STAT. ANN. §2C:58-6.1(a); N.Y. PENAL LAW §400.00(1)(a); OHIO REV. CODE ANN. §2923.211(B); R.I. GEN. LAWS §11-47-37.

may have adopted age-based restrictions on handgun purchases merely to mirror those found in 18 U.S.C. §§922(b)(1) and (c)(1).[5] And no State wants to subject itself to the costs associated with a challenge to its parallel laws. *See* 42 U.S.C. §1988 (providing for the award of attorney's fees when the plaintiff prevails in a case brought under §1983). Thus, both the state and the federal systems will be best served if the Court answers this question now.

B. Immediate review is essential because the decision below fundamentally misconstrues the role state practice plays in this area.

The States also have substantial interests in correcting the Fifth Circuit's misunderstanding of the role state practice plays in the analysis of this legal question. The lower court upheld this statute based in part on a finding that "[b]y 1923, . . . twenty-two States and the District of Columbia had made 21 the minimum age for the purchase or use of particular firearms." Pet. App. 35. That argument was unsound for all sorts of reasons.

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[5] *See, e.g.*, KY. REV. STAT. ANN. §237.020(1) (giving Kentuckians "the right to purchase or otherwise acquire rifles, shotguns, handguns, and any other firearms which they are permitted to purchase or otherwise acquire under federal law and Kentucky law"); MICH. COMP. LAWS ANN. §28.422(3)(b) (allowing pistol licenses to be issued to Michiganders who are 18, unless "the seller is licensed under 18 U.S.C. §923," in which case the purchaser must be "21 years of age or older"); W. VA. CODE ANN. §61-7-10(d) (prohibiting sale of firearms to persons under the age of 18 and to persons "prohibited by . . . the provisions of 18 U.S.C. §922").

As Judge Jones explained in her dissent from denial of rehearing *en banc*, the Fifth Circuit panel focused on the wrong state laws and the wrong state history. The most important data points for defining the Second Amendment right are sources contemporaneous with the Bill of Rights' ratification in 1791. *See* Pet. App. 68 & n.5 (citing *McDonald*, 130 S. Ct. 3035 & n.14; *Moore v. Madigan*, 702 F.3d 933, 935 (7th Cir. 2012)). For reasons Judge Jones set forth in detail, those sources point decidedly against the enactment at issue here. *See id.* at 68-73.

Meanwhile, as Judge Jones also observed, the panel's reliance on various state laws from the 19th and 20th centuries was "highly questionable" at best. *Id.* at 68. The first state law the panel cited was a facially discriminatory statute the Alabama legislature passed not long before the Civil War. *See id.* at 34 n.14 (citing 1856 ALA. ACTS 17). That enactment cannot possibly evince the concept of individual liberty the Fourteenth Amendment would guarantee more than a decade later. The other enactments the Fifth Circuit cited, though arising after 1868, are no more supportive of the statute at issue here. Nearly all those laws were passed in the wake of decisions from this Court holding "that the Second Amendment applies only to the Federal Government." *Heller,* 554 U.S. at 620 n.23. Those enactments therefore tell us nothing about what the Second Amendment means.

The far more probative lesson from state practice is in the consensus States have developed about the appropriate age of majority. As Justice Ginsburg observed during oral argument in an Eighth Amendment case, in today's society "the dividing line between" children and "people who are members of

the community, the adult community, is pervasively 18." Transcript of Oral Argument at 5, *Roper v. Simmons,* 543 U.S. 551 (2005) (No. 03-633) (question of Ginsburg, J.). The same consensus is critical to the Second Amendment question at issue here.

C. Immediate review is essential because the question presented is logically antecedent to other Second Amendment questions that are important to the States.

Review is particularly imperative from the States' perspective because of the relationship between the question presented and other issues now working their way through the courts. Much pending Second Amendment litigation concerns the scope of the right to bear arms—whether, for example, governments may restrict handgun use to the inside of an owner's home, or whether these governments may prohibit citizens from possessing other kinds of firearms. *See* Pet. 18-19, 28-29 (citing *Osterweil v. Bartlett*, 706 F.3d 139 (2d Cir. 2013); *Ezell v. City of Chicago*, 651 F.3d 684, 712 (7th Cir. 2011); *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011)). It will be easier for courts to answer questions of that variety—concerning the conduct the Second Amendment protects—once this Court has clarified *who* possesses the right the Second Amendment secures. By resolving this logically antecedent issue now, the Court can mark the proper path forward for both the federal government and the States.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

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