No. 25-24

In the Supreme Court of the United States

JOSHUA CLAY MCCOY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED AS A CLASS, ET AL.,

Petitioners,

v.

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

Respondents.

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

BRIEF OF GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE*[1]

Giffords Law Center to Prevent Gun Violence ("Giffords Law Center") is a non-profit policy organization serving lawmakers, advocates, legal professionals, gun violence survivors, and others who seek to reduce gun violence and improve the safety of their communities. The organization was founded more than thirty years ago following a gun massacre at a San Francisco law firm and was renamed Giffords Law Center in 2017 after joining forces with the gun-safety organization led by former Congresswoman Gabrielle Giffords. Today, through partnerships with gun violence researchers, public health experts, and community organizations, Giffords Law Center researches, drafts, and defends the laws, policies, and programs proven to effectively reduce gun violence. Together with its partner organization Giffords, Giffords Law Center also advocates for the interests of gun owners and law enforcement officials who understand that Second Amendment rights have always been consistent with gun safety legislation and community violence prevention strategies.

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution to the brief's preparation or submission. Counsel for all parties received notice of *amicus*'s intention to file this brief at least 10 days prior to the due date.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case concerns a direct circuit split as to whether longstanding federal laws regulating the commercial sale of handguns to 18-to-20-year-olds violate the Second Amendment. The Fourth Circuit in this case correctly applied this Court's Second Amendment precedent and upheld these laws, concluding that "[f]rom English common law to America's founding and beyond, our regulatory tradition has permitted restrictions on the sale of firearms to individuals under the age of 21," and that current federal law "fits squarely within this tradition and is therefore constitutional." Pet. App. 3a.

The Fourth Circuit's decision, however, is directly contradicted by the Fifth Circuit's opinion in *Reese* v. *Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 127 F.4th 583 (5th Cir. 2025). In *Reese*, the Fifth Circuit held that the same federal laws are unconstitutional based on a faulty application of this Court's rulings in *New York State Rifle & Pistol Association, Inc.* v. *Bruen*, 597 U.S. 1 (2022), and *United States* v. *Rahimi*, 602 U.S. 680 (2024). The federal government declined to challenge the incorrect decision in *Reese*, leaving this case as the best vehicle for resolving the circuit split.[2]

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[2] The Fourth Circuit also issued a per curiam opinion resolving a separate challenge to the same federal laws, relying exclusively on the reasoning of *McCoy*. *Brown* v. *Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 2025 WL 1704429, at *1 (4th Cir. June 18, 2025). Plaintiffs in *Brown* have since also filed a certiorari petition with this Court. *W. Va. Citizens Def. League, Inc.* v. *Bureau of Alcohol, Tobacco, Firearms, & Explosives*, No. 25-132 (U.S. July 31, 2025). *Amicus* supports review of this important issue in both cases, but takes no position as to which case presents a better vehicle.

As a result of the Fifth Circuit's decision and the federal government's startling choice to decline to defend these longstanding federal laws, a significant portion of this country is now governed by a dangerous and singular regime: In Louisiana, Mississippi, and Texas, 18-to-20-year-olds—who are disproportionately likely to engage in dangerous acts when armed—can purchase handguns in a manner that their peers in Maryland, North Carolina, South Carolina, Virginia, West Virginia, and other states across the country cannot. Federally licensed firearms dealers in Louisiana, Mississippi, and Texas now face completely different regulations than do any other dealers in the nation. This inconsistent application of federal law is untenable and poses a direct threat to public safety.

Just two terms ago, this Court upheld another longstanding federal firearms law, reversing the Fifth Circuit and holding that the law was consistent with the Second Amendment. *Rahimi*, 602 U.S. at 701. Now, a clear circuit split on the constitutionality of a different but equally important set of federal firearms regulations calls out for this Court's review once again. *Amicus* urges this Court to grant certiorari and uphold the longstanding laws that Congress deemed critical to our nation's safety. And, if the executive branch refuses to fulfill its obligation to defend these laws, this Court should appoint an *amicus* to argue in their defense.

ARGUMENT

A. There Is Currently A Circuit Split That Effectively Enjoins The Enforcement Of Important Federal Laws In One Circuit.

1. The Fourth Circuit's Decision Correctly Recognizes Congress's Authority To Regulate Firearm Sales.

In *District of Columbia* v. *Heller*, this Court held that, while the Second Amendment protects an individual right to bear arms for lawful self-defense, the right "is not unlimited." 554 U.S. 570, 626 (2008). *Heller* set forth several categories of "presumptively lawful" firearms regulations, including "laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626-27 & n.26. The Fourth Circuit correctly followed these principles when it upheld the laws at issue in this case: decades-old federal statutes imposing a minimum-age condition on the commercial sale of select firearms.

As part of the Gun Control Act of 1968, Congress enacted a limited and temporal commercial restriction on 18-to-20-year-olds' ability to purchase certain firearms from federally licensed firearms dealers ("FFLs") without the involvement of their parents or legal guardians. *See* 18 U.S.C. 922(a)(1)(A), (a)(5), (b)(1); 27 C.F.R. 478.99(b), 478.102, 478.124(a), (c)(1)-(5), (f) (the "Challenged Laws"). In enacting the Challenged Laws, Congress carefully balanced the need to safeguard Second Amendment rights with the need for public safety. Indeed, as the Fourth Circuit noted in its decision, Congress specifically found that there was "a causal relationship between the easy availability of [handguns] and juvenile and youthful criminal behavior" and therefore "sought to prohibit handgun sales 'to

emotionally immature' and 'thrill-bent juveniles and minors.'" Pet. App. 4a (quoting Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 901(a)(6), 82 Stat. 197, 225-26). 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." Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 901(a)(3), 82 Stat. 197, 225.

Congress's findings comport with a commonsense principle recognized throughout history and by this Court: Due to their still-developing brains, 18-to-20-year-olds are generally more impulsive and less reasoned than older adults. *See* Pet. App. 15a (noting the Founding-era belief that individuals under age 21 "lack[ed] 'the judgment and discretion' to transact with more sophisticated adults"); *Graham* v. *Florida*, 560 U.S. 48, 68 (2010) ("[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence."); *Miller* v. *Alabama*, 567 U.S. 460, 472 n.5 (2012) ("[T]he science and social science supporting . . . *Graham*'s conclusions have become even stronger.").

Notably, the Challenged Laws went undisturbed in the ensuing decades, even as the Gun Control Act was amended numerous times. *See* Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993); Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796. In other words, while "Congress has had many chances to amend and revise

the compromises reflected in the age provision at issue here, . . . it has passed them by." Pet. App. 21a. The Fourth Circuit thus properly exercised "[b]asic respect for traditional democratic authority" in this case when it declined petitioners' request for it to "improve on Congress's work," recognizing that "[d]eclaring an Act of Congress to be unconstitutional is a big step for a court to take." Pet. App. 21a-22a.

Applying this Court's precedent in *Bruen* and *Rahimi*, the Fourth Circuit found that the "presumptively lawful" Challenged Laws were indeed constitutional because the burden they imposed on the Second Amendment right was sufficiently analogous to the burden imposed by historical laws such as the common-law "infancy doctrine," a longstanding rule "that contracts with individuals under the age of 21 were unenforceable." Pet. App. 10a-16a, 22a. Under *Rahimi*, "[w]hy and how the regulation burdens the [Second Amendment] right are central" to "ascertain[ing] whether [a modern-day] law is 'relevantly similar' to laws that our tradition is understood to permit." 602 U.S. at 692. Here, the common-law infancy doctrine and the Challenged Laws burden Second Amendment rights according to the same "how" and "why." Pet. App. 14a-15a. As for "how," both "make it exceedingly difficult for a minor to purchase a handgun from a commercial seller," and "do so in similar ways[] [by] subject[ing] sellers to a risk of loss if they sell a handgun to a minor." Pet. App. 15a. And as for "why," both "were motivated by a recognition that individuals under the age of 21 lack good judgment and reason." Pet. App. 15a. Thus, the Fourth Circuit concluded, "[t]here plainly exists a robust tradition that supports the constitutionality of § 922(b)(1)." Pet. App. 22a.

2. The Fifth Circuit's Incorrect Decision In *Reese* Creates An Inconsistent And Unenforceable Regulatory Scheme.

The case at hand was correctly decided by the Fourth Circuit. However, the Fifth Circuit's conflicting decision in *Reese*—which struck down the same scheme of longstanding federal firearms regulations—means that the Challenged Laws are currently unenforceable in, and thus unable to afford their protection to, a substantial portion of the country. This Court should grant certiorari so that it can resolve the circuit conflict and reaffirm the constitutionality of this critical public safety measure.

a. The Fifth Circuit's primary error was failing to recognize the existence of historical analogues to the Challenged Laws. In reaching its decision, the Fifth Circuit focused largely on the Militia Act of 1792, which required 18-to-20-year-old militia members "to furnish their own weapons," as support for its conclusion that "[i]nstead of refusing to arm young Americans for fear of their irresponsibility, founding-era regulations required them to *be* armed to secure public safety." *Reese*, 127 F.4th at 593-94, 596, 598.

That analysis misses the mark. It fails to recognize the important differences between an obligation and a right, and between *possessing* and *purchasing* a firearm. Although Founding-era 18-to-20-year-olds in some states were indeed obligated to furnish and carry firearms during militia service, it was their parents that would acquire the firearms on their behalf, *see Nat'l Rifle Ass'n* v. *Bondi*, 133 F.4th 1108, 1119-20 (11th Cir. 2025) (en banc), precisely because the 18-to-20-year-olds themselves were precluded from purchasing firearms, Pet. App. 10a-12a. As the Fourth Circuit

pointed out, the Challenged Laws regulate the *commercial sale* of firearms, not their possession: 18-to-20-year-olds may still obtain handguns through private sales and gifts.[3] Pet. App. 5a. Thus, "any constitutional right derived from the Militia Act would not conflict with § 922(b)(1)'s narrow restriction on purchase." Pet. App. 17a; *see Chavez* v. *Bonta*, 773 F. Supp. 3d 1028, 1040-44 (S.D. Cal. 2025) (finding *Reese* "unpersuasive" because it failed to consider "Founding Era common law that curtailed *commercial firearm purchases* by individuals aged 18 to 20" (emphasis added)).

b. The Fifth Circuit also erred by ignoring historical common-law principles, including the infancy doctrine, that restricted 18-to-20-year-olds' access to firearms. As the Eleventh Circuit has pointed out, the *Reese* court "misapprehended the import of the[] written laws" cited in its decision because it "failed to consider the background common-law regime," according to which minors' access to firearms was "limited" and "a matter of parental consent." *Bondi*, 133 F.4th at 1128-29.

In ignoring this body of common law, the Fifth Circuit contravened this Court's explicit instruction in *Rahimi* that, to be constitutional, a firearm regulation "must comport with the *principles* underlying the Second Amendment, but it need not be a 'dead ringer' or a 'historical twin.'" 602 U.S. at 692 (emphasis added) (quoting *Bruen*, 597 U.S. at 30). Indeed, in *Rahimi*, this Court expressly considered principles "[w]ell entrenched in the common law" that were not limited to firearms. *Id.* at 695-98. The Fifth Circuit's decision in *Reese* also contradicts Justice Alito's concurrence in

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[3] 18-to-20-year-olds also have the ability to purchase shotguns and rifles, categories of firearms to which Section 922(b)(1) does not apply.

Bruen, which favorably cited the very same federal laws that the Fifth Circuit has now overturned, noting that *Bruen* did "not expand the categories of people who may lawfully possess a gun, and federal law generally . . . bars the sale of a handgun to anyone under the age of 21, §§ 922(b)(1), (c)(1)." 597 U.S. at 73.

c. As a result of the Fifth Circuit's faulty historical analysis, the Challenged Laws currently are unconstitutional in one circuit, yet constitutional in the rest. This split is logistically untenable because it creates an unmanageable patchwork of regulatory regimes across the country. It places FFLs in Louisiana, Mississippi, and Texas under a regulatory framework that differs from those of all other states. It leaves communities without the public safety protections granted to them by Congress over a half century ago, simply because of the jurisdiction in which they live.

Alarmingly, although the *Reese* decision incorrectly struck down these longstanding public safety laws, the federal government declined to seek this Court's review. Because the government has elected not to defend its own laws, the case at hand presents the best avenue through which this Court can uphold a scheme enacted by Congress pursuant to its well-established authority to regulate the sale of firearms. *See Heller*, 554 U.S. at 626-27 & n.26.

B. Now Is The Time To Resolve This Circuit Split.

1. A Resolution Of This Circuit Split Will Provide Urgently Needed Guidance To Lower Courts.

In addition to resolving the direct circuit split on the specific federal Challenged Laws, granting certiorari would also provide much-needed guidance to the lower courts on the constitutionality of minimum-age laws

more broadly, bringing an end to the inconsistency that is festering below.

Lower courts have reached different conclusions as to the constitutionality of state laws governing 18-to-20-year-olds' ability to purchase and use firearms.[4] In reaching these inconsistent judgments, the lower courts have disagreed as to how to conduct the historical analysis required by *Bruen* and clarified in *Rahimi*. Some courts have imposed an overly stringent "historical analogue" test, requiring the identification of a "historical twin" for the challenged law, and have myopically focused on statutes from 1791, despite this Court's instruction that "public understanding of [the Second Amendment's] text in the period *after* its enactment or ratification" is probative of its meaning. *Heller*, 554 U.S. at 605 (emphasis omitted and added).

For instance, on remand in *Lara*, the Third Circuit refused to meaningfully engage with *Rahimi*. In purporting to carry out the analysis required by the new precedent, the court focused on statutes from 1791 and concluded that there was a "sparse record of state regulations on 18-to-20-year-olds" at that time. *Lara*, 125

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[4] *Compare Bondi*, 133 F.4th at 1111 (upholding provision of Florida's Marjory Stoneman Douglas High School Public Safety Act setting minimum age for firearm purchases), *petition for cert. filed*, No. 24-1185 (U.S. May 16, 2025), *Rocky Mountain Gun Owners* v. *Polis*, 121 F.4th 96, 104 (10th Cir. 2024) (upholding Colorado's minimum age for firearm purchases), *and Chavez*, 773 F. Supp. 3d at 1044-45 (same in California), *appeal docketed*, No. 25-02509 (9th Cir. Apr. 18, 2025), *with Worth* v. *Jacobson*, 108 F.4th 677, 683 (8th Cir. 2024) (striking down Minnesota statute governing the minimum age for permits to carry), *cert. denied*, 145 S. Ct. 1924 (2025), *and Lara* v. *Comm'r Pa. State Police*, 125 F.4th 428, 431 (3d Cir. 2025) (holding that Pennsylvania's "combined operation of three statutes" that "effectively ban[] 18-to-20-year olds from carrying firearms out their homes during a state of emergency" violates the Second Amendment), *petition for cert. filed*, No. 24-1329 (U.S. June 26, 2025).

F.4th at 438-43. This approach not only disregarded this Court's directive that the period after the Second Amendment's ratification be taken into account, *see Heller*, 554 U.S. at 605, but also failed to acknowledge the broader context of minors' lack of rights historically and under the common law. The Third Circuit thus erred in the same way that the Fifth Circuit later did in *Reese* by ignoring the "background common-law regime," as a result of which "minors needed parental consent to access firearms." *Bondi*, 133 F.4th at 1120, 1129.

In contrast, other courts have correctly found that the historical limitations on 18-to-20-year-olds' access to firearms are sufficiently analogous to today's regulations governing the same age group. *See* Pet. App. 10a-16a; *Bondi*, 133 F.4th at 1115-24; *Chavez*, 773 F. Supp. 3d at 1040-44. These courts have taken care to avoid the rigid search for a "historical twin" that this Court rejected in *Bruen* and recognize that "the Second Amendment permits more than just those regulations identical to ones that could be found in 1791," for "[h]olding otherwise would be as mistaken as applying the protections of the right only to muskets and sabers." *Chavez*, 773 F. Supp. 3d at 1039 (quoting *Rahimi*, 602 U.S. at 691-92).

This conflict amongst the lower courts demonstrates the need for further guidance from this Court on the proper application of *Bruen* and *Rahimi*.

2. This Case Presents The Best Vehicle For This Court To Consider The Issues Presented.

Petitioners are correct that the case at hand is well suited for this Court's review because (1) it presents a purely legal question of constitutional law; (2) the par-

ties agree that there is no factual dispute; and (3) petitioners have standing. *See* Pet. 15. This case also appears on appeal from a grant of summary judgment, meaning there is a robust record of historical evidence—including regarding historical militia laws and the Challenged Laws' legislative history, *see, e.g.*, *Fraser* v. *Bureau of Alcohol, Tobacco, Firearms, & Explosives*, No. 3:22-cv-410 (E.D. Va. Aug. 31, 2023), ECF Nos. 36, 41—and a complete analysis of the issues, including the application of *Bruen* and *Rahimi* by the Fourth Circuit.

Furthermore, although there are also certiorari petitions pending before this Court in cases raising similar questions, *Nat'l Rifle Ass'n* v. *Glass* (formerly captioned as *Nat'l Rifle Ass'n* v. *Bondi*), No. 24-1185 (U.S. May 16, 2025), and *Lara*, No. 24-1329 (U.S. June 26, 2025), this case is a far superior vehicle for this Court to consider the constitutionality of the Challenged Laws and minimum-age requirements more generally.[5]

Glass concerns a Florida statute much broader in scope than the Challenged Laws. While the Challenged Laws prohibit only the sale of handguns by FFLs to 18-to-20-year-olds, and thus "leave[] much of the firearms market untouched," Pet. App. 5a, the law at issue in *Glass* prohibits the same age group from purchasing *any* firearm (with certain exceptions for peace officers, correctional officers, and military personnel), *Bondi*, 133 F.4th at 1111-13. As a result, even

[5] As discussed above, *see supra* note 2, *amicus* believes that this Court's review of the Fourth Circuit's decision is the best way to resolve the question of the Challenged Laws' constitutionality, but takes no position as to whether this case or *West Virginia Citizens Defense League* presents a better vehicle.

if this Court did review *Glass*, the conflict over the constitutionality of the Challenged Laws would not necessarily be resolved.

Lara is inapposite because it concerns the overlapping operation of three Pennsylvania statutes regulating the *carrying*, not the purchase, of firearms during a state- or municipality-declared state of emergency. *Lara*, 125 F.4th at 431. Thus, while the case was incorrectly decided for a number of reasons, *see supra* pp. 10-11, resolving *Lara* would not resolve the debate over the Challenged Laws and similar state laws governing firearm purchases.

In contrast to *Glass* and *Lara*, this case presents the issue of a direct circuit split on the constitutionality of longstanding federal laws—and, crucially, due to the government's decision not to challenge *Reese*, is the best avenue through which the split can be resolved. It also raises questions regarding the proper application of this Court's precedent in *Bruen* and *Rahimi* that, if answered, will provide much-needed guidance to the lower courts. This case thus falls squarely under the primary purview of this Court, *see Stanley* v. *City of Sanford, Fla.*, 145 S. Ct. 2058, 2073 (2025) (Thomas, J., concurring in part) (emphasizing that one of the "leading considerations" of this Court "in deciding whether to grant certiorari" is whether courts of appeals are in direct conflict over a matter of federal law), and necessitates a prompt review.

3. The Challenged Laws Save Lives.

On the merits, this Court should affirm the Fourth Circuit's well-reasoned decision because, as the Fourth Circuit correctly concluded, "[t]here plainly exists a robust tradition that supports the constitutionality of § 922(b)(1)." Pet. App. 22a. In addition to the Fourth Circuit's thorough historical analysis, an established

body of empirical research confirms that the Challenged Laws are consistent with a long historical tradition of regulating persons—including individuals aged 18 to 20—who are deemed to pose a heightened risk of harm when armed.

Studies have found a connection between age-based firearms regulations and a decline in firearm-related adolescent deaths—particularly those due to suicide. For instance, one study found that state laws raising the minimum legal age to purchase a handgun to 21 were associated with a 9% decline in firearm suicide rates among 18-to-20-year-olds.[6] Another report on the science of gun policy issued last year found "supportive evidence that increasing the minimum age required to purchase a firearm above the threshold set by federal law can reduce firearm suicides among young people."[7]

Age-based firearms regulations have also proven effective in reducing gun violence by young people. A 2019 study found that 18-to-21-year-olds made up more than two-thirds of the 21,241 firearm-related deaths among U.S. children and adolescents from 2011 to 2015, but that every 10-point increase in a score measuring the strength of a state's gun laws "decreases the firearm-related mortality rate in children by 4%."[8] Another study using the same gun-law scores found that the pediatric firearm mortality rate among children under 20 was almost twice as high in the quartile of

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[6] Daniel W. Webster et al., *Association Between Youth-Focused Firearm Laws and Youth Suicides*, 292 JAMA 594, 598 (2004).

[7] Rosanna Smart et al., RAND Corp., *The Science of Gun Policy*, at xiii (4th ed. 2024), https://www.rand.org/pubs/research_reports/RRA243-9.html.

[8] Monika K. Goyal et al., *State Gun Laws and Pediatric Firearm-Related Mortality*, 144 Pediatrics 2, 3 & tbl. 1 (2019).

states with the weakest laws than in the quartile of states with the strongest laws.[9]

Notably, research demonstrates that most mass shooters obtain their weapons lawfully. In a report examining active shootings from 2000 to 2013, the FBI concluded that "only very small percentages [of shooters] obtain[ed] a firearm illegally," indicating that, rather than being sophisticated participants in the black market for firearms, perpetrators seek easy access to weapons.[10] Indeed, a survey of convicted gun offenders in 13 states found that 17% of the offenders would have been prohibited from obtaining firearms at the time of the crime if the minimum legal age for purchasing a firearm in that state had been 21 years, a finding that "underscore[s] the importance of minimum-age restrictions."[11]

The Challenged Laws thus play a crucial role in deterring the suicidal and criminal use of firearms by young people—precisely the type of "why" that is consistent with the principles underlying many historical firearms regulations. *See Rahimi*, 602 U.S. at 693.

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[9] Sriraman Madhavan et al., *Firearm Legislation Stringency and Firearm-Related Fatalities Among Children in the US*, 229 J. Am. Coll. Surgeons 150, 152 (2019).

[10] James Silver et al., Fed. Bureau of Investigation, U.S. Dep't of Just., *A Study of Pre-Attack Behaviors of Active Shooters in the United States Between 2000 and 2013*, at 7 (2018), https://www.fbi.gov/file-repository/reports-and-publications/pre-attack-behaviors-of-active-shooters-in-us-2000-2013.pdf/view.

[11] Katherine A. Vittes et al., *Legal Status and Source of Offenders' Firearms in States with the Least Stringent Criteria for Gun Ownership*, 19 Inj. Prevention 26, 29-30 (2013).

C. This Court Should Appoint An *Amicus* To Defend The Challenged Laws If The Federal Government Refuses.

The federal government declined to seek review in *Reese*, and it remains unclear whether it will defend the Challenged Laws in this case. This would be a troubling development. Under both Republican and Democratic administrations, the Solicitor General and the Department of Justice have generally defended acts of Congress in all but the rarest of circumstances.[12] Allowing the executive branch "to nullify Congress' enactment solely on its own initiative and without any determination from the Court" poses a "grave challenge[] to the separation of powers." *United States* v. *Windsor*, 570 U.S. 744, 762 (2013).

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[12] *See, e.g.*, *Confirmation Hearings on the Nominations of Thomas Perrelli, Nominee to Be Associate Attorney General of the United States and Elena Kagan, Nominee to Be Solicitor General of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 47 (2009) (statement of Elena Kagan) ("Traditionally, outside of a very narrow band of cases involving the separation of powers, the Solicitor General has defended any Federal statute in support of which any reasonable argument can be made."); *Confirmation Hearing on the Nomination of Paul D. Clement to Be Solicitor General of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 6 (2005) (statement of Paul D. Clement) ("[O]utside a narrow band of cases implicating the President's Article II authority, the [Solicitor General's] office will defend the constitutionality of the acts of Congress as long as reasonable arguments can be made in the statute's defense."); *see generally The Attorney General's Duty to Defend the Constitutionality of Statutes*, 5 Op. O.L.C. 25, 25-26 (1981) ("[T]he Department [of Justice] has the duty to defend an act of Congress whenever a reasonable argument can be made in its support, even if the Attorney General and the lawyers examining the case conclude that the argument may ultimately be unsuccessful in the courts.").

To allay these concerns, this Court should consider appointing an *amicus* to defend the law. *See id.* at 760 ("The Court adopts the practice of entertaining arguments made by an *amicus* when the Solicitor General confesses error with respect to a judgment below, even if the confession is in effect an admission that an Act of Congress is unconstitutional."); *Dickerson* v. *United States*, 530 U.S. 428, 441 n.7 (2000) ("Because no party to the underlying litigation argued in favor of [the statute]'s constitutionality in this Court, we invited Professor Paul Cassell to assist our deliberations by arguing in support of the judgment below."). After all, "when an Act of Congress is alleged to conflict with the Constitution, '[i]t is emphatically the province and duty of the judicial department to say what the law is.'" *Zivotofsky* v. *Clinton*, 566 U.S. 189, 196 (2012) (alteration in original) (quoting *Marbury* v. *Madison*, 5 U.S. 137, 177 (1803)).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari and affirm the decision of the Fourth Circuit.

Respectfully submitted.

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