

No. _____

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**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under federal law, it is illegal for a licensed firearms dealer to sell a handgun or handgun ammunition to anyone under the age of 21. 18 U.S.C. § 922(b)(1). Because everyone who sells firearms on anything even approaching a regular basis must be federally licensed, this restriction precludes law-abiding adults under the age of 21 from purchasing handguns from the most common (and most logical) sources. According to the panel decision below, this categorical burden on the fundamental right to keep and bear arms passes constitutional muster because law-abiding young adults likely do not possess Second Amendment rights *at all*, but in any event are sufficiently removed from the “core” of the Amendment’s concern that their rights may be infringed based on Congress’ factually unsupported “predictive judgment” that they are too “irresponsible” to be entrusted with them. In an opinion dissenting from denial of rehearing en banc, six judges found this dubious logic impossible to square with this Court’s holdings in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), that the Second Amendment protects a *fundamental* individual right that may not be relegated to “second-class” status.

The question presented is:

Whether a nationwide, class-based, categorical ban on meaningful access to the quintessential means to exercise the right to keep and bear arms for self-defense can be reconciled with the Second Amendment, the equal protection guarantee, and this Court’s precedents.

PARTIES TO THE PROCEEDING

Petitioners are the National Rifle Association of America, Inc., Andrew M. Payne, and Katherine Taggart. Along with Rebekah Jennings and Brennan Harmon, the NRA and Payne were plaintiffs and appellants below. Since the case was commenced, Jennings and Harmon have turned 21, and Taggart, who is 19, has been added as a plaintiff.

Respondents, who were defendants and appellees below, are the 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; and Eric H. Holder, Jr., U.S. Attorney General.

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

It has been five years since this Court concluded in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that the Second Amendment secures an individual right to keep and bear arms, and three years since the Court underscored in *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), that this individual right is a fundamental one. Given the number of laws enacted by the federal government, states, and localities in the years when a mistaken understanding of the Second Amendment held sway, one would have expected a major reconsideration of extant firearms laws to have occurred. It has not. Instead, jurisdictions have engaged in massive resistance to the clear import of those landmark decisions, and the lower federal courts, long out of the habit of taking the Second Amendment seriously, have largely facilitated the resistance.

The decision below is a case in point. In the pre-*Heller* era, Congress filled an entire chapter of the United States Code with firearms regulations. Perhaps no provision in that chapter is more obviously incompatible with an individual right subject to some form of heightened scrutiny than the provisions at issue here, which effectively preclude adults under the age of 21 from purchasing the quintessential self-defense weapon from the most common, obvious, and regulated sources (yet permit them to purchase handguns in circumstances that actually render the prohibitions well-nigh irrational). Nonetheless, both lower courts deemed it doubtful that the Second Amendment was even implicated, and both courts concluded that any Second

Amendment rights could be overridden on the flimsiest of theories that adults in the first three years of their legal majority are too “irresponsible” to be entrusted with them. As six judges who dissented from the denial of rehearing en banc recognized, that reasoning is at profound odds with this Court’s holding that the individual right to keep and bear arms is a fundamental one, and even more so with its insistence that this fundamental right may not be relegated to second-class status. It is unthinkable that a court would allow Congress to declare law-abiding individuals in the first three years of their legal majority too “irresponsible” to be entrusted with First Amendment rights or to exercise fundamental unenumerated rights to autonomy. And this Court has already rejected one post-*Heller* effort to treat the Second Amendment as a lesser right.

Regrettably, the decision below is not an outlier in the post-*Heller* landscape. It is instead reflective of a stubborn resistance to treating *Heller* and *McDonald* like other decisions of this Court. Jurisdictions across the country have tried to narrow those decisions to the precise laws they considered, expressing doubt about whether they extend outside the home or even to a summer home. The federal government for its part has categorically deemed a whole class of legal adults unsuitable for exercising Second Amendment rights, and the courts below condoned it. Surely that is not what this Court intended when it admonished that “the enshrinement of” the Second Amendment “necessarily takes certain policy choices off the table.” *Heller*, 554 U.S. at 636. The time has come for the Court to make clear that *Heller* and *McDonald* did more than invalidate a

collection of outlier ordinances. The Framers' decision to enshrine the Second Amendment and this Court's decisions recognizing that the right it secures is both individual and fundamental are decisions with consequences. One obvious consequence is that individuals above the legal age of majority cannot be denied any meaningful ability to purchase the quintessential means for exercising the core individual right. This Court should grant certiorari and reaffirm the fundamental nature of the Second Amendment.

OPINIONS BELOW

The panel opinion of the Court of Appeals is reported at 700 F.3d 185 and reproduced at App. 3–56. The order of the Court of Appeals denying rehearing en banc and the opinion of six dissenting judges are reported at 714 F.3d 334 and reproduced at App. 57–85. The order of the District Court granting summary judgment to respondents is not reported but is reproduced at App. 86–106.

JURISDICTION

The Court of Appeals issued its opinion on October 25, 2012, and denied petitioners' timely petition for rehearing en banc on April 30, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portions of the Second, Fifth, and Fourteenth Amendments to the United States Constitution, 18 U.S.C. §§ 921 and 922, and 27

C.F.R. §§ 478.96, 478.99, and 478.124 are reproduced at App. 109–77.

STATEMENT OF THE CASE

A. Statutory and Regulatory Scheme

This case involves a challenge to a set of federal laws and regulations that bar law-abiding adults under the age of 21 from purchasing handguns and handgun ammunition in the most common and logical of circumstances. Under federal law dating back to the pre-*Heller* era, it is “unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver—

(1) 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[.]

18 U.S.C. § 922(b)(1); *see also* 27 C.F.R. § 478.99(b)(1) (same). Because federal law also prohibits anyone “except a licensed importer, licensed manufacturer, or licensed dealer” from “engag[ing] in the business of importing, manufacturing, or dealing in firearms” or ammunition, 18 U.S.C. § 922(a)(1); *see also id.* § 921(21), section 922(b)(1) operates to preclude law-abiding adults under the age of 21 from participating in the licensed market for handguns.

Section 922(c) reinforces this ban by prohibiting a licensed dealer—also known as a “federal firearm

licensee” (“FFL”)—from selling a firearm to someone “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, among other things, “in the case of any firearm other than a shotgun or rifle, [he or she is] twenty-one years or more of age.” *Id.* § 922(c)(1); *see also* 27 C.F.R. §§ 478.124(a), (f); 478.96(b).

Congress enacted these federal laws in 1968 as part of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197. At the time, males were required to register for the Selective Service when they turned 18 and, as had been the case since the founding, were fully eligible to enlist in the military. *See* Selective Service Act of 1948, Pub. L. No. 62-759, §§ 3–4, 62 Stat. 604, 605–06 (1948); Universal Military Training and Service Act, Pub. L. No. 65-51, § 1(c)–(d), 65 Stat. 75, 76 (1951); Act of May 8, 1792, 1 Stat. 271 (“Militia Act”). Nonetheless, 21 was still considered the age of majority for other purposes, including, in some states, the right to vote. *See Oregon v. Mitchell*, 400 U.S. 112 (1970). That changed with the ratification of the Twenty-Sixth Amendment in 1971; since then, individuals who have reached the age of 18 generally have been considered legal adults entitled to all the same fundamental rights as other adults.

Since the Twenty-Sixth Amendment was ratified, Congress has amended its age-based firearms regulations to prohibit individuals *under* the age of 18 from possessing handguns and to prohibit the transfer of handguns to these minors in

most circumstances. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110201, 108 Stat. 1796, 2010 (adding 18 U.S.C. § 922(x)). Congress has not imposed any possession prohibition on those who have reached age 18, but it nonetheless has left in place the prohibition on handgun and handgun ammunition *sales* to adults under age 21.

The net effect of this web of federal statutes and regulations is that law-abiding adults under age 21 may *possess* handguns, but they may obtain them in only two ways. First, BATF has advised that a licensed dealer may sell a handgun to someone age 21 or older, such a parent or guardian, who is purchasing it as a gift for someone between the ages of 18 and 20 (unless state or local law prohibits such sales). *See* App. 7 n.1. Second, because 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), an 18-to-20-year-old may purchase a handgun from a casual, unregulated seller (again, unless state or local law prohibits such sales). In other words, federal law precludes a 19-year-old from purchasing a handgun through the normal and logical course of a heavily regulated transaction requiring a background check and registered record of the sale, but does not preclude a 19-year-old from buying a handgun at a garage sale.

B. Parties and Proceedings Below

1. 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 civilians and law enforcement. Today, the NRA has approximately five million members, including tens of thousands of 18-to-20-year-olds.

The NRA and three of its law-abiding adult members under age 21—Rebekah Jennings, Brennan Harmon, and Andrew Payne—brought this lawsuit asserting that the federal ban described above violates both the Second Amendment and the Equal Protection Clause, as applicable against the federal government through the Fifth Amendment. Jennings, a decorated pistol marksman and former member of the U.S. Olympic Development Team, attested that she was injured by the ban because she wished to purchase a handgun, both for self-defense and to further her interest in competitive shooting, but was precluded by the ban from doing so. App. to Pls.’ Opp. to Defs.’ Mot. to Dismiss (Dist. Ct. Doc. 35) 5–9. Jennings also detailed the many complications with purchasing a handgun or handgun ammunition from an unlicensed seller, including serious safety, quality, and reliability concerns. *Id.* at 7–8. Harmon and Payne likewise attested that, but for the ban, they would purchase handguns from licensed dealers

for self-defense. *Id.* at 11–22. The NRA proceeded on behalf of its tens of thousands of young adult members whose constitutional rights are similarly abridged by the ban, as well as its federally licensed firearm dealer members, who are prohibited by the ban from selling handguns and ammunition to these otherwise-qualified, would-be customers. *Id.* at 1–3.¹

During the course of the proceeding, Jennings and Harmon have turned 21, and Payne will turn 21 on July 30, 2013. Accordingly, petitioners recently sought and were granted permission to add another plaintiff, Katherine Taggart. Mot. to Add Pl. (Dist. Ct. Doc. 68); June 7, 2013 Order (Dist. Ct. Doc. 71); Third Amended Complaint (Dist. Ct. Doc. 72). Like the other individual plaintiffs, Taggart, a 19-year-old martial arts instructor and NRA member, would like to purchase a handgun from a licensed dealer for self-defense but is prevented by the ban from doing so. App. in Supp. of Mot. to Add Pl. (Dist. Ct. Doc. 70).

2. The government moved to dismiss for lack of standing, arguing, *inter alia*, that adults under age 21 are not injured by the ban because their parents can purchase handguns for them, they can obtain them through unregulated channels, or they can purchase them when they turn 21. In the alternative, the government sought summary judgment; petitioners cross-moved for summary judgment as well.

¹ The NRA's nationwide membership also includes young adults who, through a combination of the federal ban and state or local laws, have *no* legal avenue for purchasing handguns. *See, e.g.*, Cal. Penal Code §§ 27545, 28050; Md. Code Pub. Safety §§ 5-101(r), 5-106, 5-124; D.C. Code §§ 22-4509, 22-4510.

On September 29, 2011, the District Court granted summary judgment to the government. The court began by concluding that both the individual plaintiffs and the NRA have standing. App. 94–99. As to the individuals, the court explained that each “desires to obtain [a handgun] for lawful purposes, including self-defense,” each “identified a specific handgun [he or she] would purchase from an FFL if lawfully permitted to do so,” and each would obtain the relief sought “[w]ere the Court to hold that the ban is unconstitutional.” App. 95. As to the NRA, the court concluded that it has associational standing on behalf its adult members under age 21, emphasizing the NRA’s uncontested “evidence of several other similarly situated members between the ages of 18 to 20 who allege to have been injured by the ban in ways similar to those asserted by the Individual Plaintiffs.” App. 96. The court also concluded that the NRA has standing on behalf of “its vendor members” who “would sell handguns to law-abiding citizens in this age range if it were legal to do so.” App. 99.

Turning to the merits, the court first concluded that the ban does not violate the Second Amendment. Characterizing this Court’s decision in *Heller* as having “carved out conditions and qualifications on the commercial sale of arms as presumptively lawful regulatory measures,” the court deemed it “within the purview of Congress, not the courts, to weigh the relative policy considerations and to make decisions as to the age of the customer to whom those licensed by the federal government may sell handguns and handgun ammunition.” App. 100, 103. The court also denied petitioners’ equal protection challenge,

declaring it sufficient that “Congress identified a legitimate state interest—public safety—and passed legislation that is rationally related to addressing that issue—the ban.” App. 105.

3. Petitioners timely appealed, and the Court of Appeals affirmed. Like the District Court, the court first rejected the government’s standing argument. Although Jennings and Harmon had turned 21 (and Taggart had not yet been added to the case) by the time its decision issued, the court concluded that “Payne and the NRA, on behalf of its under-21 members, have standing” because the federal ban causes both Payne and those NRA members “a concrete, particularized injury—i.e., the injury of not being able to purchase handguns from FFLs.” App. 11–12. The court did not address the NRA’s additional basis for associational standing on behalf of its vendor members. App. 13.

Turning to the merits, the court began by adopting what it described as a “two-step inquiry” to resolve Second Amendment challenges, under which “the first inquiry is whether the conduct at issue falls within the scope of the Second Amendment right.” App. 17. If it does, the second step is “to apply the appropriate level of means-ends scrutiny.” App. 19. According to the court, any “longstanding, presumptively lawful regulatory measure ... would likely fall outside the ambit of the Second Amendment” entirely, but even if it did not, such a measure would be subject only to “our version of ‘intermediate’ scrutiny.” App. 21. The court also declared that “a regulation can be deemed

‘longstanding’ even if it cannot boast a precise founding-era analogue.” App. 22.

Applying this two-part test, the court first posited that, “[i]n 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.” App. 31. To support this proposition, the court cited Revolutionary War provisions disarming those who refused to swear loyalty to the new Nation and laws denying arms to “law-abiding slaves” and “free blacks.” App. 31. Although the court did not identify any founding-era laws that denied arms to individuals between the ages of 18 and 20, it insisted “it stands to reason” that they likewise were considered “unworthy of the Second Amendment guarantee” because the age of majority at common law was 21, not 18. App. 34. The court dismissed in a footnote the undisputed fact that, at the time of the Second Amendment’s ratification, both the federal government and every state not only permitted but required all 18-year-old males to enroll in the militia. App. 39 n.17. Instead, the court placed great weight on late 19th and early 20th century laws restricting the ability of “‘minors’ to purchase or use particular firearms while the age of majority was set at age 21.” App. 34.

In the court’s view, this evidence was sufficient to prove the challenged laws “consistent with a long-standing, historical tradition ... [a]t a high level of generality ... of targeting select groups’ ability to access and to use arms for the sake of public safety,” and “[m]ore specifically, ... of age- and safety-based

restrictions on the ability to access arms.” App. 37. Accordingly, the court noted that it was “inclined to uphold the challenged federal laws at step one” but, “in an abundance of caution,” proceeded to analyze whether the laws “pass constitutional muster even if they implicate the Second Amendment.” App. 39.

As to that inquiry, the court declared it “[u]nquestionabl[e]” that “the challenged federal laws trigger nothing more than ‘intermediate’ scrutiny.” App. 41. “Like the federal bans targeting felons and the mentally ill,” the court reasoned, “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.” App. 41. Such laws do not “violate the central concern of the Second Amendment,” moreover, because the Amendment only “protects ‘law-abiding, *responsible*’ citizens,” and “Congress found that persons under 21 tend to be relatively irresponsible.” App. 43 (quoting *Heller*, 554 U.S. at 635; emphasis added by Court of Appeals). The court further posited that because the challenged laws “resemble ‘laws imposing conditions and qualifications on the commercial sale of arms,’” “they must not trigger strict scrutiny.” App. 44 (quoting *Heller*, 554 U.S. at 626–27). Applying its version of intermediate scrutiny, the court upheld the federal scheme. App. 45–55. It also rejected petitioners’ equal protection challenge, concluding, like the District Court, that the scheme need satisfy only rational-basis review. App. 55–56.

4. Petitioners sought rehearing en banc, and the court denied the petition by an 8-7 vote. App. 57–58. In a dissenting opinion joined by Judges Jolly, Smith,

Clement, Owen, and Elrod, Judge Jones warned of the “far-reaching” implications of the panel’s conclusion “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.’” App. 59. “Never in the modern era,” she emphasized, “has the Supreme Court held that a fundamental constitutional right could be abridged for a law-abiding adult class of citizens.” App. 61.

In her view, “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.” App. 66. Reviewing “the properly relevant historical materials,” Judge Jones concluded that “they 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.” App. 67. The panel’s approach of “rummaging through random ‘gun safety regulations’ of the 18th century,” by contrast, would “justify virtually any limit on gun ownership” and “render *Heller* valueless against most class-based legislative assaults on the right to keep and bear arms.” App. 67.

Judge Jones also criticized the majority for the “very weak sort” of “intermediate scrutiny” it applied, and for proceeding “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.’” App. 80.

As she pointed out, the same “circular reasoning” would justify class-based restrictions on, “e.g. aliens, or military veterans with PTSD”—particularly given uncontested evidence that only 0.58% of 18-to-20-year-olds were arrested for violent crimes in 2010. App. 80. Judge Jones also noted that the challenged ban not only has done little to advance the government’s proffered interest over the past 40 years, but also “perversely assures that when such young adults obtain handguns, they do not do so through licensed firearms dealers, where background checks are required.” App. 83. In short, she concluded, “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.” App. 85.

REASONS FOR GRANTING CERTIORARI

This case is part of a pervasive pattern of stubborn resistance to this Court’s holding that the Second Amendment secures a right that is not just individual, but *fundamental*. As six judges who dissented from the denial of rehearing en banc recognized, it cannot seriously be contended that the panel’s decision is reconcilable with that holding. There is no other fundamental right that could be effectively denied to an entire class of law-abiding citizens on the theory that they are too near the age of legal majority or too “irresponsible” to exercise it. Indeed, there is no other fundamental right that an entire class of law-abiding adult citizens has been denied for any reason *at all*.

The panel's effort to identify a historical analog to the age-based restrictions challenged here reveals how incompatible its decision is with this Court's precedents. It is undisputed that 18-to-20-year-olds were not only permitted but *required* to keep and bear arms when the Second Amendment was ratified. The panel not only dismissed that compelling evidence of the Amendment's full applicability to individuals who have reached the age of 18, but identified purported analogs in founding-era laws denying Second Amendment rights to "law-abiding slaves" and "free blacks." While those laws are powerful evidence of the need for the Reconstruction Amendments, reliance on such precedents to deny present-day constitutional rights is nothing short of astonishing. That reliance alone is proof enough that courts are not "tak[ing] seriously *Heller's* methodology and reasoning," App. 61, and that this Court's intervention in this area of critical importance is sorely needed.

The categorical denial of the quintessential means of exercising the core Second Amendment right to an entire class of legal adults is reminiscent of the complete ban invalidated in *Heller*. This kind of broad restriction flunks any level of meaningful constitutional scrutiny because such a categorical approach is antithetical to the core right the Second Amendment protects. That the courts below could uphold such a blunderbuss approach while purporting to apply heightened scrutiny underscores the need for this Court's intercession. Indeed, the decision below is illustrative of the efforts of lower courts to limit *Heller* and *McDonald* to their facts while ignoring the clear import of their reasoning.

For instance, although the panel purported to presume that adults under age 21 have Second Amendment rights, it then concluded that these law-abiding citizens could be denied those rights because they do not fall within the “core” of the Amendment’s protection. Ipse dixit about what constitutes the Amendment’s core cannot justify ignoring the Amendment’s protections. The core of the First Amendment’s free speech guarantee may be political speech critical of the government, but the protection the Amendment provides has never been so limited. And by giving lip service to application of the Second Amendment only to deny any protection to activity deemed to fall outside the Amendment’s core, the panel neatly excised from its analysis the very right it purported to presume exists. The Fifth Circuit is not alone in applying this two-step technique to narrow the scope of the right to keep and bear arms. The Second and Fourth Circuits have relied on reasoning every bit as circular to effectively eliminate any right to keep and bear arms outside the home. What is more, these courts have insisted that the restrictions they upheld are constitutional not in spite of but *because of* the burden they impose on the very constitutional rights the courts purported to presume exist.

None of this is remotely consistent with this Court’s decisions in *Heller* and *McDonald*. It is too late in the day to argue that the right to keep and bear arms is less fundamental than the other individual rights enumerated in the Constitution. Yet that is the inevitable consequence of the method of analysis that is pervading the lower courts. Because that result is irreconcilable with this Court’s

precedents, and more fundamentally, with our Constitution, the Court should grant this petition and put an end to this troubling trend.

I. The Decision Below Is Part Of A Recurring Trend Of Obstinate Resistance To This Court's Holding That The Second Amendment Secures A *Fundamental* Right.

Heller marked a watershed moment in Second Amendment jurisprudence. Resolving a debate that had been ongoing for the better part of a century, this Court concluded that the text, structure, and history of the Second Amendment confirm that it “confer[s] an individual right to keep and bear arms.” *Heller*, 554 U.S. at 595. Two years later, the Court concluded in *McDonald* that this individual right is a fundamental one that applies with full force to the states as well. *McDonald*, 130 S. Ct. at 3026 (plurality opinion); *id.* at 3058 (Thomas, J., concurring in part and concurring in the judgment).

Given that *Heller*'s holding was contrary to the law that had held sway over most of the Nation for decades, one would have expected to see federal, state, and local governments respond to this landmark decision by reexamining their laws to determine whether they are consistent with the fundamental individual right this Court recognized. It simply could not be that hundreds of jurisdictions operating on the assumption that the Second Amendment protected only collective rights nonetheless uniformly passed laws that were fully compatible with an individual right subject to some form of heightened scrutiny. Some degree of reexamination clearly was necessary. And to the

extent governments failed to undertake that reexamination, one would have expected to see courts engage in serious scrutiny of stringent firearms regulations that pre-date *Heller*.

Instead, the five years since *Heller* was decided have been marked by intransigence by governments and courts that at best have simply been unable to break habits formed during pre-*Heller* days and at worst are engaged in massive resistance to this Court's decisions. While *Heller*'s detractors have begrudgingly accepted that laws *identical* to those invalidated in *Heller* and *McDonald* must fall, many at the same time have endeavored to render both decisions as narrow as possible, limiting the scope of the Second Amendment to the precise circumstances at issue in those cases.

For instance, in what one judge described as “a thumbing of the municipal nose at the Supreme Court,” shortly after *McDonald* the City of Chicago attempted to circumvent this Court's decision by imposing a new requirement that all firearms owners obtain training at live shooting ranges, but simultaneously banning live shooting ranges within city limits. See *Ezell v. City of Chicago*, 651 F.3d 684, 712 (7th Cir. 2011) (Rovner, J., concurring in the judgment). Seemingly adopting Chicago's exceedingly minimalist view of *Heller* and *McDonald*, numerous courts have concluded that because those cases involved firearms restrictions *inside* the home, restrictions *outside* the home do not implicate the Second Amendment at all. See, e.g., *Little v. United States*, 989 A.2d 1096, 1101 (D.C. 2010); *Williams v. Maryland*, 10 A.3d 1167, 1169 (Md. 2011);

Commonwealth v. Perez, 952 N.E.2d 441, 451 (Mass. App. Ct. 2011); *cf. United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011) (“On the question of *Heller*’s applicability outside the home environment, we think it prudent to await direction from the [Supreme] Court itself.”). Indeed, the Second Circuit would not even make a definitive ruling on whether the Second Amendment applies to a summer home. *See Osterweil v. Bartlett*, 706 F.3d 139 (2d Cir. 2013) (certifying question to New York Court of Appeals rather than giving immediate relief to individual denied permit to possess a handgun in his summer residence).

The decision below is of a piece with this pattern of dogged resistance. Seizing on *Heller*’s reference to the “right of law-abiding, *responsible* citizens to use arms in defense of hearth and home,” *Heller*, 554 U.S. at 635 (emphasis added), the panel posited that law-abiding citizens do not possess Second Amendment rights *at all* unless the legislature deems them sufficiently “responsible” to keep and bear arms. Comparing young adults to convicted felons, domestic-violence misdemeanants, and the mentally ill, the court deemed it doubtful that they even possess Second Amendment rights, but held that if they do, they may be stripped of those rights based on a showing that *less than 1%* of people in their age group commit violent crimes (with or without handguns). App. 43, 84–85.

That conclusion is irreconcilable with this Court’s holding that the Second Amendment right is a fundamental one that may not be “singled out for special—and specially unfavorable—treatment.”

McDonald, 130 S. Ct. at 3043 (plurality opinion). Whatever room for debate *Heller* may have left on the matter, *McDonald* definitively foreclosed any suggestion that the right to keep and bear arms is not fundamental. See, e.g., *id.* at 3037 (“the right to bear arms was fundamental to the newly formed system of government”); *id.* at 3059 (Thomas, J., concurring in part and concurring in the judgment) (“the right to keep and bear arms ... is ‘fundamental’ to the American ‘scheme of ordered liberty’”).² And *McDonald* makes equally clear that courts may not “treat the right recognized in *Heller* as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.” *Id.* at 3044 (plurality opinion). Indeed, that should have been obvious even before *McDonald*, as this Court has long admonished that no fundamental right may be deemed “less ‘fundamental’ than” others, and reiterated that there is “no principled basis on which

² Among the many examples of *McDonald*’s explicit recognition that the right to keep and bear arms is fundamental, see, e.g., 130 S. Ct. at 3041 (“Evidence from the period immediately following the ratification of the Fourteenth Amendment only confirms that the right to keep and bear arms was considered fundamental.”); *id.* at 3037 (“The right to keep and bear arms was considered no less fundamental by those who drafted and ratified the Bill of Rights.”); *id.* at 3042 (“[T]he Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.”); *id.* at 3040 (39th Congress’ “efforts to safeguard the right to keep and bear arms demonstrate that the right was still recognized to be fundamental”); *id.* at 3041 (“In debating the Fourteenth Amendment, the 39th Congress referred to the right to keep and bear arms as a fundamental right deserving of protection.”).

to create a hierarchy of constitutional values.” *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982); accord *Ullmann v. United States*, 350 U.S. 422, 428–29 (1956) (“To view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted application of it. This is to disrespect the Constitution.”).

Whether adults under the age of 21 are entitled to the protection of the Second Amendment therefore should have been an easy question. No court today would accept for one moment the notion that Congress could declare 19-year-olds too “irresponsible” to buy books with violent content—let alone do so based on evidence that reading violent books might lead less than 1% of 19-year-olds to engage in violent crimes. In fact, as Judge Jones and five of her colleagues emphasized in dissenting from denial of rehearing en banc, “[n]ever in the modern era has th[is] Court held that a fundamental constitutional right could be abridged for a law-abiding adult class of citizens.” App. 61 (emphasis added). The panel’s holding that the Second Amendment rights of young adults may be abridged with impunity therefore renders the right to keep and bear arms precisely the kind of “second-class right” that this Court has unequivocally instructed it is not.

That conclusion is further underscored by the palpable conflict between the decision below and this Court’s decisions dealing with age-based restrictions on other fundamental rights. As the Court has emphasized in many contexts, “[m]inors, as well as adults, are protected by the Constitution and possess

constitutional rights.” *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976); *see also, e.g., New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (considering Fourth Amendment rights of 14-year-old); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (considering First Amendment rights of 15- and 16-year-olds). The typical question thus is whether restrictions on the fundamental rights of *minors* are compatible with the Constitution—and they often are not. *See, e.g., Danforth*, 428 U.S. at 74 (holding unconstitutional provision that granted parents an absolute veto over decision of women under the age of 18 to obtain an abortion); *McConnell v. FEC*, 540 U.S. 93, 231 (2003) (holding unconstitutional provision that prohibited individuals “17 years old or younger” from making contributions to candidates or political party committees). There are *no* modern decisions, by contrast, denying fundamental constitutional rights to those who have reached the age of majority on the theory that they are too young to possess them. So long as the Second Amendment protects a right as fundamental as all others, *see McDonald*, 130 S. Ct. at 3044, it simply cannot be the case that other rights—even unenumerated ones—extend to individuals who *have not* reached the age of majority, yet the Second Amendment does not even protect individuals who *have*.

Not only is the decision below flatly inconsistent with *McDonald*’s holding that the right to keep and bears arms is a fundamental one; it also “does not take seriously *Heller*’s methodology and reasoning.” App. 61. As this Court reiterated at the conclusion of its painstakingly detailed historical analysis in *Heller*, “[c]onstitutional rights are enshrined with the

scope they were understood to have when the people adopted them.” 554 U.S. at 634–35. Had the panel considered “the properly relevant historical materials,” rather than “rummaging through random ‘gun safety regulations’ of the 18th century,” it would have found that the answer “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.” App. 67.

Most obviously, mere months after the Second Amendment was ratified, Congress in its very first effort to “provide for organizing, arming, and disciplining, the Militia,” U.S. Const. art. I, § 8, enacted a law requiring 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 herein after excepted) shall severally and respectively be enrolled in the militia.” Militia Act, 1 Stat. 271 (emphasis added). Every state in the Nation likewise required able-bodied men to enroll in the militia at no later than age 18. App. 69–74 (collecting laws). These individuals not only were entrusted with the responsibility of bearing arms in defense of their country, but also were required by law to keep their own arms to do so. Militia Act, 1 Stat. 271 (requiring each enrollee, regardless of age, to “provide himself with a good musket or firelock”); *see also United States v. Miller*, 307 U.S. 174, 179 (1939) (“when called for service these men were expected to appear bearing arms supplied by themselves”).

Heller and *McDonald* may not have “clarif[ied] the entire field” of Second Amendment analysis, *Heller*, 554 U.S. at 634, but surely they foreclose any suggestion that the Amendment does not protect individuals who, at the time of its ratification, were required by both state and federal law to keep and bear arms in service of the militia. While the right protected by the Second Amendment is by no means limited to militia service, “the threat that the new Federal Government would destroy the citizens’ militia by taking away their arms was the reason that the right ... was codified in a written Constitution.” *Heller*, 554 U.S. at 599; *see also id.* (“[i]t was understood across the political spectrum that the right helped to secure the ideal of a citizen militia”). It is therefore unthinkable that the Second Amendment was not intended to protect at a bare minimum the rights of those who were universally understood to be part of the very militia the Amendment was codified to help secure.

Unsurprisingly, the panel identified not a single founding-era law suggesting otherwise. Instead, the panel deemed it sufficient that, “[i]n 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.” App. 30–31. The “select groups” it identified include not 18-to-20-year-olds, but rather “law-abiding slaves,” “free blacks,” and “persons who refused to swear an oath of allegiance to the state or to the nation.” App. 31. Hypothesizing that “[t]hese categorical restrictions may have been animated by a classical republican notion that only those with adequate civic ‘virtue’

could claim the right to arms,” the panel concluded—without identifying a shred of supporting evidence—that “it stands to reason that” “a representative citizen of the founding era” also “would have supported restricting an 18-to-20-year-old’s right to keep and bear arms.” App. 32, 34. In other words, the panel reasoned that because *some* law-abiding adults were (unjustly) denied *all* constitutional rights at the founding, *other* law-abiding adults may be denied *some* (or, more aptly, *one*) of their constitutional rights today.

When the best that can be said in defense of a law that abridges a fundamental right is that it is “compatible with” the invidious racial discrimination that our Nation fought a civil war and amended the Constitution to rectify, it should be obvious that something has gone seriously wrong. The Reconstruction Amendments were necessary precisely to ensure that fundamental rights could not be denied to an entire class of law-abiding individuals. *McDonald*’s conclusion that Second Amendment rights are fundamental for purposes of, *inter alia*, the Reconstruction Amendments should have foreclosed the Court of Appeals’ misguided reliance on this unhappy historical chapter. The decision below squarely conflicts with the reasoning and conclusion of both *Heller* and *McDonald*. Moreover, it leaves little room for doubt that unless and until this Court confirms that its decisions in *Heller* and *McDonald* have real consequences for the regulation of firearms, governments and courts are bound to continue attempting to evade them.

II. This Court's Intervention Is Needed To Stem The Tide Of Decisions Applying A Diluted Form Of Scrutiny To Artificially Cabin The Scope Of The Second Amendment.

The decision below is also a prime example of how lower courts are manipulating the constitutional analysis to chip away at the scope of the Second Amendment. As noted, this case, like *Heller*, necessitates no extended discussion of the standard of review. A categorical denial of any meaningful ability to purchase the quintessential self-defense weapon to an entire class of law-abiding adults is just as antithetical to the right enshrined in the Second Amendment as the possession ban invalidated in *Heller*. Nonetheless, both lower courts upheld the ban while purporting to apply some form of heightened scrutiny to “protect” the constitutional right. This Court’s intervention is needed to reverse the tide of case law that strangles the Second Amendment right while purporting to apply a form of “heightened scrutiny” to “protect” it. This form of right-denying scrutiny would not be remotely tolerable in the context of any other constitutional right, and this Court should make clear that its recognition of an individual right to keep and bear arms in *Heller* and *McDonald*—and the majority’s rejection of Justice Breyer’s argument for a diluted form of intermediate scrutiny—were meant to be taken seriously.

Although many courts have adopted the same basic “two-step inquiry” the panel adopted here, they have varied in the degree to which they use that analysis to eviscerate meaningful protection for the

right protected by the Second Amendment. In many (if not most) instances, courts have purported to assume without deciding that “the conduct at issue falls within the scope of the Second Amendment right.” App 60; *see, e.g.*, App. 39. Yet they then proceed to apply a watered-down form of “intermediate” (or sometimes even rational-basis) scrutiny, on the theory that the conduct at issue is not within some ill-defined “core” of the Second Amendment right. In other words, they eliminate meaningful protection for conduct they claim to treat as protected by the Constitution by deeming it outside the core of the right.

This is a case in point. Here, the panel purported to proceed on the assumption that adults under age 21 have Second Amendment rights. Yet it then reasoned that, “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” because the “Amendment, at its core, protects ‘law-abiding, *responsible*’ citizens.” App. 43 (quoting *Heller*, 554 U.S. at 635; emphasis added by Court of Appeals). Likewise, the panel asserted that Congress has an “important” interest in solving the “problem” of “the ease with which young persons—including 18-to-20-year-olds—[a]re getting their hands on handguns.” App. 46. (How exactly a regulatory scheme that precludes young adults from purchasing handguns through the most common and heavily regulated channels but leaves them free to obtain handguns from casual sellers at garage sales even achieves that dubious goal remains a mystery.) In effect, then, the panel upheld the challenged laws

on the logic that Congress has an important interest in eliminating the very right the court purported to presume exists.

In that respect, the Fifth Circuit took its cue from the Second Circuit, which applied much the same approach to uphold New York's near-total ban on carrying handguns outside the home. *See Kachalsky v. Cnty. of Westchester*, 701 F.3d 81 (2d Cir. 2012), *cert. denied*, No. 12-845. There, the court likewise purported to assume that the Second Amendment "must have *some* application" outside the home. *Id.* at 89. Yet when it came to determining what level of scrutiny to apply, the court settled on a similarly diluted form of intermediate scrutiny, reasoning that the presumed right to carry a handgun outside the home "falls outside the core Second Amendment protections identified in *Heller*." *Id.* at 94. The court then concluded that New York may deny most law-abiding citizens this presumed right because it has a "substantial, indeed compelling," interest in preventing them from exercising it. *Id.* at 97.

The Fourth Circuit relied on the same dubious logic when upholding Maryland's functional ban on carrying handguns outside the home. *See Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013), *petition for cert. pending*, No. 13-42. Like the Second Circuit, the court purported to "assume that the *Heller* right exists outside the home and ... has been infringed." *Id.* at 876. Yet it then relied on the broad generalization that "public safety interests often outweigh individual interests in self-defense" outside the home to apply a weak form of intermediate

scrutiny. *Id.* (quoting *Masciandaro*, 638 F.3d at 470). Having declared the right it purported to presume not “*really worth* insisting upon” in most instances, *Heller*, 554 U.S. at 634, the court then concluded that Maryland’s scheme is constitutional *precisely because* it restricts the ability to exercise that presumed right. *See Woollard*, 712 F.3d at 879 (holding scheme constitutional “because it reduces the number of handguns carried in public”).

Even assuming intermediate scrutiny is appropriate when a law burdens fundamental rights, *but see, e.g., Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 54 (1983) (“strict scrutiny [is] applied when government action impinges upon a fundamental right protected by the Constitution”); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16 (1973) (same), the approach these courts have applied bears no resemblance to any legitimate form of intermediate scrutiny. Such a right-denying two-step would not be tolerated in any other context. Commercial speech may lie outside the core protection of the First Amendment, but no court would uphold a commercial speech restriction not because it prevents unlawful or misleading speech, but simply because it reduces the amount of commercial speech. Because such circular reasoning denies the activity in question the constitutional protection that warrants heightened scrutiny in the first place, it is utterly alien to this Court’s decisions. To deem firearms restrictions constitutional not in spite of but *because of* the burdens they impose on Second Amendment rights is therefore just another variation on the same theme that the fundamental right to keep and bear arms should be “singled out

for special—and specially unfavorable—treatment.” *McDonald*, 130 S. Ct. at 3043 (plurality opinion).

The problems with the toothless form of scrutiny pervading the lower courts do not end there. Rather than engage in any serious examination of whether restrictions on Second Amendment rights are sufficiently tailored to serve an important interest, courts have largely just deferred to the legislatures’ self-serving judgments that they are. *See, e.g., Woollard*, 712 F.3d at 881 (deferring to “the considered judgment of the General Assembly that the good-and-substantial-reason requirement strikes an appropriate balance between granting handgun permits to those persons known to be in need of self-protection and precluding a dangerous proliferation of handguns on the streets of Maryland”); *Kachalsky*, 701 F.3d at 97 (same). As this Court recently reiterated, it is one thing to defer to a legislature’s judgment that a challenged law advances an important interest, but it is another thing entirely to defer to its judgment that a law does so in a manner consistent with the Constitution. *See Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013).

The same undue deference is on full display in the decision below. In upholding the federal age-based restrictions, the panel relied almost exclusively on evidence not that young adults are relatively likely to commit violent crimes, but that those who commit violent crimes are relatively likely to be young adults. App. 47. That is unsurprising since undisputed evidence showed that *only 0.58%* of young adults were arrested for violent crimes in 2010. App. 83. That pales in comparison even to the

2% correlation this Court deemed “unduly tenuous” to allow “maleness ... to serve as a proxy for drinking and driving” when it rejected Oklahoma’s gender-based restriction on the purchase of 3.2% beer. *See Craig v. Boren*, 429 U.S. 190, 201–02 (1976). If a 2% correlation cannot satisfy intermediate scrutiny when fundamental rights are *not* at stake, *id.* at 202, then surely a paltry 0.58% correlation is manifestly insufficient to justify an age-based restriction on the fundamental right to keep and bear arms. Yet rather than even attempt to distinguish *Craig*, the panel ignored this glaring evidentiary problem in favor of deferring to Congress’ “predictive judgments” that young adults “are prone to violent crime.” App. 54 & n.21.

And that just scratches the surface of the flaws in the decision below. The court also posited, for instance, that because *Heller* deemed “laws imposing conditions and qualifications on the commercial sale of arms” “presumptively lawful,” *Heller*, 554 U.S. at 626–27 & n.26, *every* law imposing *any* kind of restriction on handgun purchases—even, as here, a near-total ban—is “presumptively lawful,” no matter its impact on Second Amendment rights. App. 44. (The panel begrudgingly conceded, with considerable understatement, that “[i]t is not clear that the Court had an age qualification in mind when it penned that sentence.” App. 44.) The court maintained that an age-based restriction does not seriously burden constitutional rights because those to whom it applies “will soon grow up and out of its reach.” App. 45. The court suggested that the government’s case for justifying the ban as a crime-prevention measure was *bolstered* by the fact that it achieves the utterly

irrational result of precluding young adults from engaging in the most common and closely regulated handgun transactions, but leaves them free to obtain handguns at garage sales. App. 47–50. The court even deemed lesser scrutiny particularly appropriate because, “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.” App. 41. That a law abridges the constitutional rights of a discrete minority is typically cause for consternation, not commendation.

It would be one thing if this remarkable decision were the exception to the post-*Heller* norm. But this case is no outlier. It is paradigmatic of the lengths to which lower courts have gone to avoid the necessary implications of *Heller* and *McDonald*. Indeed, the prevailing methodology has led one commentator to observe that it is Justice Breyer’s dissent in *Heller*, not Justice Scalia’s majority’s opinion, that has become the touchstone of Second Amendment analysis. See Allen Rostron, *Justice Breyer’s Triumph in the Third Battle over the Second Amendment*, 80 Geo. Wash. L. Rev. 703 (2012). As the *Heller* majority correctly predicted, that “interest-balancing” approach has proven so malleable as to provide “no constitutional guarantee at all.” *Heller*, 554 U.S. at 634.

In stark contrast to that approach, a minority of courts and judges have recognized that *Heller* and *McDonald* demand a much more stringent analysis of burdens on Second Amendment rights. For instance, Judge Posner concluded for the court in holding

unconstitutional Illinois’ ban on carrying handguns outside the home that any attempt to limit the Second Amendment to the confines of the home amounts to an attempt “to repudiate th[is] Court’s historical analysis” in *Heller*. *Moore v. Madigan*, 702 F.3d 933, 935 (7th Cir. 2012). Similarly acknowledging that “it is not our role to re-litigate *Heller* or to bend it in any particular direction,” Judge Kavanaugh rejected any form of “judicial interest balancing” in favor of an approach that focuses, as *Heller* and *McDonald* did, on the “history and tradition” of the right to keep and bear arms. *Heller v. District of Columbia*, 670 F.3d 1244, 1269, 1280, 1284 (D.C. Cir. 2011) (Kavanaugh, J. dissenting). Judge Sykes likewise has reiterated that the approach courts are applying merely “pay[s] lip service” to the burden that *Heller* and *McDonald* place on the government to “justif[y] the application of laws that criminalize the exercise of enumerated rights.” *United States v. Skoien*, 614 F.3d 638, 654 (7th Cir. 2010) (en banc) (Sykes, J., dissenting). Like the six judges dissenting from the denial of rehearing en banc on this case, those of this minority view have recognized that the prevailing mode of Second Amendment analysis “does not take seriously *Heller*’s methodology and reasoning.” App. 61.

This case provides a compelling vehicle for this Court to correct the pervasive errors in the approach that has become so common in the lower courts. As a result of the federal ban and the decision below, law-abiding young adults throughout the Nation are being denied access to the quintessential means for exercising the fundamental right this Court recognized in *Heller* and *McDonald*. And the Fifth

Circuit has already relied on this erroneous decision to justify another equally categorical restriction on the Second Amendment rights of young adults. *See Nat'l Rifle Ass'n of Am., Inc. v. McCraw*, --- F.3d ---, 2013 WL 2156571 (5th Cir. May 20, 2013) (upholding state law that prohibits 18-to-20-year-olds from carrying handguns in public). Significant procedural hurdles also make further percolation of this particular issue impractical, as the very individuals whose rights are denied by the federal ban often age out of the restrictions before litigation can conclude. Here, the temporal problem has been alleviated by, among other things, the participation of the NRA, which seeks to vindicate the rights of its young adult members throughout the Nation. But the NRA likely will face collateral estoppel challenges should it attempt to help facilitate similar litigation in other forums.

Indeed, quite remarkably, the government has consistently insisted throughout this litigation that *no one* has standing to challenge the federal ban. In its view, law-abiding adults under the age of 21 are not injured by the ban *at all* because, among other things, it does not foreclose *every conceivable* means by which they might obtain handguns. *See* App. 12, 94. Relying on the same dubious logic, the government has likewise maintained that the NRA's young adult members have no legally cognizable interest for the NRA to represent on their behalf. *See* App. 10–13, 95–99. The government has even insisted that the vendors who are precluded from selling handguns to young adults have no legally cognizable interest in the constitutionality of this direct restriction on their businesses. *But see Craig*,

429 U.S. at 195 (concluding that vendor not only has standing to challenge age-based restriction on sales, but also to assert rights of third parties affected by restriction). The government's extraordinary efforts to prevent law-abiding adults from even asserting—let alone vindicating—their Second Amendment rights confirm the need for this Court to grant certiorari to hold this nationwide, categorical ban on meaningful access to the quintessential means to exercise the right to keep and bear arms unconstitutional and restore the Second Amendment to the fundamental status to which it is entitled.

CONCLUSION

For the reasons set forth above, this Court should grant the petition for certiorari.

Respectfully submitted,

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Inc. v. Bureau of Alcohol, Tobacco,
Firearms, and Explosives,*
L-10-00140 (Sept. 29, 2011)..... App-107

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Appendix A

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 11-10959

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

Plaintiffs-Appellant

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
D.C. Docket No. 5:10-CV-140-C

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

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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

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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

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

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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 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

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 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).

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

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

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)).

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.*

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.

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 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

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 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,

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. 2011) (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 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.

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).

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

If the challenged law burdens conduct that falls outside the Second Amendment’s scope, then the law

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.* 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.

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 (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*,

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.

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 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 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

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

(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 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

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.

for preventing the acquisition of the specified firearms by persons under such ages. However, under the title, a minor or juvenile 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 virtue (i.e., the virtuous citizenry),” and that “[o]ne implication of this emphasis on the virtuous citizen is that 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

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).

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.

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. *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,

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)).

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

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.

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

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

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. Calicutt*, 69 Tenn. 714 (1878)). Cooley 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, *Calicutt*, 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

Thirty-five States have Second Amendment analogues in their respective constitutions.

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 Al. 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 Calicutt*, 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

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 bar is unavailing. First, the right to arms is not coextensive 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 Preexisting Status or Rights*, 75 A.L.R. 3d 228 § 3 (1977). The

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 prohibits commercial handgun sales to 18-to-20-year-

terms “majority” and “minority” lack content without reference to the right at issue. Seventeen-year-olds may not vote or serve in the 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.

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 misdemeanor-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

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.

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 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.”).

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 ‘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 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 GunInterdiction Initiative
(YCGII) paint a disturbing picture of

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)).

crimegun activity by persons under 21. In the most recent YCGII TraceAnalysis 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}

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-

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

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 “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.”).

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, 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.

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Appendix B

**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
D.C. Docket No. 5:10-CV-140-C

Filed: April 30, 2013
(Opinion October 25, 2012, 700 F.3d 185)

OPINION FOR REHEARING EN BANC

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

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

Amendment. 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

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

panel states, during that part of the discussion, that “Congress could have sought to prohibit all persons under 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 “non-exclusive 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 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.

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.

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 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

⁴ Tench Coxe, “A Pennsylvanian, No. 3,” *Pennsylvania Gazette*, Feb. 20, 1788.

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).

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 service in every state became eighteen.⁸ Almost every state

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

⁷ *Id.* at 8.

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 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*).

adopted the federal Militia Act of 1792 by reference and began using its age structure.⁹ The duty range in the Militia Act, 18 to 45 years, was 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 sixteen¹¹ and, more importantly,

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.

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*).

New Jersey's militia age in 1792 was eighteen.¹² The 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

¹² See note 7, *supra*; see also Ch. CCCCXXXIII, A Supplement to the Act, Intituled, ‘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 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).

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 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

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.

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

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).

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 *disarmed*—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 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

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.

²² Cramer, *supra* note 6, at 30–34.

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 death penalty; regulations on gun ownership by felons was, therefore, a non-issue.²⁴ Indeed, early in the Republic,

²³ Cornell & DeDino, *supra* note 19, at 510–12.

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

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 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

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).

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 . . .”).

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 married³² and in Iowa any married person was of age (and this in a time when the average age of marriage was quite 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

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).

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

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.

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 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.

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Appendix C

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

No. 5:10-CV-140-C

REBEKAH JENNINGS; BRENNAN HARMON; ANDREW
PAYNE; NATIONAL RIFLE ASSOCIATION,

Plaintiffs,

v.

THE BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND
EXPLOSIVES, et al.,

Defendants.

September 29, 2011

ORDER

On this date, the Court considered:

- (1) Defendants Bureau of Alcohol, Tobacco, Firearms and Explosives; Kenneth E. Melson, in his official capacity as Acting Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives; and Eric H. Holder, Jr., in his official capacity as Attorney General of the United States' ("Defendants") Motion to Dismiss or, in the Alternative, for Summary Judgment, Brief, and Appendix, filed December 22, 2010;

- (2) Plaintiffs' Response and Cross-Motion for Summary Judgment, Brief, and Appendix, filed January 28, 2011;
- (3) Defendants' Combined Reply in Support of their Motion to Dismiss or, in the Alternative, for Summary Judgment and Response to Plaintiffs' Cross-Motion for Summary Judgment, Brief, and Appendix, filed April 6, 2011;
- (4) Plaintiffs' Reply in Support of Plaintiffs' Cross-Motion for Summary Judgment, filed May 18, 2011;
- (5) Defendants' Notice of Recent Authority, filed May 12, 2011;
- (6) Plaintiffs' Notice of Supplemental Authority, filed July 18, 2011;
- (7) Defendants' Response, filed July 22, 2011; and
- (8) 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, filed January 28, 2011.

After considering the relevant arguments and authorities, the Court DENIES Defendants' Motion to Dismiss Pursuant to Rule 12(b)(1), GRANTS Defendants' Motion for Summary Judgment, DENIES as moot Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6), and DENIES Plaintiffs' Cross-Motion for Summary Judgment.

I. FACTS

a. Preliminary Statement

Plaintiffs bring this action for declaratory judgment and injunctive relief challenging the constitutionality of federal statutes and regulations that ban the sale by federal firearm license holders (“FFLs”) of handguns and handgun ammunition to persons under the age of twenty-one (“the ban”). The crux of Plaintiffs’ allegations is that the ban violates both the Second Amendment to the United States Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

b. Statutory Scheme

The statutes and regulations that implement the ban, and thus are the subject of this lawsuit, are the following:

- (1) 18 U.S.C. § 922(b)(1), which states: “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, to any individual who the licensee knows or has reasonable cause to believe is less than twenty-one years of age.”
- (2) 18 U.S.C. § 922(c)(1), which prescribes that “a licensed importer, licensed manufacturer, or licensed dealer may sell a firearm to a person

who does not appear in person at the licensee's business premises . . . only if" the person signs a sworn statement attesting "that, in the case of any firearm other than a shotgun or a rifle, I am twenty-one years or more of age."

- (3) 27 C.F.R. § 478.99(b)(1), which provides: "A licensed importer, licensed manufacturer, licensed dealer, or licensed collector shall not sell or deliver any firearm or ammunition . . . 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."
- (4) 27 C.F.R. §§ 478.124(a), 478.96(b), which require that federal firearms licensees obtain a signed copy of Form 4473 before transferring a handgun to a purchaser. Form 4473 states that the information provided therein "will be used to determine whether [the transferee is] prohibited under law from receiving a firearm" and instructs licensees that it is "unlawful for a licensee to sell any firearm other than a shotgun or rifle to any person under the age of 21."¹

Each of these laws operates in reference to FFLs. Title 18, Section 922(a)(1)(A) of the U.S. Code requires any person who "engage[s] in the business of importing, manufacturing, or dealing in firearms" to

¹ Plaintiffs do not challenge 18 U.S.C. § 922(x), which prohibits anyone, not just FFLs, from transferring handguns to individuals under 18 and also prohibits individuals under 18 from possessing handguns, subject to specified exceptions.

obtain a federal firearms license. A firearms “dealer,” in turn, is any person who, inter alia, “engage[s] in the business of selling firearms at wholesale or retail,” including pawnbrokers. 18 U.S.C. § 921(a)(11)(A), (C). A person “engage[s] in the business” of selling firearms, and therefore must obtain a federal firearms license, if he “devotes time, attention, and labor to dealing in firearms 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(a)(21)(C). In other words, anyone who engages in the firearms business regularly must become an FFL, and the ban therefore forecloses 18- to 20-year-olds from gaining access to the entire licensed market for handguns and handgun ammunition. The ban, however, does not apply to other avenues such as gifts or to those who sell arms on an irregular basis only.²

c. Plaintiffs

Rebekah Jennings is a 19-year-old resident of Boerne, Texas. She is a decorated competitive pistol shooter but does not own a pistol of her own and must rely on her father to loan her his pistol for practice and competition. Jennings reportedly desires to purchase her own handgun from an FFL, both for

² The Court emphasizes that the ban does not prohibit the possession of handguns or handgun ammunition by 18- to 20-year-olds. Those in this age group are free to acquire handguns and ammunition from sources other than FFLs. Even still, the ban is temporal in nature, meaning the prohibition expires once the would-be buyer reaches the age of 21.

her self-protection and to further her interest in competitive pistol shooting.

Brennan Harmon is a 19-year-old resident of San Antonio, Texas, where she lives alone in an apartment. There have been shooting incidents in apartment complexes that neighbor Harmon's apartment. Harmon's family owns several firearms, and her father has instructed her in their proper and safe handling. Harmon currently owns a rifle and a shotgun, but she does not own a handgun. She finds the long guns insufficient for self-defense. Harmon therefore desires to own a handgun for self-defense and other lawful purposes, and she would purchase one from an FFL if such a transaction were not prohibited under the ban.

Andrew Payne is an 18-year-old resident of Lubbock, Texas. Payne and his father visit shooting ranges for recreation and to gain proficiency in the effective use of firearms, including handguns. Payne does not own a handgun, but he would purchase a handgun and handgun ammunition if such a transaction were not illegal under the ban.

The National Rifle Association ("NRA") is a membership organization committed to protecting and defending the fundamental right to keep and bear arms, as well as the safe and responsible use of firearms for self-defense and other lawful purposes. Many of the NRA's members are 18-to-20 years old or will enter that age bracket during the pendency of this litigation. Under the ban, these members are unable to purchase a handgun or handgun ammunition from an FFL.

One representative NRA member in this class is Halie Fewkes, a 19-year-old resident of Washington. She lives in Pullman, where she attends college. She plans to live in an off-campus apartment next semester, and she would like to purchase a new handgun to keep in that apartment for self-defense and for use in target shooting. The ban, however, prevents her from purchasing a handgun from a licensed dealer. She is not aware of anyone she knows selling a used firearm, and she is uncomfortable with the idea of engaging in a face-to-face transaction with an unlicensed stranger.

The NRA's licensed dealer members also allege to be harmed by the ban, as the law prohibits them from making profitable handgun sales and handgun ammunition sales to otherwise qualified 18- to 20-year-olds. Roger Koeppe and Paul White are two such members; they own and operate FFLs in Houston, Texas, and Richmond, Utah, respectively.

II. STANDARDS

a. Motion to Dismiss

A court must dismiss a claim pursuant to a Rule 12(b)(1) motion if it lacks subject matter jurisdiction over the claim asserted in the complaint. Fed. R. Civ. P. 12(b)(1). If a Rule 12(b)(1) motion is filed conjunctively with any other Rule 12 motions, the court should consider the Rule 12(b)(1) attack first. *See Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). The party seeking the federal forum bears the burden of establishing jurisdiction. *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 916 (5th Cir. 2001).

Standing is one aspect of justiciability, and a federal court's jurisdiction is invoked only when the plaintiff has actually suffered injury resulting from the conduct of the defendant. *Warth v. Seldin*, 422 U.S. 490, 499 (1975); see *Lewis v. Knutson*, 699 F.2d 230, 236 (5th Cir. 1983) (“[T]he constitutional limitation continues to arise when plaintiff fails to allege a personalized injury.”). Additionally, because Article III standing requires an injury-in-fact caused by a defendant's challenged conduct that is redressable by a court, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992), a party is ordinarily denied standing to assert the rights of third persons. See *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263–64 (1977).

b. Motion for Summary Judgment

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 nonmoving 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

Defendants challenge the standing to bring suit of both firearms dealers subject to the ban’s criminal prohibition and the 18- to 20-year-olds whose constitutional rights are allegedly burdened by the statutory scheme. 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 or official violation of law.” *Summers v. Earth Island Inst.*, 555 U.S. 488, 129 S. Ct. 1142, 1148 (2009); *see* U.S. Const. art. III, § 1. The doctrine of standing enforces this limitation. *Summers*, 129 S. Ct. at 1149; *Lujan*, 504 U.S. at 559–60.

In general, individuals who allege that their constitutional rights are burdened by a law have standing to sue. In *Doe v. Bolton*, for example, the Supreme Court held that not only “Georgia-licensed doctors consulted by pregnant women” but also a

pregnant woman herself has standing to challenge a statute criminalizing the provisions of most abortions even though “[t]he physician [was] the one against whom these criminal statutes directly operate[d]” 410 U.S. 179, 187–88 (1973); *see also Roe v. Wade*, 410 U.S. 113, 124 (1973) (holding that “a pregnant single woman thwarted by the Texas criminal abortion laws, had standing to challenge those statutes.”). Similarly, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Court allowed a challenge to a statute prohibiting pharmacists from advertising their prices for prescription drugs brought “not by one directly subject to its prohibition, that is, a pharmacist, but by prescription drug consumers who claim they would greatly benefit if the prohibition were lifted and advertising freely allowed.” 425 U.S. 748, 753 (1976).

The Individual Plaintiffs do not own handguns, but each of them desires to obtain one for lawful purposes, including self-defense. They have all identified a specific handgun they would purchase from an FFL if lawfully permitted to do so. The FFLs from whom Harmon and Payne would purchase their handguns have refused to sell them handguns in the past because they are under 21. Were the Court to hold that the ban is unconstitutional, it could provide the relief that Plaintiffs seek. Therefore, the Individual Plaintiffs have standing to sue even though they have not been threatened with or been subject to prosecution under the ban.

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. *Arlington Heights*, 429 U.S. at 264. Nevertheless, out of an abundance of caution, the Court will address whether the NRA, as an association or organization, has standing as well.

An association may have standing solely as the representative of its members, even in the absence of injury to itself. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 342 (1972). The test for representational standing requires that

- (1) the members of the association would have standing individually,
- (2) the interests pursued through the litigation are germane to the association's purpose, and
- (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Nat'l Treasury Emps. Union v. United States Dep't of the Treasury, 25 F.3d 237, 241 (5th Cir. 1994) (citing *Hunt*, 432 U.S. at 343).

The NRA has a stated interest in vindicating the Second Amendment rights of its membership, and this suit does not require the participation of its individual members in light of the equitable relief it seeks. Furthermore, in addition to Jennings, Harmon, and Payne, whom the Court has held have standing and each of whom is an NRA member, the NRA presents evidence of several other similarly situated members between the ages of 18 and 20 who allege to have been injured by the ban in ways similar to those asserted by the Individual Plaintiffs.

Therefore, the NRA has standing to bring this suit on behalf of its law-abiding 18- to 20-year-old members.

The NRA also brings this suit on behalf of its FFL, or vendor, members. As the Supreme Court has explained, “vendors and those in like positions have been uniformly permitted to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function.” *Craig v. Boren*, 429 U.S. 190, 195 (1976) (collecting cases). In *Craig*, for example, the Supreme Court held that a licensed vendor of low-alcohol beer had standing to challenge an Oklahoma statute that barred the vendor from selling such beer to 18- to 20-year-old men but allowed its sale to 18- to 20-year-old women. As the Court noted:

The legal duties created by the statutory sections under challenge are addressed directly to vendors such as appellant. She is obliged either to heed the statutory discrimination, thereby incurring a direct economic injury through the constriction of her buyers’ market, or to disobey the statutory command and suffer, in the words of Oklahoma’s Assistant Attorney General, “sanctions and perhaps loss of license.” This Court repeatedly has recognized that such injuries establish the threshold requirements of a “case or controversy” mandated by Art. III.

Id. at 194 (internal citations omitted). The Court further held that “[a]s a vendor with standing to challenge the lawfulness of [the sales restriction],

appellant . . . is entitled to assert those concomitant rights of third parties that would be ‘diluted or adversely affected’ should her constitutional challenge fail and the statutes remain in force.” *Id.* at 195. “Otherwise,” explained the Court, “the threatened imposition of governmental sanctions might deter appellant . . . and other similarly situated vendors from selling 3.2% beer to young males, thereby ensuring that ‘enforcement of the challenged restriction against the [vendor] would result indirectly in the violation of third parties’ rights.” *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 510 (1975)).

Both the Supreme Court and the Fifth Circuit have repeatedly applied this rationale to hold that vendors and service providers have standing to challenge sales and similar restrictions that burden their would-be customers’ constitutional rights. *See, e.g., Carey v. Population Servs. Int’l*, 431 U.S. 678, 681–84 (holding that “corporation primarily engaged in the mail-order retail sale of nonmedical contraceptive devices” had standing to challenge a statute that made it a crime, *inter alia*, “for anyone other than a licensed pharmacist to distribute contraceptives to persons 16 or over” and could assert the privacy rights of its would-be customers); *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 740, 743 (5th Cir. 2008) (vendor had standing to challenge statute criminalizing the sale of “a device designed or marketed for sexual stimulation” and could assert the constitutional rights of its customers); *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 333–34 (5th Cir. 1981) (holding that plaintiffs who wished to open an abortion clinic had standing to

challenge an adverse zoning decision and could assert the rights of their would-be clients); *see generally United States v. Coil*, 442 F.3d 912, 915 n.2 (5th Cir. 2006) (“The Supreme Court has consistently upheld the standing of vendors to challenge the constitutionality of statutes on their customers’ behalf where those statutes are directed at the activity of the vendors.”).

The ban prevents 18- to 20-year-olds from purchasing handguns and handgun ammunition from FFLs who would likely purchase these items were it legal to do so. The NRA presents evidence from its vendor members that they have lost profits from refusing to sell handguns to 18- to 20-year-olds and would sell handguns to law-abiding citizens in this age range if it were legal to do so. The fact that the ban restricts a would-be buyers’ market demonstrates a judicially cognizable injury directly affecting FFLs. *See Craig*, 429 U.S. at 194. As such, the NRA also has standing to bring this suit on behalf of its FFL members. Therefore, Defendants’ Motion to Dismiss pursuant to Rule 12(b)(1) is DENIED.

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 guarantees an individual right to possess and carry weapons. 554 U.S. 570, 592 (2008). The Court stated, however, that the right to bear arms is not absolute:

Like most 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. 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. Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, *nothing 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*.

Heller, 554 U.S. at 626–27 (citations omitted and emphasis added). In so qualifying the Second Amendment, the Court carved out conditions and qualifications on the commercial sale of arms as presumptively lawful regulatory measures. *See id.* at 627 n.26.

While this Court has found no case dealing with a post-*Heller* interpretation of the ban, most courts that have considered challenges to other above-mentioned presumptively lawful regulations have

made relatively short shrift of them. *See, e.g., United States v. Scroggins*, 599 F.3d 433, 451 (5th Cir. 2010) (post-*Heller* decision upholding as constitutional 18 U.S.C. § 922(g)(1), which criminalizes the possession of a firearm by a felon); *United States v. Dorosan*, 350 F. App'x 874, 875–76 (5th Cir. 2009) (upholding as constitutional under the “sensitive places” exception in *Heller* 39 C.F.R. § 232.1(l), which criminalizes bringing a handgun onto property belonging to the United States Postal Service); *United States v. McRobie*, No. 08-4632, 2009 U.S. App. LEXIS 617, at *2–3 (4th Cir. 2009) (post-*Heller* decision upholding as constitutional 18 U.S.C. § 922(g)(4), which criminalizes the possession of a firearm by a person committed to a mental institution). The Court finds no reason to treat laws imposing conditions and qualifications on the commercial sale of arms, such as the ban, any differently.

Outside the list of examples of presumptively lawful limitations, neither *Heller* nor its companion case, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), directly addresses the buying and selling of firearms, let alone holds this to be at the “core” of the Second Amendment right. The Fifth Circuit, however, has recognized a distinction between the right to “keep and bear arms” and “dealing in firearms” and has held that at least one statutory scheme related to dealing in firearms is not violative of the Second Amendment. *See United States v. King*, 532 F.2d 505, 510 (5th Cir. 1976). Although *King* was decided pre-*Heller*, its holding is likely of the nature contemplated by the Court’s articulated exceptions to the Second Amendment.

The Fifth Circuit, albeit pre-*Heller*, has also recognized that young persons do not enjoy the same guarantees of the Second Amendment as do their elders of society. In *United States v. Emerson*, the court held that the Second Amendment protects an individual right to bear arms but also noted that “felons, *infants* and those of unsound mind may be prohibited from possessing firearms.” 270 F.3d 203, 261 (5th Cir. 2001) (emphasis added); *see also id.* at 227 n.21 (quoting Robert Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 OKLA. L. REV. 65, 96 (1983) (“Colonial and English societies of the eighteenth century, as well as their modern counterparts, have excluded *infants*, idiots, lunatics, and felons [from possessing firearms].”); Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to “Bear Arms”*, 49 LAW & CONTEMP. PROBS. 151 (1986) (“violent criminals, *children*, and those of unsound mind may be deprived of firearms . . .”) (alterations in the original and emphasis added)). The exception to the right to bear arms carved out for “infants” in *Emerson* seems to be congruent with the notion in *Heller* that conditions and qualifications on the commercial sale of arms are presumptively lawful regulatory measures.

Considering *Heller*’s specific exception of conditions and qualifications on the commercial sale of arms from the individual right to keep and bear arms, along with the Fifth Circuit’s treatment of the distinction between possession and dealing of firearms and its exempting young persons from Second Amendment guarantees, the Court is of the opinion that the ban does not run afoul of the Second

Amendment to the Constitution. *See United States v. Rozier*, 598 F.3d 768, 771 (11th Cir. 2010) (citing *Heller*, 128 S. Ct. at 2817) (suggesting that, under a proper reading of *Heller*, the right to bear arms is enjoyed only by those not disqualified from the exercise of the Second Amendment rights; disqualification likely includes those affected by the aforementioned presumptively lawful regulatory measures).

In essence, it is within the purview of Congress, not the courts, to weigh the relative policy considerations and to make decisions as to the age of the customer to whom those licensed by the federal government may sell handguns and handgun ammunition. *See Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963) (“Under the system of government created by our Constitution, it is up to the legislatures, not courts, to decide on the wisdom and utility of legislation.”). Therefore, with regard to the Second Amendment issue, Defendants’ Motion for Summary Judgment is GRANTED, Defendants’ Motion to Dismiss Pursuant to Rule 12(b)(6) is DENIED as moot, 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. Although this clause applies expressly to the states only, the Supreme Court has held that its protections are encompassed by the Due Process Clause of the Fifth Amendment and are therefore applicable to the federal government as well. *Bolling v. Sharpe*, 347

U.S. 497, 498–99 (1954). Plaintiffs claim that the ban violates their right to equal protection of the laws guaranteed under the Due Process Clause of the Fifth Amendment. The focus of Plaintiffs’ claim is the allegedly unequal treatment effected by the ban between 18- to 20-year-olds and those over the age of 20.

“[A]ge is not a suspect classification under the Equal Protection Clause.” *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000). Therefore, the government “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.”³ *Id.* The Constitution permits legislators 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.

Defendants point to evidence that Congress, in passing the ban, found “that there is a causal relationship between the easy availability of firearms other than rifles and shotguns, and juvenile and youthful criminal behavior, and that such firearms have been widely *sold by federally licensed importers and dealers* to emotionally immature, or thrill-bent juveniles and minors prone to criminal behavior.” 1968 U.S.C.C.A.N. 2112, 2197–98 (emphasis added). In so finding, Congress passed the ban in an attempt

³ Because the Court has held that Plaintiffs’ claims do not raise Second Amendment concerns, their Equal Protection argument need not be evaluated based on any heightened standard of scrutiny.

to “increase safety and strengthen local regulation” by “[e]stablishing minimum ages of 18 for the purchase of long guns and 21 for the purchase of handguns.” *Id.* at 2256.

Congress identified a legitimate state interest—public safety—and passed legislation that is rationally related to addressing that issue—the ban; 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.’”)). Therefore, with regard to the Equal Protection issue, Defendants’ Motion for Summary Judgment is GRANTED, Defendants’ Motion to Dismiss Pursuant to Rule 12(b)(6) is DENIED as moot, and Plaintiffs’ Motion for Summary Judgment is DENIED.

IV. CONCLUSION

For the reasons stated herein,

- (1) Defendants’ Motion to Dismiss Pursuant to Rule 12(b)(1) is DENIED;
- (2) as to the Second Amendment issue,
 - (a) Defendants’ Motion for Summary Judgment is GRANTED,
 - (b) Defendants’ Motion to Dismiss Pursuant to Rule 12(b)(6) is DENIED as moot, and

- (c) Plaintiffs' Motion for Summary Judgment is DENIED; and
- (3) as to the Equal Protection issue,
 - (a) Defendants' Motion for Summary Judgment is GRANTED,
 - (b) Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6) is DENIED as moot, and
 - (c) Plaintiffs' Motion for Summary Judgment is DENIED.

SO ORDERED.

Dated September 29, 2011.

SAM R. CUMMINGS
UNITED STATES DISTRICT JUDGE

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Appendix D

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

No. 5:10-CV-140-C

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

Plaintiffs,

v.

THE BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND
EXPLOSIVES, et al.,

Defendants.

September 29, 2011

JUDGMENT

For the reasons stated in the Court's order of even date,

IT IS ORDERED, ADJUDGED, AND DECREED that Plaintiffs, Rebekah Jennings, Brennan Harmon, Andrew Payne, and National Rifle Association of America, Inc., take nothing as against Defendants, the Bureau of Alcohol, Tobacco, Firearms and Explosives; Kenneth E. Melson, in his official capacity as Acting Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives; and Eric H. Holder, Jr., in his official capacity as Attorney

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General of the United States. Costs of court are taxed against Plaintiffs.

Dated September 29, 2011.

SAM R. CUMMINGS
UNITED STATES DISTRICT JUDGE

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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. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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.

18 U.S.C. § 921
Definitions

(a) As used in this chapter--

(1) The term “person” and the term “whoever” include any individual, corporation, company, association, firm, partnership, society, or joint stock company.

(2) The term “interstate or foreign commerce” includes commerce between any place in a State and any place outside of that State, or within any possession of the United States (not including the Canal Zone) or the District of Columbia, but such term does not include commerce between places within the same State but through any place outside of that State. The term “State” includes the District of Columbia, the Commonwealth of Puerto Rico, and the possessions of the United States (not including the Canal Zone).

(3) The term “firearm” means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.

(4) The term “destructive device” means--

(A) any explosive, incendiary, or poison gas--

(i) bomb,

(ii) grenade,

(iii) rocket having a propellant charge of more than four ounces,

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(iv) missile having an explosive or incendiary charge of more than one-quarter ounce,

(v) mine, or

(vi) device similar to any of the devices described in the preceding clauses;

(B) any type of weapon (other than a shotgun or a shotgun shell which the Attorney General finds is generally recognized as particularly suitable for sporting purposes) by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter; and

(C) any combination of parts either designed or intended for use in converting any device into any destructive device described in subparagraph (A) or (B) and from which a destructive device may be readily assembled.

The term “destructive device” shall not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 4684(2), 4685, or 4686 of title 10; or any other device which the Attorney General finds is not likely to be used as a weapon, is an antique, or is a rifle which the owner intends to use solely for sporting, recreational or cultural purposes.

(5) The term “shotgun” means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of an explosive to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger.

(6) The term “short-barreled shotgun” means a shotgun having one or more barrels less than eighteen inches in length and any weapon made from a shotgun (whether by alteration, modification or otherwise) if such a weapon as modified has an overall length of less than twenty-six inches.

(7) The term “rifle” means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of an explosive to fire only a single projectile through a rifled bore for each single pull of the trigger.

(8) The term “short-barreled rifle” means a rifle having one or more barrels less than sixteen inches in length and any weapon made from a rifle (whether by alteration, modification, or otherwise) if such weapon, as modified, has an overall length of less than twenty-six inches.

(9) The term “importer” means any person engaged in the business of importing or bringing firearms or ammunition into the United States for purposes of sale or distribution; and the term “licensed importer” means any such person licensed under the provisions of this chapter.

(10) The term “manufacturer” means any person engaged in the business of manufacturing firearms or

ammunition for purposes of sale or distribution; and the term “licensed manufacturer” means any such person licensed under the provisions of this chapter.

(11) The term “dealer” means (A) any person engaged in the business of selling firearms at wholesale or retail, (B) any person engaged in the business of repairing firearms or of making or fitting special barrels, stocks, or trigger mechanisms to firearms, or (C) any person who is a pawnbroker. The term “licensed dealer” means any dealer who is licensed under the provisions of this chapter.

(12) The term “pawnbroker” means any person whose business or occupation includes the taking or receiving, by way of pledge or pawn, of any firearm as security for the payment or repayment of money.

(13) The term “collector” means any person who acquires, holds, or disposes of firearms as curios or relics, as the Attorney General shall by regulation define, and the term “licensed collector” means any such person licensed under the provisions of this chapter.

(14) The term “indictment” includes an indictment or information in any court under which a crime punishable by imprisonment for a term exceeding one year may be prosecuted.

(15) The term “fugitive from justice” means any person who has fled from any State to avoid prosecution for a crime or to avoid giving testimony in any criminal proceeding.

(16) The term “antique firearm” means--

(A) any firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar

type of ignition system) manufactured in or before 1898; or

(B) any replica of any firearm described in subparagraph (A) if such replica--

(i) is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition, or

(ii) uses rimfire or conventional centerfire fixed ammunition which is no longer manufactured in the United States and which is not readily available in the ordinary channels of commercial trade; or

(C) any muzzle loading rifle, muzzle loading shotgun, or muzzle loading pistol, which is designed to use black powder, or a black powder substitute, and which cannot use fixed ammunition. For purposes of this subparagraph, the term "antique firearm" shall not include any weapon which incorporates a firearm frame or receiver, any firearm which is converted into a muzzle loading weapon, or any muzzle loading weapon which can be readily converted to fire fixed ammunition by replacing the barrel, bolt, breechblock, or any combination thereof.

(17)(A) The term "ammunition" means ammunition or cartridge cases, primers, bullets, or propellant powder designed for use in any firearm.

(B) The term "armor piercing ammunition" means--

(i) a projectile or projectile core which may be used in a handgun and which is constructed entirely (excluding the presence

of traces of other substances) from one or a combination of tungsten alloys, steel, iron, brass, bronze, beryllium copper, or depleted uranium; or

(ii) a full jacketed projectile larger than .22 caliber designed and intended for use in a handgun and whose jacket has a weight of more than 25 percent of the total weight of the projectile.

(C) The term “armor piercing ammunition” does not include shotgun shot required by Federal or State environmental or game regulations for hunting purposes, a frangible projectile designed for target shooting, a projectile which the Attorney General finds is primarily intended to be used for sporting purposes, or any other projectile or projectile core which the Attorney General finds is intended to be used for industrial purposes, including a charge used in an oil and gas well perforating device.

(18) The term “Attorney General” means the Attorney General of the United States¹

(19) The term “published ordinance” means a published law of any political subdivision of a State which the Attorney General determines to be relevant to the enforcement of this chapter and which is contained on a list compiled by the Attorney General, which list shall be published in the Federal Register, revised annually, and furnished to each licensee under this chapter.

¹ So in original. Probably should be followed by a period.

(20) The term “crime punishable by imprisonment for a term exceeding one year” does not include--

(A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or

(B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

(21) The term “engaged in the business” means--

(A) as applied to a manufacturer of firearms, a person who devotes time, attention, and labor to manufacturing firearms as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of the firearms manufactured;

(B) as applied to a manufacturer of ammunition, a person who devotes time, attention, and labor to manufacturing ammunition as a regular course of trade or business with the principal objective of livelihood

and profit through the sale or distribution of the ammunition manufactured;

(C) as applied to a dealer in firearms, as defined in section 921(a)(11)(A), a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms, but such term shall 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;

(D) as applied to a dealer in firearms, as defined in section 921(a)(11)(B), a person who devotes time, attention, and labor to engaging in such activity as a regular course of trade or business with the principal objective of livelihood and profit, but such term shall not include a person who makes occasional repairs of firearms, or who occasionally fits special barrels, stocks, or trigger mechanisms to firearms;

(E) as applied to an importer of firearms, a person who devotes time, attention, and labor to importing firearms as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of the firearms imported; and

(F) as applied to an importer of ammunition, a person who devotes time, attention, and labor to importing ammunition as a regular course of trade or business with the principal objective of

livelihood and profit through the sale or distribution of the ammunition imported.

(22) The term “with the principal objective of livelihood and profit” means that the intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection: *Provided*, That proof of profit shall not be required as to a person who engages in the regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism. For purposes of this paragraph, the term “terrorism” means activity, directed against United States persons, which--

(A) is committed by an individual who is not a national or permanent resident alien of the United States;

(B) involves violent acts or acts dangerous to human life which would be a criminal violation if committed within the jurisdiction of the United States; and

(C) is intended--

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by assassination or kidnapping.

(23) The term “machinegun” has the meaning given such term in section 5845(b) of the National Firearms Act (26 U.S.C. 5845(b)).

(24) The terms “firearm silencer” and “firearm muffler” mean any device for silencing, muffling, or diminishing the report of a portable firearm, including any combination of parts, designed or redesigned, and intended for use in assembling or fabricating a firearm silencer or firearm muffler, and any part intended only for use in such assembly or fabrication.

(25) The term “school zone” means--

(A) in, or on the grounds of, a public, parochial or private school; or

(B) within a distance of 1,000 feet from the grounds of a public, parochial or private school.

(26) The term “school” means a school which provides elementary or secondary education, as determined under State law.

(27) The term “motor vehicle” has the meaning given such term in section 13102 of title 49, United States Code.

(28) The term “semiautomatic rifle” means any repeating rifle which utilizes a portion of the energy of a firing cartridge to extract the fired cartridge case and chamber the next round, and which requires a separate pull of the trigger to fire each cartridge.

(29) The term “handgun” means--

(A) a firearm which has a short stock and is designed to be held and fired by the use of a single hand; and

(B) any combination of parts from which a firearm described in subparagraph (A) can be assembled.

[(30), (31) Repealed. Pub. L. 103-322, Title XI, § 110105(2), Sept. 13, 1994, 108 Stat. 2000]

(32) The term “intimate partner” means, with respect to a person, the spouse of the person, a former spouse of the person, an individual who is a parent of a child of the person, and an individual who cohabitates or has cohabited with the person.

(33)(A) Except as provided in subparagraph (C),² the term “misdemeanor crime of domestic violence” means an offense that--

(i) is a misdemeanor under Federal, State, or Tribal³ law; and

(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim

(B)(i) A person shall not be considered to have been convicted of such an offense for purposes of this chapter, unless--

(I) the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case; and

² So in original. No subparagraph (C) has been enacted.

³ So in original. Probably should not be capitalized.

(II) in the case of a prosecution for an offense described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either

(aa) the case was tried by a jury, or

(bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.

(ii) A person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

(34) The term “secure gun storage or safety device” means--

(A) a device that, when installed on a firearm, is designed to prevent the firearm from being operated without first deactivating the device;

(B) a device incorporated into the design of the firearm that is designed to prevent the operation of the firearm by anyone not having access to the device; or

(C) a safe, gun safe, gun case, lock box, or other device that is designed to be or can be used to store a firearm and that is designed to be unlocked only by means of a key, a combination, or other similar means.

(35) The term “body armor” means any product sold or offered for sale, in interstate or foreign commerce, as personal protective body covering intended to protect against gunfire, regardless of whether the product is to be worn alone or is sold as a complement to another product or garment.

(b) For the purposes of this chapter, a member of the Armed Forces on active duty is a resident of the State in which his permanent duty station is located.

18 U.S.C. § 922
Unlawful acts

(a) It shall be unlawful--

(1) for any person--

(A) except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce; or

(B) except a licensed importer or licensed manufacturer, to engage in the business of importing or manufacturing ammunition, or in the course of such business, to ship, transport, or receive any ammunition in interstate or foreign commerce;

(2) for any importer, manufacturer, dealer, or collector licensed under the provisions of this chapter to ship or transport in interstate or foreign commerce any firearm to any person other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, except that--

(A) this paragraph and subsection (b)(3) shall not be held to preclude a licensed importer, licensed manufacturer, licensed dealer, or licensed collector from returning a firearm or replacement firearm of the same kind and type to a person from whom it was received; and this paragraph shall not be held to preclude an individual from mailing

a firearm owned in compliance with Federal, State, and local law to a licensed importer, licensed manufacturer, licensed dealer, or licensed collector;

(B) this paragraph shall not be held to preclude a licensed importer, licensed manufacturer, or licensed dealer from depositing a firearm for conveyance in the mails to any officer, employee, agent, or watchman who, pursuant to the provisions of section 1715 of this title, is eligible to receive through the mails pistols, revolvers, and other firearms capable of being concealed on the person, for use in connection with his official duty; and

(C) nothing in this paragraph shall be construed as applying in any manner in the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States differently than it would apply if the District of Columbia, the Commonwealth of Puerto Rico, or the possession were in fact a State of the United States;

(3) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector to transport into or receive in the State where he resides (or if the person is a corporation or other business entity, the State where it maintains a place of business) any firearm purchased or otherwise obtained by such person outside that State, except that this paragraph (A) shall not preclude any person who lawfully acquires a firearm by bequest or

intestate succession in a State other than his State of residence from transporting the firearm into or receiving it in that State, if it is lawful for such person to purchase or possess such firearm in that State, (B) shall not apply to the transportation or receipt of a firearm obtained in conformity with subsection (b)(3) of this section, and (C) shall not apply to the transportation of any firearm acquired in any State prior to the effective date of this chapter;

(4) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, to transport in interstate or foreign commerce any destructive device, machinegun (as defined in section 5845 of the Internal Revenue Code of 1986), short-barreled shotgun, or short-barreled rifle, except as specifically authorized by the Attorney General consistent with public safety and necessity;

(5) for any person (other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector) to transfer, sell, trade, give, transport, or deliver any firearm to any person (other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector) who the transferor knows or has reasonable cause to believe does not reside in (or if the person is a corporation or other business entity, does not maintain a place of business in) the State in which the transferor resides; except that this paragraph shall not apply to (A) the transfer, transportation, or delivery of a firearm made to carry out a bequest of a firearm to, or an

acquisition by intestate succession of a firearm by, a person who is permitted to acquire or possess a firearm under the laws of the State of his residence, and (B) the loan or rental of a firearm to any person for temporary use for lawful sporting purposes;

(6) for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter;

(7) for any person to manufacture or import armor piercing ammunition, unless--

(A) the manufacture of such ammunition is for the use of the United States, any department or agency of the United States, any State, or any department, agency, or political subdivision of a State;

(B) the manufacture of such ammunition is for the purpose of exportation; or

(C) the manufacture or importation of such ammunition is for the purpose of testing or experimentation and has been authorized by the Attorney General;

(8) for any manufacturer or importer to sell or deliver armor piercing ammunition, unless such sale or delivery--

(A) is for the use of the United States, any department or agency of the United States, any State, or any department, agency, or political subdivision of a State;

(B) is for the purpose of exportation; or

(C) is for the purpose of testing or experimentation and has been authorized by the Attorney General;¹

(9) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, who does not reside in any State to receive any firearms unless such receipt is for lawful sporting purposes.

(b) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver--

(1) 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;

(2) any firearm to any person in any State where the purchase or possession by such person of such firearm would be in violation of any State

¹ So in original. Probably should be followed with “and”.

law or any published ordinance applicable at the place of sale, delivery or other disposition, unless the licensee knows or has reasonable cause to believe that the purchase or possession would not be in violation of such State law or such published ordinance;

(3) any firearm to any person who the licensee knows or has reasonable cause to believe does not reside in (or if the person is a corporation or other business entity, does not maintain a place of business in) the State in which the licensee's place of business is located, except that this paragraph (A) shall not apply to the sale or delivery of any rifle or shotgun to a resident of a State other than a State in which the licensee's place of business is located if the transferee meets in person with the transferor to accomplish the transfer, and the sale, delivery, and receipt fully comply with the legal conditions of sale in both such States (and any licensed manufacturer, importer or dealer shall be presumed, for purposes of this subparagraph, in the absence of evidence to the contrary, to have had actual knowledge of the State laws and published ordinances of both States), and (B) shall not apply to the loan or rental of a firearm to any person for temporary use for lawful sporting purposes;

(4) to any person any destructive device, machinegun (as defined in section 5845 of the Internal Revenue Code of 1986), short-barreled shotgun, or short-barreled rifle, except as

specifically authorized by the Attorney General consistent with public safety and necessity; and

(5) any firearm or armor-piercing ammunition to any person unless the licensee notes in his records, required to be kept pursuant to section 923 of this chapter, the name, age, and place of residence of such person if the person is an individual, or the identity and principal and local places of business of such person if the person is a corporation or other business entity.

Paragraphs (1), (2), (3), and (4) of this subsection shall not apply to transactions between licensed importers, licensed manufacturers, licensed dealers, and licensed collectors. Paragraph (4) of this subsection shall not apply to a sale or delivery to any research organization designated by the Attorney General.

(c) In any case not otherwise prohibited by this chapter, a licensed importer, licensed manufacturer, or licensed dealer may sell 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) only if--

(1) the transferee submits to the transferor a sworn statement in the following form:

“Subject to penalties provided by law, I swear that, in the case of any firearm other than a shotgun or a rifle, I am twenty-one years or more of age, or that, in the case of a shotgun or a rifle, I am eighteen years or more of age; that I am not prohibited by the provisions of chapter 44 of title 18, United States Code, from receiving a firearm in

interstate or foreign commerce; and that my receipt of this firearm will not be in violation of any statute of the State and published ordinance applicable to the locality in which I reside. Further, the true title, name, and address of the principal law enforcement officer of the locality to which the firearm will be delivered are _____

Signature _____ Date _____.”

and containing blank spaces for the attachment of a true copy of any permit or other information required pursuant to such statute or published ordinance;

(2) the transferor has, prior to the shipment or delivery of the firearm, forwarded by registered or certified mail (return receipt requested) a copy of the sworn statement, together with a description of the firearm, in a form prescribed by the Attorney General, to the chief law enforcement officer of the transferee's place of residence, and has received a return receipt evidencing delivery of the statement or has had the statement returned due to the refusal of the named addressee to accept such letter in accordance with United States Post Office Department regulations; and

(3) the transferor has delayed shipment or delivery for a period of at least seven days following receipt of the notification of the acceptance or refusal of delivery of the statement.

A copy of the sworn statement and a copy of the notification to the local law enforcement officer, together with evidence of receipt or rejection of that notification shall be retained by the licensee as a part of the records required to be kept under section 923(g).

(d) It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person--

(1) is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) is a fugitive from justice;

(3) is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) has been adjudicated as a mental defective or has been committed to any mental institution;

(5) who, being an alien--

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who² has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) is subject to a court order that restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child, except that this paragraph shall only apply to a court order that--

(A) was issued after a hearing of which such person received actual notice, and at which such person had the opportunity to participate; and

(B)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) has been convicted in any court of a misdemeanor crime of domestic violence.

This subsection shall not apply with respect to the sale or disposition of a firearm or ammunition to a licensed importer, licensed manufacturer, licensed dealer, or licensed collector who pursuant to

² So in original. The word “who” probably should not appear.

subsection (b) of section 925 of this chapter is not precluded from dealing in firearms or ammunition, or to a person who has been granted relief from disabilities pursuant to subsection (c) of section 925 of this chapter.

(e) It shall be unlawful for any person knowingly to deliver or cause to be delivered to any common or contract carrier for transportation or shipment in interstate or foreign commerce, to persons other than licensed importers, licensed manufacturers, licensed dealers, or licensed collectors, any package or other container in which there is any firearm or ammunition without written notice to the carrier that such firearm or ammunition is being transported or shipped; except that any passenger who owns or legally possesses a firearm or ammunition being transported aboard any common or contract carrier for movement with the passenger in interstate or foreign commerce may deliver said firearm or ammunition into the custody of the pilot, captain, conductor or operator of such common or contract carrier for the duration of the trip without violating any of the provisions of this chapter. No common or contract carrier shall require or cause any label, tag, or other written notice to be placed on the outside of any package, luggage, or other container that such package, luggage, or other container contains a firearm.

(f)(1) It shall be unlawful for any common or contract carrier to transport or deliver in interstate or foreign commerce any firearm or ammunition with knowledge or reasonable cause to believe that the

shipment, transportation, or receipt thereof would be in violation of the provisions of this chapter.

(2) It shall be unlawful for any common or contract carrier to deliver in interstate or foreign commerce any firearm without obtaining written acknowledgement of receipt from the recipient of the package or other container in which there is a firearm.

(g) It shall be unlawful for any person--

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien--

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that--

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(h) It shall be unlawful for any individual, who to that individual's knowledge and while being employed for any person described in any paragraph

of subsection (g) of this section, in the course of such employment--

(1) to receive, possess, or transport any firearm or ammunition in or affecting interstate or foreign commerce; or

(2) to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(i) It shall be unlawful for any person to transport or ship in interstate or foreign commerce, any stolen firearm or stolen ammunition, knowing or having reasonable cause to believe that the firearm or ammunition was stolen.

(j) It shall be unlawful for any person to receive, possess, conceal, store, barter, sell, or dispose of any stolen firearm or stolen ammunition, or pledge or accept as security for a loan any stolen firearm or stolen ammunition, which is moving as, which is a part of, which constitutes, or which has been shipped or transported in, interstate or foreign commerce, either before or after it was stolen, knowing or having reasonable cause to believe that the firearm or ammunition was stolen.

(k) It shall be unlawful for any person knowingly to transport, ship, or receive, in interstate or foreign commerce, any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered or to possess or receive any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered and has, at any time, been shipped or transported in interstate or foreign commerce.

(l) Except as provided in section 925(d) of this chapter, it shall be unlawful for any person knowingly to import or bring into the United States or any possession thereof any firearm or ammunition; and it shall be unlawful for any person knowingly to receive any firearm or ammunition which has been imported or brought into the United States or any possession thereof in violation of the provisions of this chapter.

(m) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector knowingly to make any false entry in, to fail to make appropriate entry in, or to fail to properly maintain, any record which he is required to keep pursuant to section 923 of this chapter or regulations promulgated thereunder.

(n) It shall be unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce any firearm or ammunition or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(o)(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.

(2) This subsection does not apply with respect to--

(A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or

(B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

(p)(1) It shall be unlawful for any person to manufacture, import, sell, ship, deliver, possess, transfer, or receive any firearm--

(A) that, after removal of grips, stocks, and magazines, is not as detectable as the Security Exemplar, by walk-through metal detectors calibrated and operated to detect the Security Exemplar; or

(B) any major component of which, when subjected to inspection by the types of x-ray machines commonly used at airports, does not generate an image that accurately depicts the shape of the component. Barium sulfate or other compounds may be used in the fabrication of the component.

(2) For purposes of this subsection--

(A) the term "firearm" does not include the frame or receiver of any such weapon;

(B) the term "major component" means, with respect to a firearm, the barrel, the slide or cylinder, or the frame or receiver of the firearm; and

(C) the term "Security Exemplar" means an object, to be fabricated at the direction of the Attorney General, that is--

(i) constructed of, during the 12-month period beginning on the date of the enactment of this subsection, 3.7 ounces of

material type 17-4 PH stainless steel in a shape resembling a handgun; and

(ii) suitable for testing and calibrating metal detectors:

Provided, however, That at the close of such 12-month period, and at appropriate times thereafter the Attorney General shall promulgate regulations to permit the manufacture, importation, sale, shipment, delivery, possession, transfer, or receipt of firearms previously prohibited under this subparagraph that are as detectable as a “Security Exemplar” which contains 3.7 ounces of material type 17-4 PH stainless steel, in a shape resembling a handgun, or such lesser amount as is detectable in view of advances in state-of-the-art developments in weapons detection technology.

(3) Under such rules and regulations as the Attorney General shall prescribe, this subsection shall not apply to the manufacture, possession, transfer, receipt, shipment, or delivery of a firearm by a licensed manufacturer or any person acting pursuant to a contract with a licensed manufacturer, for the purpose of examining and testing such firearm to determine whether paragraph (1) applies to such firearm. The Attorney General shall ensure that rules and regulations adopted pursuant to this paragraph do not impair the manufacture of prototype firearms or the development of new technology.

(4) The Attorney General shall permit the conditional importation of a firearm by a licensed

importer or licensed manufacturer, for examination and testing to determine whether or not the unconditional importation of such firearm would violate this subsection.

(5) This subsection shall not apply to any firearm which--

(A) has been certified by the Secretary of Defense or the Director of Central Intelligence, after consultation with the Attorney General and the Administrator of the Federal Aviation Administration, as necessary for military or intelligence applications; and

(B) is manufactured for and sold exclusively to military or intelligence agencies of the United States.

(6) This subsection shall not apply with respect to any firearm manufactured in, imported into, or possessed in the United States before the date of the enactment of the Undetectable Firearms Act of 1988.

(q)(1) The Congress finds and declares that--

(A) crime, particularly crime involving drugs and guns, is a pervasive, nationwide problem;

(B) crime at the local level is exacerbated by the interstate movement of drugs, guns, and criminal gangs;

(C) firearms and ammunition move easily in interstate commerce and have been found in increasing numbers in and around schools, as documented in numerous hearings in both the Committee on the Judiciary³ the House of

³ So in original. Probably should be followed by "of".

Representatives and the Committee on the Judiciary of the Senate;

(D) in fact, even before the sale of a firearm, the gun, its component parts, ammunition, and the raw materials from which they are made have considerably moved in interstate commerce;

(E) while criminals freely move from State to State, ordinary citizens and foreign visitors may fear to travel to or through certain parts of the country due to concern about violent crime and gun violence, and parents may decline to send their children to school for the same reason;

(F) the occurrence of violent crime in school zones has resulted in a decline in the quality of education in our country;

(G) this decline in the quality of education has an adverse impact on interstate commerce and the foreign commerce of the United States;

(H) States, localities, and school systems find it almost impossible to handle gun-related crime by themselves--even States, localities, and school systems that have made strong efforts to prevent, detect, and punish gun-related crime find their efforts unavailing due in part to the failure or inability of other States or localities to take strong measures; and

(I) the Congress has the power, under the interstate commerce clause and other provisions of the Constitution, to enact measures to ensure the integrity and safety of the Nation's schools by enactment of this subsection.

(2)(A) It shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone.

(B) Subparagraph (A) does not apply to the possession of a firearm--

- (i) on private property not part of school grounds;

- (ii) if the individual possessing the firearm is licensed to do so by the State in which the school zone is located or a political subdivision of the State, and the law of the State or political subdivision requires that, before an individual obtains such a license, the law enforcement authorities of the State or political subdivision verify that the individual is qualified under law to receive the license;

- (iii) that is--

- (I) not loaded; and

- (II) in a locked container, or a locked firearms rack that is on a motor vehicle;

- (iv) by an individual for use in a program approved by a school in the school zone;

- (v) by an individual in accordance with a contract entered into between a school in the school zone and the individual or an employer of the individual;

- (vi) by a law enforcement officer acting in his or her official capacity; or

(vii) that is unloaded and is possessed by an individual while traversing school premises for the purpose of gaining access to public or private lands open to hunting, if the entry on school premises is authorized by school authorities.

(3)(A) Except as provided in subparagraph (B), it shall be unlawful for any person, knowingly or with reckless disregard for the safety of another, to discharge or attempt to discharge a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the person knows is a school zone.

(B) Subparagraph (A) does not apply to the discharge of a firearm--

(i) on private property not part of school grounds;

(ii) as part of a program approved by a school in the school zone, by an individual who is participating in the program;

(iii) by an individual in accordance with a contract entered into between a school in a school zone and the individual or an employer of the individual; or

(iv) by a law enforcement officer acting in his or her official capacity.

(4) Nothing in this subsection shall be construed as preempting or preventing a State or local government from enacting a statute establishing gun free school zones as provided in this subsection.

(r) It shall be unlawful for any person to assemble from imported parts any semiautomatic rifle or any shotgun which is identical to any rifle or shotgun

prohibited from importation under section 925(d)(3) of this chapter as not being particularly suitable for or readily adaptable to sporting purposes except that this subsection shall not apply to--

- (1) the assembly of any such rifle or shotgun for sale or distribution by a licensed manufacturer to the United States or any department or agency thereof or to any State or any department, agency, or political subdivision thereof; or

- (2) the assembly of any such rifle or shotgun for the purposes of testing or experimentation authorized by the Attorney General.

(s)(1) Beginning on the date that is 90 days after the date of enactment of this subsection and ending on the day before the date that is 60 months after such date of enactment, it shall be unlawful for any licensed importer, licensed manufacturer, or licensed dealer to sell, deliver, or transfer a handgun (other than the return of a handgun to the person from whom it was received) to an individual who is not licensed under section 923, unless--

- (A) after the most recent proposal of such transfer by the transferee--

- (i) the transferor has--

- (I) received from the transferee a statement of the transferee containing the information described in paragraph (3);

- (II) verified the identity of the transferee by examining the identification document presented;

(III) within 1 day after the transferee furnishes the statement, provided notice of the contents of the statement to the chief law enforcement officer of the place of residence of the transferee; and

(IV) within 1 day after the transferee furnishes the statement, transmitted a copy of the statement to the chief law enforcement officer of the place of residence of the transferee; and

(ii)(I) 5 business days (meaning days on which State offices are open) have elapsed from the date the transferor furnished notice of the contents of the statement to the chief law enforcement officer, during which period the transferor has not received information from the chief law enforcement officer that receipt or possession of the handgun by the transferee would be in violation of Federal, State, or local law; or

(II) the transferor has received notice from the chief law enforcement officer that the officer has no information indicating that receipt or possession of the handgun by the transferee would violate Federal, State, or local law;

(B) the transferee has presented to the transferor a written statement, issued by the chief law enforcement officer of the place of residence of the transferee during the 10-day period ending on the date of the most recent proposal of such transfer by the transferee, stating that the transferee requires access to a

handgun because of a threat to the life of the transferee or of any member of the household of the transferee;

(C)(i) the transferee has presented to the transferor a permit that--

(I) allows the transferee to possess or acquire a handgun; and

(II) was issued not more than 5 years earlier by the State in which the transfer is to take place; and

(ii) the law of the State provides that such a permit is to be issued only after an authorized government official has verified that the information available to such official does not indicate that possession of a handgun by the transferee would be in violation of the law;

(D) the law of the State requires that, before any licensed importer, licensed manufacturer, or licensed dealer completes the transfer of a handgun to an individual who is not licensed under section 923, an authorized government official verify that the information available to such official does not indicate that possession of a handgun by the transferee would be in violation of law;

(E) the Attorney General has approved the transfer under section 5812 of the Internal Revenue Code of 1986; or

(F) on application of the transferor, the Attorney General has certified that compliance with subparagraph (A)(i)(III) is impracticable because--

(i) the ratio of the number of law enforcement officers of the State in which the transfer is to

occur to the number of square miles of land area of the State does not exceed 0.0025;

(ii) the business premises of the transferor at which the transfer is to occur are extremely remote in relation to the chief law enforcement officer; and

(iii) there is an absence of telecommunications facilities in the geographical area in which the business premises are located.

(2) A chief law enforcement officer to whom a transferor has provided notice pursuant to paragraph (1)(A)(i)(III) shall make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General.

(3) The statement referred to in paragraph (1)(A)(i)(I) shall contain only--

(A) the name, address, and date of birth appearing on a valid identification document (as defined in section 1028(d)(1)⁴) of the transferee containing a photograph of the transferee and a description of the identification used;

(B) a statement that the transferee--

(i) is not under indictment for, and has not been convicted in any court of, a crime punishable by imprisonment for a term exceeding 1 year, and has not been convicted

⁴ See References in Text note below.

in any court of a misdemeanor crime of domestic violence;

(ii) is not a fugitive from justice;

(iii) is not an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act);

(iv) has not been adjudicated as a mental defective or been committed to a mental institution;

(v) is not an alien who--

(I) is illegally or unlawfully in the United States; or

(II) subject to subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(vi) has not been discharged from the Armed Forces under dishonorable conditions; and

(vii) is not a person who, having been a citizen of the United States, has renounced such citizenship;

(C) the date the statement is made; and

(D) notice that the transferee intends to obtain a handgun from the transferor.

(4) Any transferor of a handgun who, after such transfer, receives a report from a chief law enforcement officer containing information that

receipt or possession of the handgun by the transferee violates Federal, State, or local law shall, within 1 business day after receipt of such request, communicate any information related to the transfer that the transferor has about the transfer and the transferee to--

(A) the chief law enforcement officer of the place of business of the transferor; and

(B) the chief law enforcement officer of the place of residence of the transferee.

(5) Any transferor who receives information, not otherwise available to the public, in a report under this subsection shall not disclose such information except to the transferee, to law enforcement authorities, or pursuant to the direction of a court of law.

(6)(A) Any transferor who sells, delivers, or otherwise transfers a handgun to a transferee shall retain the copy of the statement of the transferee with respect to the handgun transaction, and shall retain evidence that the transferor has complied with subclauses (III) and (IV) of paragraph (1)(A)(i) with respect to the statement.

(B) Unless the chief law enforcement officer to whom a statement is transmitted under paragraph (1)(A)(i)(IV) determines that a transaction would violate Federal, State, or local law--

(i) the officer shall, within 20 business days after the date the transferee made the statement on the basis of which the notice

was provided, destroy the statement, any record containing information derived from the statement, and any record created as a result of the notice required by paragraph (1)(A)(i)(III);

(ii) the information contained in the statement shall not be conveyed to any person except a person who has a need to know in order to carry out this subsection; and

(iii) the information contained in the statement shall not be used for any purpose other than to carry out this subsection.

(C) If a chief law enforcement officer determines that an individual is ineligible to receive a handgun and the individual requests the officer to provide the reason for such determination, the officer shall provide such reasons to the individual in writing within 20 business days after receipt of the request.

(7) A chief law enforcement officer or other person responsible for providing criminal history background information pursuant to this subsection shall not be liable in an action at law for damages--

(A) for failure to prevent the sale or transfer of a handgun to a person whose receipt or possession of the handgun is unlawful under this section; or

(B) for preventing such a sale or transfer to a person who may lawfully receive or possess a handgun.

(8) For purposes of this subsection, the term “chief law enforcement officer” means the chief of police, the sheriff, or an equivalent officer or the designee of any such individual.

(9) The Attorney General shall take necessary actions to ensure that the provisions of this subsection are published and disseminated to licensed dealers, law enforcement officials, and the public.

(t)(1) Beginning on the date that is 30 days after the Attorney General notifies licensees under section 103(d) of the Brady Handgun Violence Prevention Act that the national instant criminal background check system is established, a licensed importer, licensed manufacturer, or licensed dealer shall not transfer a firearm to any other person who is not licensed under this chapter, unless--

(A) before the completion of the transfer, the licensee contacts the national instant criminal background check system established under section 103 of that Act;

(B)(i) the system provides the licensee with a unique identification number; or

(ii) 3 business days (meaning a day on which State offices are open) have elapsed since the licensee contacted the system, and the system has not notified the licensee that the receipt of a firearm by such other person would violate subsection (g) or (n) of this section; and

(C) the transferor has verified the identity of the transferee by examining a valid identification document (as defined in section

1028(d) of this title) of the transferee containing a photograph of the transferee.

(2) If receipt of a firearm would not violate subsection (g) or (n) or State law, the system shall--

(A) assign a unique identification number to the transfer;

(B) provide the licensee with the number; and

(C) destroy all records of the system with respect to the call (other than the identifying number and the date the number was assigned) and all records of the system relating to the person or the transfer.

(3) Paragraph (1) shall not apply to a firearm transfer between a licensee and another person if--

(A)(i) such other person has presented to the licensee a permit that--

(I) allows such other person to possess or acquire a firearm; and

(II) was issued not more than 5 years earlier by the State in which the transfer is to take place; and

(ii) the law of the State provides that such a permit is to be issued only after an authorized government official has verified that the information available to such official does not indicate that possession of a firearm by such other person would be in violation of law;

(B) the Attorney General has approved the transfer under section 5812 of the Internal Revenue Code of 1986; or

(C) on application of the transferor, the Attorney General has certified that compliance with paragraph (1)(A) is impracticable because--

(i) the ratio of the number of law enforcement officers of the State in which the transfer is to occur to the number of square miles of land area of the State does not exceed 0.0025;

(ii) the business premises of the licensee at which the transfer is to occur are extremely remote in relation to the chief law enforcement officer (as defined in subsection (s)(8)); and

(iii) there is an absence of telecommunications facilities in the geographical area in which the business premises are located.

(4) If the national instant criminal background check system notifies the licensee that the information available to the system does not demonstrate that the receipt of a firearm by such other person would violate subsection (g) or (n) or State law, and the licensee transfers a firearm to such other person, the licensee shall include in the record of the transfer the unique identification number provided by the system with respect to the transfer.

(5) If the licensee knowingly transfers a firearm to such other person and knowingly fails to comply with paragraph (1) of this subsection with respect to the transfer and, at the time such other person most recently proposed the transfer, the national instant criminal background check system was operating and

information was available to the system demonstrating that receipt of a firearm by such other person would violate subsection (g) or (n) of this section or State law, the Attorney General may, after notice and opportunity for a hearing, suspend for not more than 6 months or revoke any license issued to the licensee under section 923, and may impose on the licensee a civil fine of not more than \$5,000.

(6) Neither a local government nor an employee of the Federal Government or of any State or local government, responsible for providing information to the national instant criminal background check system shall be liable in an action at law for damages--

(A) for failure to prevent the sale or transfer of a firearm to a person whose receipt or possession of the firearm is unlawful under this section; or

(B) for preventing such a sale or transfer to a person who may lawfully receive or possess a firearm.

(u) It shall be unlawful for a person to steal or unlawfully take or carry away from the person or the premises of a person who is licensed to engage in the business of importing, manufacturing, or dealing in firearms, any firearm in the licensee's business inventory that has been shipped or transported in interstate or foreign commerce.

[(v), (w) Repealed. Pub. L. 103-322, Title XI, § 110105(2), Sept. 13, 1994, 108 Stat. 2000]

(x)(1) It shall be unlawful for a person to sell, deliver, or otherwise transfer to a person who the

transferor knows or has reasonable cause to believe is a juvenile--

(A) a handgun; or

(B) ammunition that is suitable for use only in a handgun.

(2) It shall be unlawful for any person who is a juvenile to knowingly possess--

(A) a handgun; or

(B) ammunition that is suitable for use only in a handgun.

(3) This subsection does not apply to--

(A) a temporary transfer of a handgun or ammunition to a juvenile or to the possession or use of a handgun or ammunition by a juvenile if the handgun and ammunition are possessed and used by the juvenile--

(i) in the course of employment, in the course of ranching or farming related to activities at the residence of the juvenile (or on property used for ranching or farming at which the juvenile, with the permission of the property owner or lessee, is performing activities related to the operation of the farm or ranch), target practice, hunting, or a course of instruction in the safe and lawful use of a handgun;

(ii) with the prior written consent of the juvenile's parent or guardian who is not prohibited by Federal, State, or local law from possessing a firearm, except--

(I) during transportation by the juvenile of an unloaded handgun in a locked container directly from the place of transfer to a place at which an activity described in clause (i) is to take place and transportation by the juvenile of that handgun, unloaded and in a locked container, directly from the place at which such an activity took place to the transferor; or

(II) with respect to ranching or farming activities as described in clause (i), a juvenile may possess and use a handgun or ammunition with the prior written approval of the juvenile's parent or legal guardian and at the direction of an adult who is not prohibited by Federal, State or local law from possessing a firearm;

(iii) the juvenile has the prior written consent in the juvenile's possession at all times when a handgun is in the possession of the juvenile; and

(iv) in accordance with State and local law;

(B) a juvenile who is a member of the Armed Forces of the United States or the National Guard who possesses or is armed with a handgun in the line of duty;

(C) a transfer by inheritance of title (but not possession) of a handgun or ammunition to a juvenile; or

(D) the possession of a handgun or ammunition by a juvenile taken in defense of the juvenile or other persons against an intruder into the residence of the juvenile or a residence in which the juvenile is an invited guest.

(4) A handgun or ammunition, the possession of which is transferred to a juvenile in circumstances in which the transferor is not in violation of this subsection shall not be subject to permanent confiscation by the Government if its possession by the juvenile subsequently becomes unlawful because of the conduct of the juvenile, but shall be returned to the lawful owner when such handgun or ammunition is no longer required by the Government for the purposes of investigation or prosecution.

(5) For purposes of this subsection, the term “juvenile” means a person who is less than 18 years of age.

(6)(A) In a prosecution of a violation of this subsection, the court shall require the presence of a juvenile defendant’s parent or legal guardian at all proceedings.

(B) The court may use the contempt power to enforce subparagraph (A).

(C) The court may excuse attendance of a parent or legal guardian of a juvenile defendant at a proceeding in a prosecution of a violation of this subsection for good cause shown.

(y) PROVISIONS RELATING TO ALIENS ADMITTED UNDER NONIMMIGRANT VISAS--

(1) DEFINITIONS.--In this subsection--

(A) the term “alien” has the same meaning as in section 101(a)(3) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(3)); and

(B) the term “nonimmigrant visa” has the same meaning as in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)).

(2) EXCEPTIONS.--Subsections (d)(5)(B), (g)(5)(B), and (s)(3)(B)(v)(II) do not apply to any alien who has been lawfully admitted to the United States under a nonimmigrant visa, if that alien is--

(A) admitted to the United States for lawful hunting or sporting purposes or is in possession of a hunting license or permit lawfully issued in the United States;

(B) an official representative of a foreign government who is--

(i) accredited to the United States Government or the Government’s mission to an international organization having its headquarters in the United States; or

(ii) en route to or from another country to which that alien is accredited;

(C) an official of a foreign government or a distinguished foreign visitor who has been so designated by the Department of State; or

(D) a foreign law enforcement officer of a friendly foreign government entering the

United States on official law enforcement business.

(3) WAIVER--

(A) CONDITIONS FOR WAIVER.--Any individual who has been admitted to the United States under a nonimmigrant visa may receive a waiver from the requirements of subsection (g)(5), if--

(i) the individual submits to the Attorney General a petition that meets the requirements of subparagraph (C); and

(ii) the Attorney General approves the petition.

(B) PETITION.--Each petition under subparagraph (B) shall--

(i) demonstrate that the petitioner has resided in the United States for a continuous period of not less than 180 days before the date on which the petition is submitted under this paragraph; and

(ii) include a written statement from the embassy or consulate of the petitioner, authorizing the petitioner to acquire a firearm or ammunition and certifying that the alien would not, absent the application of subsection (g)(5)(B), otherwise be prohibited from such acquisition under subsection (g).

(C) APPROVAL OF PETITION.--The Attorney General shall approve a petition submitted

in accordance with this paragraph, if the Attorney General determines that waiving the requirements of subsection (g)(5)(B) with respect to the petitioner--

(i) would be in the interests of justice; and

(ii) would not jeopardize the public safety.

(z) SECURE GUN STORAGE OR SAFETY DEVICE.--

(1) IN GENERAL.--Except as provided under paragraph (2), it shall be unlawful for any licensed importer, licensed manufacturer, or licensed dealer to sell, deliver, or transfer any handgun to any person other than any person licensed under this chapter, unless the transferee is provided with a secure gun storage or safety device (as defined in section 921(a)(34)) for that handgun.

(2) EXCEPTIONS.--Paragraph (1) shall not apply to--

(A)(i) the manufacture for, transfer to, or possession by, the United States, a department or agency of the United States, a State, or a department, agency, or political subdivision of a State, of a handgun; or

(ii) the transfer to, or possession by, a law enforcement officer employed by an entity referred to in clause (i) of a handgun for law enforcement purposes (whether on or off duty); or

(B) the transfer to, or possession by, a rail police officer employed by a rail carrier and

certified or commissioned as a police officer under the laws of a State of a handgun for purposes of law enforcement (whether on or off duty);

(C) the transfer to any person of a handgun listed as a curio or relic by the Secretary pursuant to section 921(a)(13); or

(D) the transfer to any person of a handgun for which a secure gun storage or safety device is temporarily unavailable for the reasons described in the exceptions stated in section 923(e), if the licensed manufacturer, licensed importer, or licensed dealer delivers to the transferee within 10 calendar days from the date of the delivery of the handgun to the transferee a secure gun storage or safety device for the handgun.

(3) LIABILITY FOR USE.--

(A) IN GENERAL.--Notwithstanding any other provision of law, a person who has lawful possession and control of a handgun, and who uses a secure gun storage or safety device with the handgun, shall be entitled to immunity from a qualified civil liability action.

(B) PROSPECTIVE ACTIONS.--A qualified civil liability action may not be brought in any Federal or State court.

(C) DEFINED TERM.--As used in this paragraph, the term “qualified civil liability action”--

(i) means a civil action brought by any person against a person described in subparagraph (A) for damages resulting from the criminal or unlawful misuse of the handgun by a third party, if--

(I) the handgun was accessed by another person who did not have the permission or authorization of the person having lawful possession and control of the handgun to have access to it; and

(II) at the time access was gained by the person not so authorized, the handgun had been made inoperable by use of a secure gun storage or safety device; and

(ii) shall not include an action brought against the person having lawful possession and control of the handgun for negligent entrustment or negligence per se.

27 C.F.R. § 478.96
Out-of-State and mail order sales

(a) The provisions of this section shall apply when a firearm is purchased by or delivered to a person not otherwise prohibited by the Act from purchasing or receiving it.

(b) A licensed importer, licensed manufacturer, or licensed dealer may sell a firearm that is not subject to the provisions of § 478.102(a) to a nonlicensee who does not appear in person at the licensee's business premises if the nonlicensee is a resident of the same State in which the licensee's business premises are located, and the nonlicensee furnishes to the licensee the firearms transaction record, Form 4473, required by § 478.124. The nonlicensee shall attach to such record a true copy of any permit or other information required pursuant to any statute of the State and published ordinance applicable to the locality in which he resides. The licensee shall prior to shipment or delivery of the firearm, forward by registered or certified mail (return receipt requested) a copy of the record, Form 4473, to the chief law enforcement officer named on such record, and delay shipment or delivery of the firearm for a period of at least 7 days following receipt by the licensee of the return receipt evidencing delivery of the copy of the record to such chief law enforcement officer, or the return of the copy of the record to him due to the refusal of such chief law enforcement officer to accept same in accordance with U.S. Postal Service regulations. The original Form 4473, and evidence of receipt or rejection of delivery of the copy of the Form 4473 sent to the chief law enforcement officer shall be retained

by the licensee as a part of the records required of him to be kept under the provisions of Subpart H of this part.

(c)(1) A licensed importer, licensed manufacturer, or licensed dealer may sell or deliver a rifle or shotgun, and a licensed collector may sell or deliver a rifle or shotgun that is a curio or relic to a nonlicensed resident of a State other than the State in which the licensee's place of business is located if--

(i) The purchaser meets with the licensee in person at the licensee's premises to accomplish the transfer, sale, and delivery of the rifle or shotgun;

(ii) The licensed importer, licensed manufacturer, or licensed dealer complies with the provisions of § 478.102;

(iii) The purchaser furnishes to the licensed importer, licensed manufacturer, or licensed dealer the firearms transaction record, Form 4473, required by § 478.124; and

(iv) The sale, delivery, and receipt of the rifle or shotgun fully comply with the legal conditions of sale in both such States.

(2) For purposes of paragraph (c) of this section, any licensed manufacturer, licensed importer, or licensed dealer is presumed, in the absence of evidence to the contrary, to have had actual knowledge of the State laws and published ordinances of both such States.

27 C.F.R. § 478.99

Certain prohibited sales or deliveries

(a) *Interstate sales or deliveries.* A licensed importer, licensed manufacturer, licensed dealer, or licensed collector shall not sell or deliver any firearm to any person not licensed under this part and who the licensee knows or has reasonable cause to believe does not reside in (or if a corporation or other business entity, does not maintain a place of business in) the State in which the licensee's place of business or activity is located: *Provided*, That the foregoing provisions of this paragraph (1) shall not apply to the sale or delivery of a rifle or shotgun (curio or relic, in the case of a licensed collector) to a resident of a State other than the State in which the licensee's place of business or collection premises is located if the requirements of § 478.96(c) are fully met, and (2) shall not apply to the loan or rental of a firearm to any person for temporary use for lawful sporting purposes (see § 478.97).

(b) *Sales or deliveries to underaged persons.* A licensed importer, licensed manufacturer, licensed dealer, or licensed collector shall not sell or deliver (1) 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, or (2) any firearm to any person in any State where the purchase or possession by such person of

such firearm would be in violation of any State law or any published ordinance applicable at the place of sale, delivery, or other disposition, unless the importer, manufacturer, dealer, or collector knows or has reasonable cause to believe that the purchase or possession would not be in violation of such State law or such published ordinance.

(c) *Sales or deliveries to prohibited categories of persons.* A licensed manufacturer, licensed importer, licensed dealer, or licensed collector shall not sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person:

(1) Is, except as provided by § 478.143, under indictment for, or, except as provided by § 478.144, has been convicted in any court of a crime punishable by imprisonment for a term exceeding 1 year;

(2) Is a fugitive from justice;

(3) Is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substance Act, 21 U.S.C. 802);

(4) Has been adjudicated as a mental defective or has been committed to any mental institution;

(5) Is an alien illegally or unlawfully in the United States or, except as provided in § 478.32(f), is an alien who has been admitted to the United States under a nonimmigrant visa: *Provided*, That the provisions of this paragraph (c)(5) do not apply to any alien who has been lawfully admitted to the United States under a nonimmigrant visa if that alien is--

(i) Admitted to the United States for lawful hunting or sporting purposes or is in possession of a hunting

license or permit lawfully issued in the United States;

(ii) An official representative of a foreign government who is either accredited to the United States Government or the Government's mission to an international organization having its headquarters in the United States or en route to or from another country to which that alien is accredited. This exception only applies if the firearm or ammunition is shipped, transported, possessed, or received in the representative's official capacity;

(iii) An official of a foreign government or a distinguished foreign visitor who has been so designated by the Department of State. This exception only applies if the firearm or ammunition is shipped, transported, possessed, or received in the official's or visitor's official capacity, except if the visitor is a private individual who does not have an official capacity; or

(iv) A foreign law enforcement officer of a friendly foreign government entering the United States on official law enforcement business;

(6) Has been discharged from the Armed Forces under dishonorable conditions;

(7) Who, having been a citizen of the United States, has renounced citizenship;

(8) Is subject to a court order that restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or

child, except that this paragraph shall only apply to a court order that--

(i) Was issued after a hearing of which such person received actual notice, and at which such person had the opportunity to participate; and

(ii)(A) Includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(B) By its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury, or

(9) Has been convicted of a misdemeanor crime of domestic violence.

(d) *Manufacture, importation, and sale of armor piercing ammunition by licensed importers and licensed manufacturers.* A licensed importer or licensed manufacturer shall not import or manufacture armor piercing ammunition or sell or deliver such ammunition, except:

(1) For use of the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof;

(2) For the purpose of exportation; or

(3) For the purpose of testing or experimentation authorized by the Director under the provisions of § 478.149.

(e) *Transfer of armor piercing ammunition by licensed dealers.* A licensed dealer shall not willfully transfer armor piercing ammunition: *Provided*, That armor piercing ammunition received and maintained

by the licensed dealer as business inventory prior to August 28, 1986, may be transferred to any department or agency of the United States or any State or political subdivision thereof if a record of such ammunition is maintained in the form and manner prescribed by § 478.125(c). Any licensed dealer who violates this paragraph is subject to license revocation. See Subpart E of this part. For purposes of this paragraph, the Director shall furnish each licensed dealer information defining which projectiles are considered armor piercing. Such information may not be all-inclusive for purposes of the prohibition on manufacture, importation, or sale or delivery by a manufacturer or importer of such ammunition or 18 U.S.C. 929 relating to criminal misuse of such ammunition.

27 C.F.R. § 478.124
Firearms transaction record.

(a) A licensed importer, licensed manufacturer, or licensed dealer shall not sell or otherwise dispose, temporarily or permanently, of any firearm to any person, other than another licensee, unless the licensee records the transaction on a firearms transaction record, Form 4473: *Provided*, That a firearms transaction record, Form 4473, shall not be required to record the disposition made of a firearm delivered to a licensee for the sole purpose of repair or customizing when such firearm or a replacement firearm is returned to the person from whom received.

(b) A licensed manufacturer, licensed importer, or licensed dealer shall retain in alphabetical (by name of purchaser), chronological (by date of disposition), or numerical (by transaction serial number) order, and as a part of the required records, each Form 4473 obtained in the course of transferring custody of the firearms.

(c)(1) Prior to making an over-the-counter transfer of a firearm to a nonlicensee who is a resident of the State in which the licensee's business premises is located, the licensed importer, licensed manufacturer, or licensed dealer so transferring the firearm shall obtain a Form 4473 from the transferee showing the transferee's name, sex, residence address (including county or similar political subdivision), date and place of birth; height, weight and race of the transferee; the transferee's country of citizenship; the transferee's INS-issued alien number or admission number; the transferee's State of residence; and

certification by the transferee that the transferee is not prohibited by the Act from transporting or shipping a firearm in interstate or foreign commerce or receiving a firearm which has been shipped or transported in interstate or foreign commerce or possessing a firearm in or affecting commerce.

(2) In order to facilitate the transfer of a firearm and enable NICS to verify the identity of the person acquiring the firearm, ATF Form 4473 also requests certain optional information. This information includes the transferee's social security number. Such information may help avoid the possibility of the transferee being misidentified as a felon or other prohibited person.

(3) After the transferee has executed the Form 4473, the licensee:

(i) Shall verify the identity of the transferee by examining the identification document (as defined in § 478.11) presented, and shall note on the Form 4473 the type of identification used;

(ii) [Reserved]

(iii) Must, in the case of a transferee who is an alien admitted to the United States under a nonimmigrant visa who states that he or she falls within an exception to, or has a waiver from, the prohibition in section 922(g)(5)(B) of the Act, have the transferee present applicable documentation establishing the exception or waiver, note on the Form 4473 the type of documentation provided, and attach a copy of the documentation to the Form 4473; and

(iv) Shall comply with the requirements of § 478.102 and record on the form the date on which

the licensee contacted the NICS, as well as any response provided by the system, including any identification number provided by the system.

(4) The licensee shall identify the firearm to be transferred by listing on the Form 4473 the name of the manufacturer, the name of the importer (if any), the type, model, caliber or gauge, and the serial number of the firearm.

(5) The licensee shall sign and date the form if the licensee does not know or have reasonable cause to believe that the transferee is disqualified by law from receiving the firearm and transfer the firearm described on the Form 4473.

(d) Prior to making an over-the-counter transfer of a shotgun or rifle under the provisions contained in § 478.96(c) to a nonlicensee who is not a resident of the State in which the licensee's business premises is located, the licensee so transferring the shotgun or rifle, and such transferee, shall comply with the requirements of paragraph (c) of this section.

(e) Prior to making a transfer of a firearm to any nonlicensee who is not a resident of the State in which the licensee's business premises is located, and such nonlicensee is acquiring the firearm by loan or rental from the licensee for temporary use for lawful sporting purposes, the licensed importer, licensed manufacturer, or licensed dealer so furnishing the firearm, and such transferee, shall comply with the provisions of paragraph (c) of this section.

(f) Form 4473 shall be submitted, in duplicate, to a licensed importer, licensed manufacturer, or licensed dealer by a transferee who is purchasing or otherwise acquiring a firearm by other than an over-the-

counter transaction, who is not subject to the provisions of § 478.102(a), and who is a resident of the State in which the licensee's business premises are located. The Form 4473 shall show the name, address, date and place of birth, height, weight, and race of the transferee; and the title, name, and address of the principal law enforcement officer of the locality to which the firearm will be delivered. The transferee also must date and execute the sworn statement contained on the form showing, in case the firearm to be transferred is a firearm other than a shotgun or rifle, the transferee is 21 years or more of age; in case the firearm to be transferred is a shotgun or rifle, the transferee is 18 years or more of age; whether the transferee is a citizen of the United States; the transferee's State of residence; the transferee is not prohibited by the provisions of the Act from shipping or transporting a firearm in interstate or foreign commerce or receiving a firearm which has been shipped or transported in interstate or foreign commerce or possessing a firearm in or affecting commerce; and the transferee's receipt of the firearm would not be in violation of any statute of the State or published ordinance applicable to the locality in which the transferee resides. Upon receipt of such Forms 4473, the licensee shall identify the firearm to be transferred by listing in the Forms 4473 the name of the manufacturer, the name of the importer (if any), the type, model, caliber or gauge, and the serial number of the firearm to be transferred. The licensee shall prior to shipment or delivery of the firearm to such transferee, forward by registered or certified mail (return receipt requested) a copy of the Form 4473 to the principal law

enforcement officer named in the Form 4473 by the transferee, and shall delay shipment or delivery of the firearm to the transferee for a period of at least 7 days following receipt by the licensee of the return receipt evidencing delivery of the copy of the Form 4473 to such principal law enforcement officer, or the return of the copy of the Form 4473 to the licensee due to the refusal of such principal law enforcement officer to accept same in accordance with U.S. Postal Service regulations. The original Form 4473, and evidence of receipt or rejection of delivery of the copy of the Form 4473 sent to the principal law enforcement officer, shall be retained by the licensee as a part of the records required to be kept under this subpart.

(g) A licensee who sells or otherwise disposes of a firearm to a nonlicensee who is other than an individual, shall obtain from the transferee the information required by this section from an individual authorized to act on behalf of the transferee. In addition, the licensee shall obtain from the individual acting on behalf of the transferee a written statement, executed under the penalties of perjury, that the firearm is being acquired for the use of and will be the property of the transferee, and showing the name and address of that transferee.

(h) The requirements of this section shall be in addition to any other recordkeeping requirement contained in this part.

(i) A licensee may obtain, upon request, an emergency supply of Forms 4473 from any Director of Industry Operations. For normal usage, a licensee

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should request a year's supply from the ATF
Distribution Center (See § 478.21).