No. 25-

IN THE

Supreme Court of the United States

JOSHUA CLAY MCCOY, TYLER DALTON MCGRATH, IAN FLETCHER SHACKLEY, JUSTIN TIMOTHY FRASER, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED AS A CLASS,

Petitioners,

v.

BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES; DANIEL DRISCOLL, IN HIS OFFICIAL CAPACITY AS ACTING DIRECTOR OF THE BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES; PAMELA J. BONDI, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether federal laws banning 18-to-20-year-olds from purchasing handguns from federally licensed firearm dealers violates the Second Amendment's guarantee of the right to keep arms.

2. Whether the Fourth Circuit erred by finding that the district court's certification of a nationwide class action pursuant to Fed. R. Civ. P. 23(b)(2) constituted an abuse of discretion because the district court's certification came after it granted summary judgment for the Plaintiffs but prior to its issuance of a final order.

PARTIES TO THE PROCEEDING

The Petitioners are Mr. Joshua McCoy, Mr. Tyler McGrath, Mr. Ian Shackley, and Mr. Justin Fraser, on behalf of themselves and a class[1] of all others similarly situated–a certified class of all U.S. citizens aged 18 to 20.

The Petitioners are hereinafter referred to collectively as "the Petitioners" or "the Class."

The Respondents are the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"); Daniel Driscoll, in his official capacity as Acting Director of the ATF; and Pamela J. Bondi, in her official capacity as Attorney General of the United States.

The Respondents are hereinafter referred to collectively as "the Respondents" or "the Government."

1. The United States Court of Appeals for the Fourth Circuit reversed the district court's certification of the Class and the Petitioners now petition for a writ of certiorari on behalf of themselves and such class, seeking reinstatement of certification.

RELATED PROCEEDINGS

United States Court of Appeals for the Fourth Circuit:

McCoy, et al. v. *BATFE, et al.*,
Case No. 23-2085, Fourth Circuit Court of Appeals.
Judgment entered June 18, 2025.

United States District Court for the Eastern District of Virginia:

Fraser, et al. v. *BATFE, et al.*,
Case No. 3:22-cv-410, Eastern District of Virginia.
Judgment entered Aug. 31, 2023.

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PETITION FOR WRIT OF CERTIORARI

This petition presents an urgent and unavoidable question of constitutional magnitude: whether the federal government may continue depriving millions of law-abiding adults—aged 18 to 20—of their fundamental Second Amendment rights. At issue is a federal statutory scheme that categorically prohibits these citizens from purchasing handguns from federally licensed dealers—the only lawful and regulated means to obtain new or unowned firearms, submit to background checks, and safely exercise their right to armed self-defense.

The Fourth Circuit's decision below entrenched a grave constitutional error and deepens an intractable circuit split with the Fifth Circuit's holding in *Reese* v. *ATF*, 127 F.4th 583 (5th Cir. 2025), which struck down the same federal prohibitions and found them inconsistent with the Second Amendment's text, history, and tradition. *Reese* recognized what the Constitution compels: the right to "keep and bear arms" necessarily includes the right to acquire them. By contrast, the Fourth Circuit recast these 18-to-20-year-olds as effectively children, or "infants," and relied on a distorted reading of postbellum firearm laws while defying this Court's directives in *New York State Rifle & Pistol Ass'n* v. *Bruen*, 597 U.S. 1 (2022).

This is not a peripheral or procedural anomaly—it promotes an ongoing, profound constitutional injustice. Millions of adult citizens are consigned to second-class status and a fundamental liberty has been cast as a second-hand right. The Petitioners are forbidden from accessing the very tools that the Framers not only used themselves, but obviously considered as the essential means of liberty,

self-preservation, and civic responsibility. The Fourth Circuit's rejection of class-wide relief compounds the injury by making redress illusory for a uniquely time-limited class whose claims expire as they age out of the prohibition. Our Constitution, its drafters, and our Nation's history have never affirmatively and willingly allowed for violations of recognized, enumerated, and enshrined liberties in such an obvious manner as the Fourth Circuit has in this case. This Court was established to vindicate the exact sort of class from the exact sort of errors as this petition now presents.

Intervention is imperative and the circuit split is well-defined. The constitutional stakes are immense, in both the near and long-term. The infringements are ongoing and persistent. If the Second Amendment is to remain a safeguard for *all* responsible citizens—not merely a privilege granted by legislative grace or the immutable, paternalistic weight of age and influence—this Court must act. Certiorari will vindicate the Constitution's promise and reaffirm that age cannot be used as a proxy to deny fundamental rights to a class of law-abiding, otherwise-eligible adult citizens. The Second Amendment does not provide second-hand guarantees and these young men and women are not second-class citizens. The Petitioners, on behalf of themselves and a class of similarly situated individuals, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit's published opinion and order vacating and reversing the district court in favor of the Respondents was entered on June 18, 2025. Pet.App. 1a–60a; *McCoy, et al.* v. *BATFE, et al.*, __ F.4th ___, 2025 U.S. App. LEXIS 15056, Case No. 23-2085 (4th Cir. June 18, 2025). The opinion and order of the district court granting the Petitioners' Motion for Summary Judgment was entered on May 10, 2023. Pet.App. 117a–82a; *Fraser, et al.* v. *BATFE, et al.*, 672 F.Supp. 3d 118 (E.D. Va. 2023). The opinion and order of the district court granting the Petitioners' motion to certify the nationwide Class and grant declaratory relief and a nationwide injunction was entered on August 30, 2023. Pet.App. 61a–90a, *Fraser, et al.* v. *BATFE, et al.*, 689 F. Supp. 3d 203 (E.D. Va. 2023) (declaratory and injunctive relief); 91a–116a (class certification), *Fraser, et al.* v. *BATFE, et al.*, 2023 U.S. Dist. LEXIS 154061, Case No. 3:22-cv-410 (Aug. 30, 2023). The district court's final order was entered on August 31, 2023.

JURISDICTION

The Fourth Circuit issued a published opinion and judgment reversing the decision of the district court and remanding the case on June 18, 2025. Pet.App. 1a–60a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AT ISSUE

The Second Amendment of the Constitution states:

> 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.

STATUTORY PROVISIONS AT ISSUE

18 U.S.C. § 922(a)(1)(A) states:

> It shall be unlawful for any person 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.

18 U.S.C. § 922(b)(1) states:

> It shall be unlawful for any . . . licensed dealer . . . to sell or deliver . . . any firearm or ammunition to any individual who the licensee 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 licensee knows or has reasonable cause to believe is less than 21 years of age.

18 U.S.C. § 922(c)(1) states:

> In any case not otherwise prohibited by this chapter, a . . . 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 . . . 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 21 years or more of age. . . ."

27 C.F.R. § 478.99(b)(1) states:

> A . . . licensed dealer . . . shall not sell or deliver (1) 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. . . .

27 C.F.R. § 478.124(a) states:

> A . . . 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. . . .

27 C.F.R. § 478.96(b) states:

> A . . . 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. . . .

27 C.F.R. § 478.124(f) states:

> 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. . . .

Fed. R. Civ. P. 23(b)(2) states:

> A class action may be maintained if Rule 23(a) is satisfied and if . . . the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.

STATEMENT OF THE CASE

I. Factual Background.

The facts have never been in dispute. The Petitioners are adult citizens between the ages of 18 and 20 years old who wish to purchase a handgun,[2] the "quintessential self-defense weapon," *District of Columbia* v. *Heller*, 554 U.S. 570, 629 (2008), from a federal firearm licensed dealer (hereinafter "FFL").

Specifically, 18 U.S.C. §§ 922(b)(1), (c)(1), and derivative regulations such as 27 C.F.R. §§ 478.99(b)(1), 478.124(a), and 478.96(b) (hereinafter the "laws at issue"), are those which bar the sale of handguns and handgun ammunition by FFLs to those under 21 years old. If the laws at issue were not in place, the Petitioners and Class would otherwise be permitted to purchase handguns and ammunition from FFLs.

II. Proceedings Below

Mr. John Corey Fraser, along with Mr. Joshua McCoy, Mr. Tyler McGrath, and Mr. Ian Shackley filed suit seeking to certify a nationwide class of similarly situated individuals and sought an injunction and declaratory judgment that the laws at issue violate

2. The original lead plaintiff, Mr. John Corey Fraser, attempted to purchase a handgun from an FFL but was denied because he was not yet 21 and was prohibited from doing so pursuant to the Gun Control Act of 1968 and its derivative regulations. All other Petitioners desired and intended to purchase similar handguns from FFLs but knew they were otherwise barred from doing so due to the laws at issue.

the Second Amendment as well as the right to equal protection and due process secured by the Fifth Amendment to the United States Constitution. Pet. App. 119a. Mr. Justin Fraser subsequently joined the suit in district court after turning 18.

Per agreement by the parties, the district court ordered disposition of the case on the legal arguments because there was no factual dispute. Pet.App. 118a, n.1. The Government moved to dismiss the case pursuant to Fed. R. Civ. P. 12(b)(6) and the Petitioners filed their opposition along with their motion for summary judgment. *Id.* The district court entered an order with a published opinion denying the Government's motion to dismiss and granting the Petitioners' motion for summary judgment. Pet. App. 117a–82a (published at *Fraser, et al.* v. *BATFE, et al.*, 672 F. Supp. 3d 118 (E.D. Va 2023)). The court held that the prohibition on the purchase of handguns from an FFL by adults between 18 and 21 violates the Second Amendment guarantee to "keep" arms. Pet. App. 177a.

Soon thereafter, the Petitioners formally moved pursuant to Fed. R. Civ. P. 23(b)(2) for the Court to certify a nationwide class as originally requested in the Complaint[3]. The district court granted the motion, Pet.App. 61a–90a, defining the Class as:

3. Amended complaints were also filed, but all of them included the same request for class certification and the facts did not change in any material way as to create a dispute in the case.

> Natural persons and citizens of the United States of America who have attained the age of 18 but who are not yet 21 and who have not been convicted of a felony, who are not fugitives from justice, have not been discharged from the Armed Forces under dishonorable conditions, are not unlawful users of or addicted to any controlled substances, have not been adjudicated as mental defectives or committed to a mental institution, are not on parole or probation, are not under indictment or restraint.

The district court granted declaratory relief and a nationwide injunction, excluding those parties subject to ongoing litigation at the time in similar cases in the Western District of Louisiana and the Northern District of West Virginia. Pet.App. 91a–116a. The injunction was stayed pending the outcome of appeal. The Government noted an appeal from the district court's decisions to the Fourth Circuit. On June 18, 2025, the Fourth Circuit issued its published opinion in a split panel decision and vacated the district court's judgment, reversing and remanding for further proceedings. Pet.App. 1a– 60a. This opinion established a direct split with the Fifth Circuit[4]—the only other circuit to address the issue presented in this case. *See Reese*, 127 F.4th 583.

This petition for certiorari now follows.

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4. After requesting two extensions for time to file its petition for a writ of certiorari from the *Reese* decision, the Government did not file such petition and has seemingly waived a challenge from the Fifth Circuit.

REASONS FOR GRANTING THE PETITION

The Fourth Circuit rendered a decision in direct conflict with the Fifth Circuit's opinion in *Reese* as to the constitutionality of the laws at issue. The Government chose not to file a petition for a writ of certiorari from the Fifth Circuit's *Reese* decision. This case presents the only means by which the Court can rectify this matter of national concern.

The laws at issue violate the Second Amendment's guarantees for millions of law-abiding adult citizens. This Court should grant a writ of certiorari to resolve the circuit split and provide guidance as to the proper application of Second Amendment jurisprudence, including its decision in *Bruen*. Due to the nationwide class, injunction, and applicability of the laws at issue, this case's impact is far-reaching. The merits present an ideal vehicle for reinforcing the Second Amendment's interpretative framework and an opportunity to rectify gross errors by lower courts and provide guidance as to how they must analyze Founding-era history, text, and tradition of firearm regulations.

I. A Direct, Post-*Bruen* Conflict Exists Between the Fourth and Fifth Circuits And Concerns Fundamental Liberties For Millions of Law-Abiding Adult Citizens.

The split between the Fourth and Fifth Circuits concerns the same federal statutes and regulations that impact rights of law-abiding adult citizens who cannot

otherwise commercially purchase,[5] and thereby "keep," handguns and ammunition. The issue cannot be resolved without this Court's intervention.

A. The Fourth Circuit's Decision Is Antithetical To The Second Amendment.

The Fourth Circuit upheld the categorical age-ban on handgun sales by FFLs, concluding that such a restriction is "consistent" with our Nation's historical tradition of firearm regulation. Pet.App. 1a–60a. The court properly assumed that those who are 18-to-20 years old are within the Second Amendment's textual scope of "the people," but analogized them to "minors" that historically lacked full legal rights. The majority relied on the common-law "infancy doctrine" which made contracts voidable by those under 21. In the majority's view, those under 21 "lack the maturity, judgment, and discretion" to engage

5. By law, FFLs are the only source of commercially sold firearms to an individual buyer. Title 18, Section 922(a)(1)(A) requires any person who "engage[s] in the business of importing, manufacturing, or dealing in firearms" to obtain a federal firearms license ("FFL"). A firearms "dealer" is any person who "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 thus must obtain an FFL—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." 18 U.S.C. § 921(a)(21)(C). Finally, a manufacturer of firearms, and thereby the only source of "new" or previously unowned firearms and ammunition, may only sell, ship, distribute, or transfer via FFLs, *see* 18 U.S.C. §§ 922(a)(1)(A), 923, thereby prohibiting the Petitioners and Class from accessing such handguns and ammunition altogether.

in commercial transactions. Pet.App. 19a. It emphasized that federal law allows young adults to obtain higher-powered firearms (rifles or shotguns) from FFLs and these young adults may receive handguns via private sales or gifts, thereby treating the challenged laws as a limited "commercial" restriction rather than disarmament. Pet. App. 5a.

The Fourth Circuit posited that, at the Founding, those within this age bracket were considered "infants," often without independent finances or power to enter into binding contracts. Pet.App. 11a, 12a. "Even if an infant had enough coin to buy a gun, merchants would have been unwilling to sell because they bore the risk that the minor would rescind the transaction and be entitled to a full refund under the infancy contract doctrine." Pet. App. 13a. The court discounted contrary Founding-era evidence—such as the Militia Act of 1792—by insisting that an 18-year-old militiaman could "provide himself" with a firearm through means other than commercial purchase. Pet.App. 17a. The court summarized: "By conditioning the sale of handguns on a buyer's age, § 922(b)(1) is presumptively lawful. *Bruen* analysis confirms that the law is indeed constitutional." *Id.*

In a concurrence, Judge Heytens suggested that 18-year-olds historically enjoyed fewer rights and the Second Amendment's scope, as understood in 1791, did not encompass firearm purchases by those under 21. Pet. App. 23a–26a. Judge Quattlebaum's dissent, *see* Pet.App. 27a–60a, emphasized that the laws "implicate[] the Second Amendment's text because 18-to-20-year-olds are part of 'the people,' [and] a ban on purchasing infringes the right to keep and bear arms," with no adequate historical

justification shown for such a sweeping age-based rule. Pet.App. 60a.

B. The Fifth Circuit's Decision Is In Direct Conflict With The Fourth Circuit.

Contrary to the decision below, the Fifth Circuit recently found the same laws at issue violate the Second Amendment after a post-*Bruen* analysis. *See Reese*, 127 F.4th 583. *Reese* held that the Second Amendment's plain text "surely implicates the right to purchase [firearms]" for lawful use, squarely rejecting the Government's argument that the Amendment protects only possession or use, not acquisition. *Id.* at 588 ("The core Second Amendment right to keep and bear arms for self-defense 'wouldn't mean much' without the ability to acquire arms." *Id.* at 588 (quoting *Ezell* v. *City of Chi.*, 651 F.3d 684, 704 (7th Cir. 2011)). The *Reese* decision noted that nothing in the text of the Second Amendment excludes young adults. *Id.* at 589–90. Historical evidence confirms that 18-to-20-year-olds were part of the Founding-era militia and expected to keep their own arms. *Id.* at 590–91. In short, "the text of the Second Amendment includes 18-to-20-year-old individuals among 'the people' whose right to keep and bear arms is protected." *Id.* at 600.

The Fifth Circuit found no American tradition justifies a categorical ban on these young adults' purchase of handguns. Similar to its reasoning before Fourth Circuit, the Government's argument in *Reese* relied principally on a handful of 19th-century state laws that restricted minors' access to pistols or other concealable weapons. These laws were overwhelmingly post-Civil War. The Fifth Circuit found these analogues deficient because they

were passed too late in time to outweigh the tradition of pervasively acceptable firearm ownership by those 18 and older at the crucial period of our nation's history. *Id.* at 599. Post-Reconstruction regulations could not overcome the fact that there was no practice of disarming young adults at the Founding. To the contrary, as 18-year-olds were required to report for militia service with arms.

Reese rejected earlier decisions that treated age-based sales restrictions as "longstanding" or presumptively lawful and rejected the pre-*Bruen* decision in *NRA of Am.* v. *Bureau of Alcohol*, 700 F.3d 185 (5th Cir. 2012). The Fifth Circuit emphasized that excluding an individual's right to engage in purchase from commercial dealers from the Second Amendment's protections would create a world where citizens' constitutional right could be displaced through narrowing regulations. *See Reese*, 127 F.4th at 590 & n.2. Concluding that "Second Amendment's protections extend to all law-abiding, adult citizens, including those aged 18 to 20," the Fifth Circuit held the laws at issue are unconstitutional. *Id.* at 600. The Fourth Circuit's ruling and that of *Reese* cannot be reconciled. This post-*Bruen* split on the validity of a federal restriction on a fundamental liberty for millions of otherwise qualified adult citizens warrants this Court's review.[6]

6. Within the Fourth Circuit itself, panels have been divided. In a 2021 split-panel decision, in which the undersigned counsel represented the Appellants, a pre-*Bruen* panel invalidated the same laws at issue and found that 18-to-20-year-olds are part of "the people." *Hirschfeld* v. *ATF*, 5 F.4th 407, 418–19 (4th Cir. 2021) (vacated for mootness after plaintiffs turned 21).

C. The Split Between the Fourth And Fifth Circuits Warrants Attention And Practical Considerations Require Further Review.

1. This Case Is A Perfect Vehicle For Consideration of The Issues Presented.

This case presents a purely legal question that is solely based on a constitutional question of national importance. The parties agree that there is no factual dispute. The district court applied *Bruen*'s framework and made detailed historical findings with a comprehensive record for review. Pet.App. 61a–182a. The Petitioners have standing. Their injury is concrete, particularized, and redressable by the relief sought. No issues of waiver, mootness, or procedural default cloud the petition. The Fourth Circuit's decision rests entirely on its conclusion that the laws at issue satisfy *Bruen*'s historical test. If this Court disagrees with the Fourth Circuit, Petitioners are entitled to their relief as initially granted. If this Court happens to agree with the Fourth Circuit, a circuit split will be eliminated. Assuming the nationwide class is reinstated, the matter will be resolved altogether. Notably, the Government chose not to petition for a writ of certiorari from the *Reese* decision and this is the only means by which this Court can resolve the split at issue.

2. Contrary To The Concurring Opinion From The Fourth Circuit, This Case Will Not Result In An Outcome That Extends Beyond The Class At Issue.

Judge Heytens' concurring opinion raised a policy concern: if 18-year-olds must be allowed to buy guns,

"what about today's 16 and 17-year-olds?" Pet.App. 23a. The concurrence served no functional purpose but for a signal to try and dissuade this Court from granting a writ of certiorari by presenting a red-herring.

The Petitioners have never argued on behalf of those younger than 18. The record does not address a historical tradition of restricting anyone younger than 18. Within one year of the Bill of Rights ratification, the Militia Act of 1792 set the age of service at 18. All states followed suit. Immediately after the Second Amendment's ratification, the federal government and all states set a service age of 18. Some evidence exists to support a service age younger than 18, but it is scattered across different colonies and states at different times with most of it predating the Bill of Rights' ratification. On the record before this Court, any support for extension of protections to those who are 16- to 17-years-old is not persuasive, while the 18- to 20-year-old evidence is obvious.

Second, even if the evidence existed, *Bruen* does not permit such consequential reasoning. It requires courts to assess the challenged regulation against our Nation's historical tradition of firearm regulation. This case is about adults and the line is not arbitrary. The delineation is not just obvious due to our contemporary law of majority, but also the Founding-era's delineation for those over 18 has significant historical, textual, and traditional support. At the Founding, although 21 was the age of majority in some contexts, 18 was the age of militia duty. Moreover, since at least 1971 and the passage of the Twenty-Sixth Amendment, 18 has been the universal age of majority, or "adulthood," given the civic and fundamental rights and duties such as voting, military service, contract, along with

marriage without consent, being criminally tried as an adult, and a myriad of other consequential risks, duties, and benefits. In sum, the concurrence's policy concerns do not alter the historical record that governs. The Second Amendment does not come with an internal age limit, but history shows it encompasses, at most, those who are 18 or older and, at minimum, those who are adults. In either event, these liberties can be fully recognized for those 18 and older without destabilizing the legal treatment of minors.

3. The Laws At Issue Involve A Narrow And Unique Set of Practical Implications For The Federal Regulation of Firearms That Make This Petition Appropriate For Consideration.

The laws at issue fall asymmetrically on buyers rather than sellers. Under these laws, sellers lose a subset of customers but may still sell to those above 20 years old. Meanwhile, those in the restricted age range can do nothing to purchase a new handgun[7] or ammunition. Not all young adults have parents who are able or willing to gift them a gun. Secondary markets are not always available to everyone, safe and legitimate, or easy to navigate. A sale from an FFL comes with unique and exclusive assurances of quality, safety, legality, background checks

7. In *Bruen*, the Court held that the Second Amendment's text covers weapons that are "in common use" for a lawful purpose. 597 U.S. at 32 (quoting *Heller*, 554 U.S. at 627). Here, no party disputes that handguns are "in common use" for a lawful purpose. *See*, e.g., *Heller*, 554 U.S. at 629; *see also Bianchi* v. *Brown*, 111 F.4th 438, 451 (4th Cir. 2024) (en banc) (contrasting "weapons of crime and war" with "the handgun").

for public safety, and more. "The laws at issue push young law-abiding adults to a less safe, less regulated market to defend themselves." *Hirschfeld*, 5 F.4th at 417 (4th Cir. 2021). If anything, the Government would be best served to invert the legal requirements and, *arguendo*, eliminate the private transfer of firearms and ammunition while *requiring* young adults to purchase through FFLs.

The Government's position inherently relies on a theory that FFL transactions somehow *increase* clandestine firearm possession in spite of regulations and reporting requirements. These restrictions apply to ammunition as well. The severity and difference in burdens shows why the laws at issue operate as a functional ban on the Petitioners and Class rather than a condition on the sale of firearms. The practical purpose and justifications suggested by the Government undermine our Nation's federal regulatory scheme altogether. This Court has an opportunity to not only fix a legal error, but a practical flaw in our Nation's firearm regulatory system. By granting this petition and ruling in the Petitioners' favor, this Court will allow them, and a Class of millions, to enter the regulatory scheme and enforce the underlying purpose of our Nation's federal regulation of firearm sales to ensure that a legitimate market is available for those who seek to purchase the "quintessential self-defense weapon." *Heller*, 554 U.S. at 629.

4. This Case Provides An Opportunity For The Court To Provide As Much or Little Guidance As It Deems Appropriate For Related Circuit Splits Concerning State Age-Based Restrictions On Firearm Purchases And Possession.

In addition to the split between the Fourth and Fifth Circuits before this Court, four sister circuits are split after having considered state laws with similar firearm-related restrictions on the same age classification at issue. This case concerns a federal law and the core Second Amendment right, as understood in 1791 and the Founding-era. By contrast, post-*Bruen* rulings from other circuits involved challenges to age-based firearm regulations and the application of the Second Amendment to the States, via the Fourteenth Amendment, which was ratified in 1868. Though some circuits have suggested that 1868-era history is most pertinent when scrutinizing state laws pursuant to the Second Amendment, whatever one's view, the split between the Fourth and Fifth Circuit is uncluttered by such a distinction. The fact that these two Circuits arrived at opposite conclusions after reviewing the same historical records amplifies the need for this Court's guidance. Whether millions of adult citizens can be categorically barred from the commercial purchase of handguns per the same federal law cannot be answered differently across the nation. This Court must resolve such an intolerable discrepancy.

a. The Third And Eighth Circuits Held That Similar State Laws With Age-Based Laws Are Unlawful.

In *Worth* v. *Jacobson*, 108 F.4th 677 (8th Cir. 2024), the Eighth Circuit invalidated Minnesota's law prohibiting anyone under 21 from carrying firearms in public. 108 F.4th at 698. The court concluded that "[o]rdinary, law-abiding, adult citizens that are 18 to 20-year-olds are members of the people" within the meaning of the Second Amendment and that "Minnesota did not proffer an analogue that meets the 'how' and 'why' of the Carry Ban for 18 to 20-year-old Minnesotans." *Id.* at 689, 698. Like the *Reese* court, the Eighth Circuit concluded that there were insufficient analogues from the Founding "to demonstrate that the Nation's historical tradition of firearm regulation supports the Carry Ban." *Id.* at 696. Like *Reese*, the *Worth* decision specifically rejected "the government's reliance on the Founding-era 'common law' rule that 'individuals did not have rights until they turned 21 years old,'" reasoning that arguments "focusing on the original contents of a right instead of the original definition" are "bordering on the frivolous." *Id.* at 689–90 (quoting *Heller*, 554 U.S. at 582). "The Second Amendment extends, prima facie, to all members of the political community, even those that were not included at the time of the founding," and "[e]ven if the 18 to 20-year-olds were not members of the political community at common law, they are today." *Id.* at 690–91 (citation modified). The government's Reconstruction-era laws, the Eighth Circuit held, both "carry less weight than Founding-era evidence" and "have serious flaws even beyond their temporal distance from the founding." *Id.* at 697.

The Third Circuit reached the same conclusion. In *Lara* v. *Commissioner Pennsylvania State Police*, 125 F.4th 428 (3d Cir. 2025), the court struck down state laws that barred 18-to-20-year-olds from carrying firearms whenever the State is under a declared state of emergency. *Id.* It held "that 18-to-20- year-olds are, like other subsets of the American public, presumptively among 'the people' to whom Second Amendment rights extend," and that the state failed to show that its age-based restriction "is consistent with the principles that underpin founding-era firearm regulations." *Id.* at 438, 445. Like the Fifth and Eighth Circuits, the *Lara* court did not find it dispositive that at "the Founding . . . those who were under the age of 21 were considered 'infants' or 'minors' in the eyes of the law," because "the legal status of 18-to-20-year-olds during that period" is not binding today, now that this legal status has changed. *Id.* at 436–37 (citation modified). The court explained, if "we were rigidly limited by Eighteenth-century conceptual boundaries, 'the people' would consist solely of white, landed men, and that is obviously not the state of the law." *Id.* at 437. The Third Circuit rejected the relevance of the late-nineteenth-century age bans because "the constitutional right to keep and bear arms should be understood according to its public meaning in 1791." *Id.* at 441.

b. The Eleventh And Tenth Circuits Held That State Firearm Restrictions With Age-Based Prohibitions Impacting Adult Citizens Are Lawful.

In *Nat'l Rifle Ass'n* v. *Bondi*, the Eleventh Circuit's en banc review upheld Florida's prohibition on those under 21 from purchasing *any* firearm. 133 F.4th 1108,

1115 (11th Cir. 2025), *petition for cert. filed sub nom.*, *Nat'l Rifle Ass'n* v. *Glass*, No. 24-1185 (U.S. May 16, 2025). In a fractured 169-page decision, the court upheld Florida's prohibitive regime.[8] *Id.* The majority's reasoning overlapped significantly with that adopted by the Fourth Circuit's approach in this case in that both relied on historical analogies to laws restricting "minors" and cited the same common-law infancy doctrine regarding voidable contracts as evidence that those under 21 were historically treated as lacking mature judgment. *Id.* at 1125–30. The Eleventh Circuit emphasized the Nineteenth-century state laws, arguing that by 1900 a "substantial" number of states had adopted age limits on arms sales or possession. *Id.* at 1131–35. Like the Fourth Circuit, the Eleventh dismissed the 1792 Militia Act as contrary to its holding, contending that a duty to bear arms did not entail a right to buy such arms. *Id.* at 1136–37. Several judges dissented, arguing that the majority's approach relegated the Second Amendment to "second-class" status for young adults and it ignored Founding-era evidence that 18-year-olds were full members of the political community. *Id.* at 1156–57 (Branch, J., dissenting).

The Tenth Circuit has charted yet another course that diverges sharply from others and even from the Fourth Circuit's analytical framework. In *Rocky Mt. Gun Owners* v. *Polis*, 121 F.4th 96 (10th Cir. 2024), a divided panel upheld Colorado's ban on firearm sales to the class at issue, but on the alternative ground that such a restriction

8. Notably, the Fourth Circuit explicitly cited and aligned itself with the Eleventh Circuit's reasoning in *NRA* v. *Bondi*. Pet. App. 27a. Thus, the Fourth and Eleventh Circuits stand together in upholding age-based firearm bans, placing them in direct opposition to the Third, Fifth, and Eighth Circuits.

"did not even implicate the Second Amendment's plain text." *Id.* at 100. The court treated the regulation as a mere "condition and qualification on the commercial sale" of arms falling outside the Amendment's scope, thereby bypassing *Bruen*'s historical inquiry entirely. *Id.* at 103–04. This also conflicts with the Fifth Circuit's holding in *Reese*: that the right to keep arms "implicitly protects those closely related acts necessary to their exercise" including purchasing arms. *Reese*, 127 F.4th at 588. It even undermines the Fourth Circuit's approach, which at least assumed that the laws at issue implicate the Second Amendment before proceeding to historical analysis. While the Tenth Circuit addressed a state law rather than the federal statute at issue here, its reasoning represents yet another methodological departure that underscores the confusion among lower courts.

II. The Fourth Circuit's Application of The "Infancy" Doctrine Conflicts With Constitutional Precedent.

The central premise of the Fourth Circuit's decision was that those older than 18, but under 21, remain akin to "infants" for purposes of the Second Amendment and firearm sales, therefore a categorical ban on purchasing handguns is justified. This "infancy" theory cannot be reconciled with how this Court approaches fundamental rights in other commercial contexts, much less how it interprets the Second Amendment.

In *Brown* v. *Ent. Merchs. Ass'n*, 564 U.S. 786 (2011), this Court struck a California law that prohibited the sale of violent video games to minors per First Amendment challenges. California argued that it could ban such sales to protect children from exposure to violent content,

claiming that minors' developmental vulnerability justified the restriction. The *Brown* Court firmly rejected that rationale. Writing for the majority, Justice Scalia explained that we have no "tradition of specially restricting children's access to depictions of violence," and the Court refused to create a new category of unprotected speech based on violent content directed at minors. *Id.* at 795. The Court emphasized that even "[w]here the protection of children is the object," the Government cannot restrict access to constitutionally protected materials absent a compelling justification that satisfies strict scrutiny. *Id.* at 805.

This Court's precedent demands consistent treatment of constitutional rights. In *McDonald* v. *City of Chicago*, the Court explicitly placed the Second Amendment on equal footing with other fundamental rights, holding that "the right to keep and bear arms [is] among those fundamental rights necessary to our system of ordered liberty." 561 U.S. 742, 778 (2010). The Court rejected any suggestion that the Second Amendment should receive lesser protection, emphasizing that it is not "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *Id.* at 780. If a state may not forbid the sale of violent video games to minors under the First Amendment, the federal government surely cannot forbid the sale of handguns—"the quintessential self-defense weapon," *Heller*, 554 U.S. at 629, to legal adults. The video games in *Brown* depicted "killing, maiming, dismembering, or sexually assaulting an image of a human being" in ways that appealed to "deviant or morbid interest of minors." *Id.* at 788. This Court held that First Amendment rights outweighed any governmental interest in shielding the class of young buyers from such content. Here, by contrast, the federal law restricts adults

rather than minors from purchasing firearms. If the Constitution protects a 17-year-old's right to purchase games simulating violence, it must protect a 20-year-old's right to purchase the quintessential means of self-defense. *Heller*, 554 U.S. at 629.

This Court's broader jurisprudence confirms that constitutional rights do not evaporate based on age alone. *See*, *e.g.*, *Tinker* v. *Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (First Amendment protections for minors); *Goss* v. *Lopez*, 419 U.S. 565 (1975) (due process for minors in civil proceedings); *Roper* v. *Simmons*, 543 U.S. 551 (2005) (Eighth Amendment applies to minors); *Brown* v. *Bd. of Educ.*, 347 U.S. 483 (recognizing Fourteenth Amendment protections for minors); *New Jersey* v. *T.L.O.*, 469 U.S. 325, 334 (1985) (Fourth Amendment right to privacy for purposes of search and seizure); *Breed* v. *Jones*, 421 U.S. 519 (1975); *In re Gault*, 387 U.S. 1 (1967); *Erznoznik* v. *Jacksonville*, 422 U.S. 205, 212–13 (1975). The Fourth Circuit's reliance on the common-law infancy doctrine fundamentally misconceives the nature of constitutional rights. The infancy doctrine was a rule of civil contract law that allowed those under 21 to void agreements—a paternalistic protection for the minor, not a sword against him. It permitted a young person to escape a bad bargain but did not criminalize the merchant's attempt to sell. Here, the laws at issue impose criminal sanctions on both the dealer who sells and the young adult who attempts to buy.

In *Heller*, the Court stated that the Second Amendment would be "nonsensical" if courts could add limiting language the Framers chose not to include. 554 U.S. at 588. Reading an age-based exception into "the people"

requires such limitations. As *McDonald* instructs, "constitutional rights are enshrined with the scope they were understood to have when the people adopted them." 561 U.S. at 788 (internal quotation marks omitted). As Judge Quattlebaum observed in his dissent, "[r]efunds are a standard part of commercial life . . . They are not to be seriously compared with the threat of prison." Pet.App. 53a. The infancy doctrine concerned private commercial relationships, not the relationship between citizens and their constitutional rights.

Historical context further undermines the Fourth Circuit's "infancy" analogy. At common law, turning 21 marked full adulthood for certain private-law purposes (for example, a person could not alienate real property until 21). 1 William Blackstone, *Commentaries on the Laws of England* *292–93. This civil disability did not translate into a broad lack of personal capacity or civic status prior to 21. To the contrary, young Americans in the Founding-era assumed responsibilities well-before adulthood. 18-year-olds were subject to militia service. 4 William Blackstone, *Commentaries* *293–94; *see also* 1 Matthew Hale, *Historia Placitorum Coronae* 587–88 (1736). Most relevant, during the debates in the First Congress, officials agreed that "all men of the legal military age should be armed," and specifically that those aged 18 to 20 made the best soldiers. 3 Annals of Cong. 574–75 (1792). In sum, while the contract law of the time afforded those younger than 21 a paternalistic exit from private agreements, it did not deny their fundamental rights or role as members of the polity.

An 18-year-old at the Founding was no "infant" in respect to the guarantees of the Second Amendment: he

was a citizen who could be entrusted with and expected to carry firearms in defense of liberty, even if he lacked technical privileges of property law. The notion that this Class of individuals was historically considered outside of the Second Amendment's scope on the theory that they were akin to "infants" finds no historical, textual, or traditional support. History shows that 18-to-20-year-olds were expected to bear arms and fulfil civic duties. The Fourth Circuit's attempt to graft contract-law and "infancy" onto the Second Amendment poorly misconceives both the doctrine and the realities of the Founding era.

Eighteen is now, at minimum, the age of full citizenship and adult responsibility. Petitioners and those in the relevant age classification may vote, *see* U.S. Const. amend. XXVI, serve on juries, marry without parental consent, *execute binding contracts*, and be drafted into military service. They are tried as adults in criminal court and may be sentenced to death. As this Court observed in *Roper*, society draws "the line between childhood and adulthood . . . at 18 years of age." *Id.* at 574. That an 18-year-old might have been subject to certain commercial disabilities at common law cannot transform him into a constitutional non-person, particularly when they have every other civic liberty. The Fourth Circuit's attempt to analogize the laws at issue to historical contract doctrine proves too much. If accepted, it would permit the Government to limit commercial access to the exercise of any constitutional right by invoking these young adults' relative immaturity.

If the Government does not have a free-floating power to restrict the ideas to which even *children* may

be exposed, *see Brown*, 564 U.S. at 794, it certainly does not have the power to restrict the liberty of legal adults to commercially access the quintessential self-defense weapon. If the Founders wanted to attach an age restriction on the Second Amendment, they knew how to do so. *See*, *e.g.*, U.S. Const. Art. I, § 2 (minimum age of 25 for holding office in House of Representatives), § 3 (minimum age of thirty for holding office in Senate), Art. II, § 1 (minimum age of thirty-five for holding office as President). Further, if the People want to apply an age threshold for constitutional purposes, they know how to do so. *See*, *e.g.*, U.S. Const. amend. XXVI (providing 18-year-olds with universal suffrage). "When the Framers decided which qualifications to include in the Constitution, they also decided not to include any other qualifications in the Constitution." *See*, *e.g.*, *United States Term Limits* v. *Thornton*, 515 U.S. 779, 868 (1995) (Thomas, J., dissenting) (applying the maxim *expressio unius est exclusio alterius*). The Second Amendment contains no such limitation. To the contrary, the Militia Act of 1792 required 18-year-olds to arm themselves, powerfully demonstrating that the Founding generation considered young adults to be full participants in the right to keep and bear arms. The Government's attempt to graft common-law contract principles onto the Second Amendment finds no support in text, history, or this Court's precedents interpreting other constitutional rights. In sum, the infancy doctrine represents a dangerous departure from established constitutional principles. It would create a constitutional underclass of young adults who would otherwise possess all the responsibilities of citizenship but denied their fundamental rights. This Court has consistently rejected such age-based discrimination in other constitutional contexts. The Second Amendment

deserves no less protection. The decision below, in accepting the Government's flawed analogy between commercial disabilities and constitutional rights, cannot stand.

III. Review is Needed Because The Fourth Circuit's Decision Undermines This Court's Second Amendment Jurisprudence.

The decision below is incorrect on the merits and cannot be squared with this Court's clear directives in *Heller*, *McDonald*, and *Bruen*. By upholding a categorical ban on young adults' purchase of handguns, the Fourth Circuit committed multiple doctrinal errors.

First, it misapplied *Bruen*'s step-one inquiry by downplaying the Second Amendment's text which presumptively includes all law-abiding adult citizens and the necessary act of acquiring arms as a means of "keep[ing]" them to exercise such rights. U.S. Const. amend. II.

Second, it relied on an inapt historical analogy to contract-law and the "infancy" doctrine, a civil rule that allowed minors to void their contracts—as if that was a tradition of government firearms regulation. This analogy conflates a paternalistic common-law rule of contract with a criminal prohibition aimed at public safety. It is also inapplicable because the doctrine simply does not apply the Petitioners or the Class, as they are law-abiding adults over 18 and therefore not subject to its protections.

Third, the court effectively engaged in what can only be considered a rational basis post-*Bruen* form of review,

in that it went out of its way to find any possible historical reason to uphold the laws at issue, despite the Government never arguing that the infancy doctrine of contract was at issue. Not only was this wrong, it would have been wrong pre-*Bruen* in both form and substance. *See*, *e.g.*, *Heller*, at 628, n.27 (finding rational-basis review improper for Second Amendment scrutiny pre-*Bruen*), *Hirschfeld*, 5 F.4th at 407–52 (invalidating the laws at issue pursuant to pre-*Bruen* standards). Instead of holding the Government to its post-*Bruen* burden to provide the requisite support for the laws at issue, the court took it upon itself to try its best to save this unconstitutional regulatory scheme and, even worse, misapplied the infancy doctrine altogether. *See* Pet.App. 40a–45a.

Fourth, the court misunderstood the 1792 Militia Act and Founding-era evidence, dismissing the fact that the First Congress required 18-year-olds to arm themselves as militia members. The majority reasoned that militia obligations did not guarantee a right to purchase arms, since an 18-year-old militiaman *could* be supplied by parents or others. This ignores the core historical reality: in the Founding-era, 18-to-20-year-olds were expected[9]

9. In Federalist No. 46, James Madison discussed the interplay between state militias and a federal army. While defending the notion of keeping a federal military small, he posited that state militias and an armed citizenry could outweigh threats of a standing military force. *See The Federalist* No. 46, p. 247–48 (Gideon, J. ed. 1818) (J. Madison). Militias consisted and relied on young people, not just adults. Militias were decentralized bands of able-bodied males comprised of adults in the age-classification at issue (and those even younger). James Lindgren, *Counting Guns In Early America*, 43 Wm. & Mary L. Rev. 1777, 1782 (2002). Militias were the first and last line of domestic defense, before and after the American Revolution, and their presence was a vital

to have arms and no law prevented them from obtaining those arms via commercial sale. The Militia Act is powerful evidence that the public understanding in 1791 included young adults as part of "the people" with a right (and duty) to "keep" arms. "[T]he conception of the militia at the time of the Second Amendment's ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty." *Heller*, 554 U.S. at 627.

Fifth, the lower court endorsed a temporal shift to Reconstruction-era evidence (circa 1868) to justify a federal law enacted in 1968, despite *Bruen*'s admonition that "not all history is created equal" and that 1791 is generally the correct focus for the Second Amendment's scope. By according outsized weight to a handful of post-Civil War state laws, the Fourth Circuit departed from *Bruen*'s focus on Founding-era tradition and blurred the distinction between incorporation (which occurred in 1868) and the substantive meaning of the right (rooted in 1791).

Sixth, it overstated the import of *Heller*'s dictum about "conditions and qualifications on the commercial sale of arms" being presumptively lawful. The federal restriction at issue here is not a modest "condition," such as the background checks that the Petitioner's can only be exposed to if the laws are invalidated, it is a ban on an entire class of adults purchasing the most common

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consideration when the Founders formulated America's system of federalism. *See*, *e.g.*, *The Federalist* No. 46, pp. 247–48 (Gideon, J. ed. 1818) (J. Madison). To think the Founders would have permitted a federal limitation on the commercial purchase of new, commonly used firearms by the same body that constituted the militia is fundamentally at odds with the Second Amendment.

category of firearms (handguns) from the commercial market. As other courts have recognized, a regulation that amounts to a functional prohibition on the ability to acquire arms is not shielded by *Heller*'s passing reference to commercial-sales regulations. The Fifth Circuit, for example, held that treating the ban on 18–20-year-old handgun sales as outside of the Second Amendment's scope would "propose[] a world in which the government can foreclose lawful avenues to gun ownership while leaving a hollow shell of a right intact"—an approach fundamentally inconsistent with *Heller* and *Bruen*.

Each of these errors is serious but, together, led the Fourth Circuit to a result that cannot be reconciled with this Court's Second Amendment jurisprudence.

IV. The Fourth Circuit's Ruling on Class Certification Require This Court's Intervention.

The Fourth Circuit's reversal of class-certification warrants this Court's review given the importance of nationwide relief. The lower court held that the district court abused its discretion by certifying a class after ruling in the Petitioners' favor on summary judgment but before entering final judgment. According to the Fourth Circuit, Fed. R. Civ. P. 23(c)(1)'s requirement to decide class certification at "an early practicable time" means a court can never wait until after deciding the merits. In doing so, the court effectively decided that the doctrine disfavoring "one-way intervention" is an absolute rule. That is not only wrong, it is not what Rule 23 requires and is judicial activism in its purest form. As the dissent explained, the historical concern about "one-way intervention," where class members can wait until

after a favorable decision to opt-in, is irrelevant in a Rule 23(b)(2) class action such as this. There is no "opt-out" opportunity and there are no individual damages at issue. The relief benefits all members. If denied, the judgment binds them. The concern of "one-way intervention" does not apply. This Court recognized as much in *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 362 (2011), noting that Rule 23(b)(2) classes are "mandatory" and do not present the same opt-out issues.

All parties agreed to expedite the decision on the merits because the case presents a purely legal question and the relief sought (injunctive and declaratory) would not change for individual cases. The Government suffered no prejudice from this sequence, as the Petitioners represented all similarly situated young adults and the legal arguments could not change. If anything, resolving the merits benefited judicial economy and, had the Government prevailed on the merits, a class could have been forced by the Government given Plaintiffs' request in the Complaint. The Fourth Circuit's decision would force parties into wasteful costs of litigation, even when a case-dispositive motion could end the matter. Such an approach is not required by Fed. R. Civ. P. 23 and was justifiably rejected by the district court, which carefully explained why, under modern case law, it had authority to certify post-merits in these circumstances. Other circuits have similarly held that one-way intervention is largely a non-issue for Rule 23(b)(2) classes or where the defendant (as here) is not unfairly surprised. *See*, *e.g.*, *Gooch* v. *Life Invs. Ins. Co. of Am.*, 672 F.3d 402, 432–33 (6th Cir. 2012) (noting the one-way rule is prudential, not jurisdictional, and does not rigidly apply to (b)(2) cases). Even worse, the Fourth Circuit held the district court abused discretion in a footnote, without fervent review.

Class actions are the preferred vehicle to obtain uniform nationwide relief and avoid piecemeal litigation by millions of potential gun owners and the practice of "universal" injunctions in cases that solely feature individual plaintiffs. *See*, *e.g.*, *Trump* v. *Casa, Inc.*, __ U.S. __, __, __ S.Ct. __, __, 2025 LEXIS 2501 at *6–7, 22–23 (U.S. June 27, 2025); *id.* at *43, 49 (Thomas, J., concurring) ("[P]erhaps a district court (or courts) will grant or deny the functional equivalent of a universal injunction—for example, by granting or denying a preliminary injunction to a putative nationwide class under Rule 23(b)(2). . . ."). In this case, class certification is particularly apt: the Class consists of young adults who are a part of a fluid population that would benefit from a single injunction rather than innumerable, separate suits where each person's aging may cause them to fall out of standing due to the passage of time and mootness of their claim. The district court's class certification and injunctive relief ensured the remedy was comprehensive and future-proof. By decertifying the Class and ordering dismissal of the entire action, the Fourth Circuit not only denied the Petitioners their relief but undermined class-wide relief from a class-based violation of fundamental liberties.

This Court's review should include the class-certification issue for two reasons. First, if the Court agrees with the Petitioners on the merits, class-wide relief is appropriate to fully resolve the matter. Second, the Fourth Circuit's rigid view on post-merits certification conflicts with Fed. R. Civ. P. 23, undermines the abuse of discretion standard for reviewing district courts, and would discourage parties from streamlining litigation. At minimum, the Court should reinstate the Class. Doing so will ensure the resulting decision on the merits

has uniform application regardless of the outcome. In nationwide constitutional cases, complete relief is often necessary to prevent patchwork enforcement and continued infringement of fundamental liberties. Rule 23(b)(2) is the preferred vehicle for such and was appropriately applied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED JUNE 18, 2025

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-2085

JOSHUA CLAY MCCOY; TYLER DALTON MCGRATH; IAN FLETCHER SHACKLEY; JUSTIN TIMOTHY FRASER, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED AS A CLASS,

Plaintiffs-Appellees,

v.

BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES; STEVEN DETTELBACH, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES; PAMELA JO BONDI, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES,

Defendants-Appellants.

Appendix A

GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE; BRADY CENTER TO PREVENT GUN VIOLENCE; ILLINOIS; ARIZONA; CALIFORNIA; COLORADO; CONNECTICUT; DELAWARE; DISTRICT OF COLUMBIA; HAWAII; MARYLAND; MASSACHUSETTS; MICHIGAN; MINNESOTA; NEVADA; NEW JERSEY; NEW YORK; NORTH CAROLINA; OREGON; PENNSYLVANIA; RHODE ISLAND; VERMONT; WASHINGTON,

Amici Supporting Appellants.

Appeal from the United States District Court
for the Eastern District of Virginia at Richmond.
Robert E. Payne, Senior District Judge.
(3:22-cv-00410-REP)

Argued: January 30, 2025
Decided: June 18, 2025

Before WILKINSON, QUATTLEBAUM, and HEYTENS, Circuit Judges.

Reversed and remanded with directions to dismiss by published opinion. Judge Wilkinson wrote the opinion, in which Judge Heytens joined. Judge Heytens wrote a concurring opinion. Judge Quattlebaum wrote a dissenting opinion.

WILKINSON, Circuit Judge:

18 U.S.C. § 922(b)(1) prohibits the commercial sale of handguns to individuals under the age of 21. Appellees

are four 18- to-20-year-olds who want to buy handguns. The question in this case is whether § 922(b)(1) violates appellees' Second Amendment rights.

We hold that it does not. From 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. Section 922(b)(1) fits squarely within this tradition and is therefore constitutional. *See N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022) (establishing text, history, and tradition test for the Second Amendment).

I.

A.

Federal law prohibits any person from "engag[ing] in the business of importing, manufacturing, or dealing in firearms" without a Federal Firearms License. 18 U.S.C. § 923(a). Upon obtaining a license, Federal Firearm Licensees ("FFLs") become subject to a number of statutory restrictions. One restriction concerns the buyer's age. Section 922(b)(1) makes it unlawful for FFLs to sell "any firearm" to individuals under the age of 18 or, as relevant here, any firearm "other than a shotgun or rifle" to individuals between 18 and 20. It reads as follows:

> 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.

18 U.S.C. § 922(b)(1). An FFL who "willfully violates" this provision can be fined, imprisoned for up to five years, or both. 18 U.S.C. § 924(a)(1)(D). The law does not penalize the underage individuals who buy firearms.

When it comes to 18- to 20-year-olds, § 922(b)(1)'s prohibition on sales of firearms "other than a shotgun or rifle" was "primarily designed to reduce access to *handguns*." S. REP. NO. 90-1097, at 189 (1968) (statement of Sen. Tydings). After years of investigation, Congress found "a causal relationship between the easy availability of [handguns] and juvenile and youthful criminal behavior" and sought to prohibit handgun sales "to emotionally immature" and "thrill-bent juveniles and minors." Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, 225-26.

Section 922(b)(1) is narrow in several respects. First, the law regulates only *transactions* involving firearms. It does not prohibit anyone from owning, possessing, or using firearms.

Second, the provision regulates only the *commercial sale* of firearms. It applies only to FFLs, who are sellers "engage[d] in the business of . . . dealing in firearms." 18 U.S.C. § 923(a). A seller engages in the business of dealing in firearms only if he "devotes time, attention, and labor to dealing in firearms as a regular course of trade or business to predominantly earn a profit through the repetitive purchase and resale of firearms." 18 U.S.C. § 921(a)(21)(C). Sellers not engaged in the business of dealing in firearms are not required to have a license, and unlicensed sellers are not covered by § 922(b)(1). As a result, gifts and private sales are beyond the law's reach. *See United States v. Hosford*, 843 F.3d 161, 166 (4th Cir. 2016).

Third, when it comes to 18- to 20-year-olds, § 922(b)(1) applies only to firearms "*other than* a shotgun or rifle." That qualification leaves much of the firearms market untouched. *See NSSF Releases Most Recent Firearm Production Figures*, Nat'l Shooting Sports Found. (Jan. 15, 2025). The law does not, for example, prohibit the sale of hunting rifles and other long guns.

B.

Appellees are four 18- to 20-year-olds who wish to buy a handgun from an FFL but cannot because of § 922(b)(1). In June 2022, appellees sued the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") in the Eastern District of Virginia. They claimed that § 922(b)(1) violates the Second Amendment and sought declaratory and injunctive relief.

Appendix A

The district court granted appellees' motion for summary judgment. Applying the text, history, and tradition test outlined in *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022), the court first determined that "the Second Amendment's protections apply to 18-to-20-year-olds" and that "the right to purchase a gun falls within the Second Amendment's plain text." *Fraser v. ATF*, 672 F. Supp. 3d 118, 130, 136 (E.D. Va. 2023). It then concluded that the government failed to demonstrate a relevant tradition of firearm regulation that could support the constitutionality of § 922(b)(1). With respect to the founding era, the district court found the government's evidence of analogous regulation lacking. It also emphasized that "the Founders understood that militia service began at the age of 18" which, in the district court's view, indicated that 18- to 20-year-olds had an unlimited constitutional right to purchase a handgun. *Id.* at 143. Turning to the nineteenth century, the court acknowledged that numerous states prohibited the sale of handguns to individuals under the age of 21 but concluded that these laws "tell[] us nothing" because they came long after the ratification of the Second Amendment. *Id.* at 144-45.

The government timely appealed. It argues that the district court erred in concluding that § 922(b)(1) violates the Second Amendment. We agree and reverse the district court's grant of summary judgment.[1]

1. After the district court ruled for appellees on the merits, appellees moved for class certification and the district court certified a nationwide class. On appeal, the government argues that the district court erred in certifying a class after issuing a

II.

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 *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022), the Supreme Court set forth a two-part test for determining "whether modern firearm regulations are consistent with the Second Amendment's text and historical understanding." *Id.* at 26.

At step one, we must determine whether "the Second Amendment's plain text covers [the] individual's conduct." *Bruen*, 597 U.S. at 17. If it does, "the Constitution presumptively protects that conduct" and we must proceed to step two. *Id.*

At step two, the burden shifts to the government to "demonstrate that the [challenged] regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with

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favorable ruling on the merits for appellees. *See* Fed. R. Civ. P. 23(c)(1)(A) ("At an early practicable time after a person sues . . . the court must determine by order whether to certify the action as a class action."). The government argues that appellees should not receive the benefit of class-wide relief when they strategically withheld their class certification motion to avoid being bound by an unfavorable ruling. Opening Br. at 26. We agree with the government that the district court did not certify the class at "an early practicable time." Fed. R. Civ. P. 23(c)(1)(A). We therefore hold that the district court's decision to certify the class was an error.

this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" *Bruen*, 597 U.S. at 17 (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50 n.10, 81 S. Ct. 997, 6 L. Ed. 2d 105 (1961)).

Determining whether the challenged regulation comports with our country's regulatory tradition involves "analogical reasoning." *Bruen*, 597 U.S. at 28. The key question is "whether the new law is 'relevantly similar' to laws that our tradition is understood to permit." *United States v. Rahimi*, 602 U.S. 680, 692, 144 S. Ct. 1889, 219 L. Ed. 2d 351 (2024) (quoting *Bruen*, 597 U.S. at 29). "How and why the regulations burden" Second Amendment rights are "central to this inquiry." *Bruen*, 597 U.S. at 29; *Rahimi*, 602 U.S. at 692. Put differently, we must ask whether the "modern and historical regulations impose a comparable burden" on the right and whether "that burden is comparably justified." *Bruen*, 597 U.S. at 29.

Importantly, the challenged law need not "precisely match its historical precursors." *Rahimi*, 602 U.S. at 692. As the Supreme Court has explained, "the appropriate analysis involves considering whether the challenged regulation is consistent with the *principles* that underpin our regulatory tradition," not applications of those principles found in particular laws. *Id.* (emphasis added); *see also id.* at 740 (Barrett, J., concurring) ("'Analogical reasoning' under *Bruen* demands a wider lens: Historical regulations reveal a principle, not a mold."). That is why the government must distill a relevant principle from a "historical *analogue*," but it need not unearth a "dead ringer" or "historical *twin*." *Bruen*, 597 U.S. at 30.

When discerning a relevant principle from our regulatory tradition, we are mindful that "not all history is created equal." *Bruen*, 597 U.S. at 34. "'Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them*.' The Second Amendment was adopted in 1791." *Id.* (quoting *District of Columbia v. Heller*, 554 U.S. 570, 634-35, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008)). A regulatory practice from around that date, therefore, is more likely to be consistent with the principles of the Second Amendment than a practice that existed long before or emerged long after the Amendment's ratification. *See id.* at 34-36.

That is not to say that pre- or post-enactment history is without value. If a founding-era practice stemmed from a "long, unbroken line of common-law precedent," that is strong evidence that the practice was part of a deeply rooted tradition and thus a "part of our law." *Bruen*, 597 U.S. at 35. Likewise, a founding-era practice that gave rise to an enduring tradition is more likely to reflect the widespread understanding of the founding generation than a practice that was short-lived and may have been an outlier. *See id.* at 37, 66 n.28.

III.

Starting with *Bruen*'s first step, we look to the text of the Second Amendment. As *Heller* made clear, handguns are "Arms" because they are "the quintessential self-defense weapon." *Heller*, 554 U.S. at 629. And the parties do not dispute that appellees' intended action—purchasing a handgun for lawful purposes—is part of

the "conduct" protected by the Amendment. *Bruen*, 597 U.S. at 31-32. The parties do seem to dispute, however, whether individuals between the ages of 18 and 20 are part of "the people" protected by the Second Amendment. Like the Eleventh Circuit, we assume without deciding that appellees are part of "the people" and are therefore covered by the Amendment's text. *See NRA v. Bondi*, 133 F.4th 1108, 2025 WL 815734, at *15 (11th Cir. Mar. 14, 2025) (en banc).

IV.

Turning to the narrower focus of step two, we conclude that the burden § 922(b)(1) imposes on the Second Amendment rights of 18- to 20-year-olds is relevantly similar to the burden imposed by the founding-era rule that contracts with individuals under the age of 21 were unenforceable.

A.

At English common law, a person under the age of 21 was considered an "infant" for purposes of contracting, and infants were not bound by their contracts. *See* Edward Coke, The First Part of the Institutes of the Lawes of England 171-72 (1628). As Blackstone put it in his influential eighteenth-century treatise, "an infant can neither aliene his lands, nor do any legal act, nor make a deed, nor indeed any manner of contract, that will bind him." 1 William Blackstone, Commentaries *453.

The common law understanding of contracting was broad. Like today, contracts could be "express or implied." 2 BLACKSTONE, *supra*, at *443. They could also be "executed," as when two parties make an exchange "immediately," or "executory," as when two parties agree to make an exchange later. *Id.; see also* 1 SAMUEL COMYN, A TREATISE OF THE LAW RELATIVE TO CONTRACTS AND AGREEMENTS NOT UNDER SEAL 151 (1809).

Like many common law principles, the infancy doctrine made its way across the Atlantic, and early American courts routinely applied it. *See*, *e.g.*, *Pool v. Pratt*, 1 D. Chip. 252, 253 (Vt. 1814) ("It is an ancient doctrine, as old as the common law, that an infant shall not, in general be bound by his contract; he is under an incapacity to bind himself by his contract."); *Collins' Lessee v. Rigua*, 2 Del. Cas. 78, 79 (Com. Pl. 1797); *Evnas v. Terry*, 3 S.C.L. (1 Brev.) 80, 80 n.b1 (Const. Ct. App. 1802); *Johnson v. Van Doren*, 2 N.J.L. 372, 373 (N.J. 1808); *Beeler v. Young*, 4 Ky. (1 Bibb.) 519, 520 (1809); *Commonwealth v. Murray*, 4 Binn. 487, 491 (Pa. 1812). Indeed, by the time of the founding, an infant's inability to contract was a well understood and engrained principle of American law. *See* 1 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 215 (1795) (noting that contracts with infants are generally unenforceable); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 191 (1827) (stating that "until the infant has attained the age of twenty-one years," he "cannot, except in a few specified cases, make a binding contract").

The infancy doctrine imposed a severe burden on a minor's ability to purchase goods, including firearms,

during the founding era. Eighteenth-century America was a credit economy. From the "account books as survive, it is evident that very little cash changed hands," "purchasers who paid in cash were rare," and because of the "shortage of a circulating medium," "credit rather than cash payment was the rule everywhere." Carl Bridenbaugh, The Colonial Craftsman 153-54 (1961). Under a practice known as "book credit," merchants recorded promises of future payment from their customers in account books. David T. Flynn, *Credit in the Colonial American Economy*, Econ. Hist. Ass'n (2008). And since infants could "not be held liable for failing to uphold their side of a contract over goods," extending credit to minors was a "considerable risk." Holly Brewer, By Birth or Consent: Children, Law, and the Anglo-American Revolution in Authority 265 (2005). Put simply, "whoever entered into a contract with an infant could lose substantial amounts of money" because courts refused to hold minors accountable for payment. *Id.* at 270; *see also*, *e.g.*, *Counts v. Bates*, 16 S.C.L. (Harp.) 464, 467 (Const. Ct. App. 1824) (holding that infant can keep a horse without paying credit amount owed). That "high risk made infants effectively unable to" purchase goods on credit. *See* Brewer, *supra*, at 270.

Nor could minors rely on buying a firearm with cash. First, coin was scarce during the founding era. *See* Bridenbaugh, *supra*, at 153-54. In addition, infants "lacked disposable income" because "they either worked for their parents for no wages, or any wages earned belonged to their parents." *Bondi*, 133 F.4th 1108, 2025 WL 815734, at *7 (citing Robert J. Spitzer, *Historical Weapons Restrictions on Minors*, 76 Rutgers U. L.R. 101, 108

(2024); 1 BLACKSTONE, *supra*, at *453). Furthermore, even if an infant had enough coin to buy a gun, merchants would have been unwilling to sell because they bore the risk that the minor would rescind the transaction and be entitled to a full refund under the infancy contract doctrine. *See*, *e.g.*, *Riley v. Mallory*, 33 Conn. 201 (1866) (holding that seller of a firearm was required to give a full refund to minor who insisted on returning used gun).

In arguing that the infancy doctrine did not apply to purchases of firearms, appellees point us to the "necessaries" exception. *See* Oral Arg. at 35:34. It is true that at English common law an infant could be bound by a contract for necessaries. But by the time of the founding, courts "began to view necessaries in very narrow terms." BREWER, *supra*, at 266. If an "infant live[d] with his father or guardian," for example, he could not "bind himself even for necessaries." 2 KENT, *supra*, at 196. And even where the necessaries exception did apply, it covered "victuals, clothing, medical aid, and 'good teaching or instruction.'" *Id.* There is no evidence that the exception was ever extended to firearms. Indeed, at least one court explicitly held that it did not apply to "pistols." *Saunders Glover & Co. v. Ott's Adm'r*, 12 S.C.L. (1 McCord) 572, 572 (Const. Ct. App. 1822).

Appellees next argue that "infancy" in contract doctrine was tethered not to the age of 21 but to a generally applicable "age of majority" that changes over time. Appellees derive this general age of majority by considering the critical mass of age restrictions for important civic activities, such as the age to vote and

to serve on juries. They then observe that while at the founding the age threshold for these civic activities was 21, today it is 18. From this appellees conclude that, even if our Nation's regulatory tradition supports restrictions on an infant's ability to buy a gun, the scope of that tradition today is limited to those who are under 18, given the change in the "age of majority." See Response Brief at 15.

The problem is that "infancy" in contract law was not tied to a dynamic, generally applicable age of majority. The definition of an "infant" at common law varied with the nature of the activity. *See* Samuel Carter, The Infants Lawyer: Or, the Law (Ancient and Modern) Relating to Infants 44 (2d ed. 1712) (describing "the Several Ages of Infants in the Law"). For example, the age of consent to marry ranged from twelve to fourteen and the age of criminal responsibility was fourteen. *Id.* at 45, 47. Sometimes the age of infancy even varied within an area of law. An individual could execute a will "as to Goods and Chattels" at eighteen "but not as to Lands" until he was twenty one. *Id.* at 49. For contracting it was determined that a person was "an infant till the age of 21 years" because such individuals lacked "judgment and discretion in their contracts and transactions with others" and it was therefore necessary to protect them from "persons of more years and experience." 1 Comyn, *supra*, at 148.

In sum, the infancy doctrine demonstrates that there was an early American tradition of burdening the ability of 18- to 20-year-olds to purchase goods, including firearms. We now hold that § 922(b)(1) fits comfortably within this tradition because it is analogous in both "how" it burdens

their Second Amendment rights and "why." *See Bruen*, 597 U.S. at 29; *Rahimi*, 602 U.S. at 692.

With respect to "how," the infancy doctrine and § 922(b)(1) both make it exceedingly difficult for a minor to purchase a handgun from a commercial seller, and they do so in similar ways. Both subject sellers to a risk of loss if they sell a handgun to a minor. Because of that risk, sellers are far less likely to transact with a minor and, in turn, a minor's ability to purchase a handgun is severely burdened.

To be sure, the risk sellers face under § 922(b)(1) is more severe than under the infancy doctrine. Section 922(b)(1) includes the possibility of imprisonment, whereas the infancy doctrine exposed sellers only to the risk of financial loss. But the relevant burden, for purposes of our analysis, is the burden on the minor purchasers challenging the law. And from the perspective of a minor purchaser, the effects of § 922(b)(1) and the infancy doctrine are virtually the same. Whether he faces criminal penalties or a law that transforms his sales into free giveaways, a rational merchant is highly unlikely to sell a gun to a minor.

As for "why," § 922(b)(1) and the infancy doctrine share a common rationale. Both were motivated by a recognition that individuals under the age of 21 lack good judgment and reason. As we have explained, the infancy doctrine responded to the concern that infants lack the "judgment and discretion" to transact with more sophisticated adults. 1 Comyn, *supra*, at 148; *see also* 2 Kent, *supra*, at

191. Similarly, Congress enacted § 922(b)(1) to prohibit firearm sales to "emotionally immature" and "thrill-bent juveniles and minors prone to criminal behavior." Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, 225-26.

Because § 922(b)(1) is "relevantly similar" to founding-era restrictions on the commercial sale of firearms, we are satisfied that the Second Amendment permits the law's burden on an 18- to 20-year-old's right to purchase a handgun.

B.

The district court held, and appellees here argue, that the Militia Act of 1792 demonstrates that 18- to 20-year-olds have a constitutional right to purchase handguns. *See also Reese v. ATF*, 127 F.4th 583, 596 (5th Cir. 2025) (holding the same). The Act required that "each and every free able-bodied white male citizen of the respective states . . . who is or shall be of the age of eighteen years, and under the age of forty-five years (except as is herein of after excepted), shall severally and respectively be enrolled in the militia." Militia Act, § 1, 1 Stat. 271, 271 (1792). It further required that "every citizen so enrolled and notified, shall, within six months thereafter, provide himself with a good musket or firelock." *Id.* Given this requirement to serve in an armed militia, the district court and appellees conclude that 18- to 20-year-olds must have had a constitutional right to purchase firearms.

We disagree for two reasons. One, the Militia Act did not mandate 18 as the universal age of militia eligibility.

It explicitly allowed states to exempt individuals from militia service "notwithstanding their being above the age of eighteen." Militia Act, § 2, 1 Stat. 271, 272 (1792). This reflected the fact that the age of enrollment fluctuated a great deal around the founding. Many state laws set the age of militia service at 21, for example.[2] So even if the Militia Act is evidence of some constitutional right to purchase firearms, it cannot stand for the proposition that such a right vested firmly at 18.

Two, any constitutional right derived from the Militia Act would not conflict with § 922(b)(1)'s narrow restriction on purchase. Again, the Act required a militiaman to "*provide himself* with a good musket or firelock." Militia Act, § 1, 1 Stat. 271, 271 (1792) (emphasis added). Not *purchase* for himself. There were of course many ways for an infant to "provide" himself with a firearm without going out and purchasing one himself. A minor could use the family gun, for instance. Indeed, "[b]y 1826, at least 21 of the 24 states admitted to the Union—representing roughly 89 percent of the population—had enacted laws that placed the onus on parents to provide minors with firearms for militia service." *Bondi*, 133 F.4th 1108, 2025 WL 815734, at *8; *see also* 133 F.4th 1108, [WL] at *7 (collecting state statutes).

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2. *See, e.g.*, An Act for Raising Levies and Recruits to Serve in the Present Expedition Against the French, on the Ohio, ch. II, §§ 1-3, *reprinted in* 6 The Statutes at Large; Being a Collection of All the Laws of Virginia, from the First Session of the Legislature, in the Year 1619, at 438-39 (William Waller Hening ed., 1819) (setting age of militia service at 21); Act of June 2, 1779, ch. XXIV, §§ 3-4, 1779 N.J. Acts 58, 59-60 (same); Ga. Code § 981, (1861) (same).

The 1792 Militia Act therefore does nothing to undermine our analysis regarding the founding-era tradition of restricting the sale of firearms to infants.

C.

Finally, our analysis is reinforced by later nineteenth-century history, which, when consistent with founding-era history, is helpful "confirmation" of original meaning. *See Bruen*, 597 U.S. at 37, 66 & n.28. Beginning in 1856, at least twenty jurisdictions enacted laws criminalizing the sale of firearms, often handguns specifically, to individuals under the age of 21.[3] An illustrative example is Indiana's

3. Act of Feb. 2, 1856, No. 26, 1856 Ala. Acts 17; Tenn. Code § 4864 (1858), *reprinted in* 1 The Code of Tennessee Enacted by the General Assembly of 1857-8, at 871 (Return J. Meigs & William F. Cooper eds., 1858); Act of Jan. 12, 1860, ch. 33, § 23, 1859 Ky. Acts 241, 245; Act of Feb. 27, 1875, ch. XL, 1875 Ind. Acts 59; Act of Feb. 17, 1876, No. CXXVIII (O. No. 63), 1876 Ga. Laws 112; Act of Feb. 28, 1878, ch. 66, § 2, 1878 Miss. Laws 175, 175; Mo. Rev. Stat. § 1274 (1879), *reprinted in* 1 The Revised Statutes of the State of Missouri 1879, at 224 (Hockaday et al. eds., 1879); Act of Apr. 8, 1881, ch. 548, § 1, 16 Del. Laws 716, 716; Act of Apr. 16, 1881, § 2, 1881 Ill. Laws 73, 73; Act of Mar. 24, 1882, ch. CXXXV, 1882 W. Va. Acts 421-22; Act of May 3, 1882, ch. 242, 1882 Md. Laws 656; Act of Mar. 5, 1883, ch. CV, 1883 Kan. Sess. Laws 159; Act of Apr. 3, 1883, ch. 329, §§ 1-2, 1883 Wis. Sess. Laws 290, 290; Act of Mar. 29, 1884, ch. 78, 1884 Iowa Acts 86; Act of July 1, 1890, No. 46, 1890 La. Acts 39; Penal Code of the Territory of Oklahoma, ch. XXV, art. 47, §§ 1-3, 1890 Okla. Sess. Laws 412, 495; Act of Mar. 14, 1890, ch. 73, § 97, 1890 Wyo. Sess. Laws 127, 140; Act of July 13, 1892, ch. 159, §§ 1, 5, 27 Stat. 116, 116–17 (District of Columbia); Act of Mar. 6, 1893, ch. 514, 1893 N.C. Sess. Laws 468; Act of May 14, 1897, ch. 155, 1897 Tex. Gen. Laws 221; *see also Bondi*, 2025 WL 815734, at *9 (collecting these statutes and relevant cases).

1875 law, which made it "unlawful for any person to sell . . . to any other person, under the age of twenty-one years, any pistol." Act of Feb. 27, 1875, ch. XL, § 1, 1875 Ind. Acts 59, 59.

Like the infancy contract doctrine, these nineteenth-century laws burdened 18- to 20-year-olds' ability to purchase handguns by making it far less likely that merchants would sell to them. And these laws were enacted for a familiar reason: a concern that youths lacked the maturity and judgment to responsibly buy their own pistols. *See* Patrick J. Charles, Armed in America: A History of Gun Rights from Colonial Militias to Concealed Carry 156, 404-05 (2019) (collecting contemporaneous sources).

These nineteenth-century laws also support our understanding that restrictions specific to handguns fall within the tradition we have identified. Because handgun ownership was not prevalent until the mid-nineteenth century, it is not surprising that the government cannot point us to a "historical twin" from the founding era. But as soon as handguns came on the scene, legislatures quickly prohibited their sale to minors, consistent with our Nation's regulatory tradition of restricting firearm sales to infants. These nineteenth-century laws were celebrated by the public and went largely unchallenged. *See* Charles, *supra*, at 156. As far as we can tell, the Tennessee Supreme Court was the only court to consider the constitutionality of these laws, and it held that they were constitutional. *See State v. Callicutt*, 69 Tenn. 714, 716-17 (1878).

Last, it is not lost upon us that in modern times "[m]any states (and the District of Columbia) proscribe or restrict the sale of handguns to persons under 21." *NRA v. ATF*, 700 F.3d 185, 190 n.4 (5th Cir. 2012). These widespread restrictions on handgun sales to those under 21 are testament to the continuity of the historical tradition that we have identified.

Moreover, the New York law struck down in *Bruen* and the D.C. law invalidated in *Heller* were both identified as outliers by the Supreme Court. *See Bruen*, 597 U.S. at 79 (Kavanaugh, J., joined by Roberts, C.J., concurring) ("[T]he Court correctly holds that New York's outlier 'may-issue' licensing regime for carrying handguns for self-defense violates the Second Amendment."); *id.* at 78 (Alito, J., concurring) ("The District of Columbia law [in *Heller*] was an extreme outlier."); *Heller*, 554 U.S. at 629 (noting that "[f]ew laws in the history of our Nation have come close to the severe restriction of the District's handgun ban"). The law before us is anything but. The only "outlier" would be our ruling unconstitutional a federal statute that is so consonant with our historical and contemporary tradition. If we were to hold that it is beyond the power of a legislature to bar an 18-year-old from purchasing a handgun, why stop at 18? What principle of law would allow a legislature to prohibit handgun sales to a 14- or 16-year-old? *See* Heytens, J., concurring, at 22. Appellees would have us pursue a path more sweeping and unlimited than any reasonable interpretation of the Constitution can bear.

V.

Declaring an Act of Congress to be unconstitutional is a big step for a court to take. Just as the Second Amendment protects the right of the people to keep and bear arms, the democratic process protects the right of the people to the blessings of self-government. *Bruen* and *Rahimi* acknowledge the latter right. *See Bruen*, 597 U.S. at 30 (noting that history and tradition is not a "regulatory straightjacket"); *Rahimi*, 602 U.S. at 691 (emphasizing that *Bruen* did not transform the Second Amendment into "a law trapped in amber"). It seems clear from the Court's decisions that individual and democratic rights do not extinguish one another in this important area and, further, that it is not impermissible for lower courts to attempt some demonstration of respect for both.

Basic respect for traditional democratic authority is a modest ask. Our holding here simply acknowledges that legislatures *may* enact these sorts of age restrictions, not that they *must*. If § 922(b)(1) proves unpopular, lawmakers remain free to take a different course. But to date they have not done so, and firearms regulation is not the kind of thing that tends to escape legislative attention. Indeed, Congress has had many chances to amend and revise the compromises reflected in the age provision at issue here, but it has passed them by. *See* Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213; Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993); Violence Against Women Act of 1994, Pub. L. 103-322, 108 Stat. 1796. Into the middle of this longstanding legislative compromise, the plaintiffs now come charging, inviting

us to improve on Congress's work. Respectfully, we must decline.

* * *

We have done our best to faithfully apply the analytical framework set out in *Bruen*. There plainly exists a robust tradition that supports the constitutionality of § 922(b)(1). Our analysis is reinforced by the Supreme Court's repeated insistence across its Second Amendment cases that "longstanding . . . laws imposing conditions and qualifications on the commercial sale of arms" are "presumptively lawful." *Heller*, 554 U.S. at 626-27 (Scalia, J.); *see McDonald v. City of Chicago*, 561 U.S. 742, 786, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010) (Alito, J.); *Bruen*, 597 U.S. at 80-81 (Kavanaugh, J., joined by Roberts, C.J., concurring); *Rahimi*, 602 U.S. at 735 (Kavanaugh, J., concurring) (calling these laws "traditional exceptions to the right"). We have no reason or right to call such expressions into question. By conditioning the sale of handguns on a buyer's age, § 922(b)(1) is presumptively lawful. *Bruen* analysis confirms that the law is indeed constitutional.

For the foregoing reasons, the district court's judgment is reversed, and the case is remanded with instructions to dismiss it.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS

TOBY HEYTENS, Circuit Judge, concurring:

Judge Wilkinson's opinion for the Court explains why the plaintiffs' arguments fail on their own terms. I write to highlight another—and, to my mind, fatal—flaw.

* * *

Do 16- and 17-year-olds have a constitutional right to buy handguns? To be sure, the plaintiffs—like others before them—have carefully limited their requested relief to those 18 and older.[*] But "[i]t is usually a judicial decision's reasoning—its *ratio decidendi*—that allows it to have life and effect in the disposition of future cases." *Ramos v. Louisiana*, 590 U.S. 83, 104, 140 S. Ct. 1390, 206 L. Ed. 2d 583 (2020) (opinion of Gorsuch, J.). And the plaintiffs are on the horns of a dilemma, because their arguments for why 18-year-olds have a constitutional right to buy handguns suggest that younger people do too—a startling result that the plaintiffs seek to obscure and for which they offer no defense.

* * *

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* See *Nat'l Rifle Ass'n v. Bondi*, 133 F.4th 1108, 1114 (11th Cir. 2025); *Reese v. ATF*, 127 F.4th 583, 586 (5th Cir. 2025); *Hirschfeld v. ATF*, 5 F.4th 407, 422 & n.13, vacated as moot, 14 F.4th 322 (4th Cir. 2021). In a related case that was argued with this one, the plaintiffs admitted that it would be "absurd" to suggest that "there cannot be *any* minimum age requirements with respect to firearms" but offer no rationale for drawing the line at 18. Appellees Br. at 39, *Brown v. ATF*, No. 23-2275 (4th Cir. Feb. 21, 2024).

The plaintiffs' arguments have a facile appeal. 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. As the argument goes, those 18 and older are part of "the people" and were generally eligible for militia service at the Founding. Serving in the militia entailed "bear[ing] Arms," and Founding-era militia members were expected to provide their own weapons. There were also no Founding-era statutes regulating firearm sales based on age. Ergo, the Second Amendment protects today's 18-to-20-year-olds' individual right to buy a handgun.

So what about today's 16- and 17-year-olds? After all, 16- and 17-year-olds also served in Founding-era militias, and they were not subject to any Founding-era firearm sales restrictions based on age. Indeed, none of the arguments in the previous paragraph are limited to those 18 and older. Thus, any decision accepting the plaintiffs' logic would suggest that—any *ipse dixit* aside—today's high school juniors *also* have a constitutionally protected right to buy handguns.

The plaintiffs respond that today's society has come to treat 18 as the critical age for most (though, of course, not all) purposes. That argument chases its own tail. For example, the plaintiffs point to the Twenty-Sixth Amendment, which says: "The right of citizens of the United States, who are eighteen years of age or older, to

vote shall not be denied or abridged by the United States or by any State on account of age." U.S. Const. amend. XXVI, § 1. But that amendment was ratified in 1971—three years after the statute challenged here was enacted. See Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, 230. It seems implausible that 18 U.S.C. § 922(b)(1) was constitutional as applied to 18-to-20-year-old purchasers on the day it took effect only to become unconstitutional a mere three years later.

True, the Supreme Court has treated 18 as a dividing line for other constitutional provisions that do not mention age—specifically, the Eighth Amendment's prohibition against "cruel and unusual punishments." U.S. Const. amend. VIII; see *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005); *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). But the Supreme Court has made clear—over and over—that Eighth Amendment analysis requires considering "the evolving standards of decency that mark the progress of a maturing society." *Roper*, 543 U.S. at 561 (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958) (plurality opinion)). In contrast, Second Amendment analysis is "centered on constitutional text and history." *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 22, 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022). It should be no surprise that these different approaches sometimes produce different outcomes. Cf. *Heller v. District of Columbia*, 670 F.3d 1244, 1274, 399 U.S. App. D.C. 314 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (noting that

"governments appear to have *more* flexibility and power to impose gun regulations under a test based on text, history, and tradition than they would under strict scrutiny").

* * *

For Second Amendment purposes, it does not matter that today's 18-year-olds have come to enjoy statutory—and even constitutional—rights they would not have possessed at the Founding. Instead, the question is whether the "*pre-existing* right" that Amendment "codified" in 1791 already encompassed a right for 18-year-olds to buy firearms. *District of Columbia v. Heller*, 554 U.S. 570, 592, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008). Because text, history, and tradition show the answer is no, I concur.

QUATTLEBAUM, Circuit Judge, dissenting:

Plaintiffs—18- to 20-year-olds who want to buy handguns—challenge federal laws prohibiting licensed firearms dealers from selling those weapons to them. They argue the federal handgun purchase ban violates their Second Amendment rights. The district court agreed. Now my colleagues in the majority reverse, upholding the handgun purchase ban as consistent with our Nation's history and tradition of regulating firearms. They reach this conclusion primarily by reviewing a founding-era contract law principle that permitted 18- to 20-year-olds to void all types of contracts they entered. But that principle does not impose a comparable governmental burden (a "how"), nor is it based on a comparable justification (a "why") to the federal handgun purchase ban. So, it does not support the constitutionality of the federal handgun purchase ban. Considering actual founding-era firearm regulations, the purchase ban is inconsistent with our Nation's history and tradition.

I recognize that to many, banning sales of handguns to those under 21 makes good sense. I appreciate that sentiment, especially during a time when gun violence is a problem in our county. But that is a policy argument. As judges, we interpret law rather than make policy. Under Supreme Court precedent, this federal handgun purchase ban violates the Second Amendment. Thus, I respectfully dissent.

Appendix A

I. Background

A. The Second Amendment and the Federal Handgun Purchase Ban

The Second Amendment of the United States Constitution states, "[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.

Plaintiffs—18- to 20-year-olds—challenge several federal statutes. They contest the validity of two provisions of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197. The first provision, 18 U.S.C. § 922(b)(1), prohibits a federally licensed importer, manufacturer, dealer or collector from selling or delivering a firearm, "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." The provision also prohibits the sale or delivery of "any firearm" to an individual less than 18. *Id.* So in effect, the statute prohibits licensees from selling or delivering handguns to 18- to 20-year-olds. The second provision, 18 U.S.C. § 922(c)(1), imposes the same prohibition on sales to a person not physically present at the licensee's business. Plaintiffs also challenge Bureau of Alcohol, Tobacco, Firearms and Explosives regulations that repeat this prohibition. *See*, *e.g.*, 27 C.F.R. § 478.99(b). For convenience, I refer to these statutes and regulations as the federal handgun purchase ban.

B. Procedural History

Plaintiffs sued "on behalf of other similarly situated members of a class": all 18- to 20-year-olds. *Fraser v. ATF*, 672 F. Supp. 3d 118, 122 (E.D. Va. 2023). Before plaintiffs moved for class certification, the parties agreed to proceed with dispositive motions. The government moved to dismiss, and plaintiffs moved for summary judgment. The district court granted plaintiffs' motion for summary judgment. Applying the analytical framework from *Bruen*, the court concluded the handgun purchase ban violated the Second Amendment. *Fraser*, 672 F Supp. 3d at 126-47 (citing *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022)). Plaintiffs then moved for class certification and a permanent injunction. The court concluded Federal Rule of Civil Procedure 23 permitted class certification after summary judgment and that plaintiffs satisfied Rule 23(b)(2)'s requirements. *See Fraser v. ATF*, No. 3:22-cv-00410, 2023 U.S. Dist. LEXIS 154061, 2023 WL 5616011, at *3, 11 (E.D. Va. Aug. 30, 2023). And it awarded the class—all 18- to 20-year-olds—a declaratory judgment and a permanent injunction. *See Fraser v. ATF*, 689 F. Supp. 3d 203, 210, 218 (E.D. Va. 2023). The government timely appealed.[1]

1. The district court exercised jurisdiction under 28 U.S.C. § 1331. We exercise appellate jurisdiction under 28 U.S.C. § 1291. We review *de novo* a district court's ruling on the constitutionality of a statute. *See Fusaro v. Howard*, 19 F.4th 357, 366 (4th Cir. 2021).

II. The Second Amendment

In *District of Columbia v. Heller*, the Supreme Court interpreted the Second Amendment to protect an individual's "inherent right" to self-defense. 554 U.S. 570, 628, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008). More recently, the Court in *Bruen* laid out a two-step analytical framework for applying the Second Amendment. 597 U.S. at 24. At step one, courts must first assess whether "the Second Amendment's plain text covers an individual's conduct." *Id.* If it does not, our inquiry ends—there is no Second Amendment problem. But if the text covers the conduct, "the Constitution presumptively protects that conduct," and we must go to step two. *Id.* At step two, the government must overcome the presumption of unconstitutionality by demonstrating that "its regulation . . . is consistent with the Nation's historical tradition of firearm regulation." *Id.* During that historical inquiry, courts must consider the "how" and "why" of historical regulations. *Id.* at 29. For the "how," we ask whether the "modern and historical regulations impose a comparable burden on the individual's right." *Id.* For the "why," we ask whether that burden is "comparably justified." *Id.*

In *United States v. Rahimi*, the Court clarified that Second Amendment jurisprudence is not "a law trapped in amber." 602 U.S. 680, 691, 144 S. Ct. 1889, 219 L. Ed. 2d 351 (2024). The historical inquiry focuses not on finding a "historical twin" but "whether the challenged regulation is consistent with the principles that underpin our regulatory tradition." *Id.* at 692. But that clarification maintained the need for courts to compare the "how" and "why"

of the challenged regulation with that of its historical comparators. "Why and how the regulation burdens the right are central to this inquiry." *Id.* Explaining further, the Court emphasized the importance of historical firearm regulations under this comparison of principles:

> For example, if laws at the founding regulated firearm use to address particular problems, that will be a strong indicator that contemporary laws imposing similar restrictions for similar reasons fall within a permissible category of regulations. Even when a new law regulates arms-bearing for a permissible reason, though, it may not be compatible with the right if it does so to an extent beyond what was done at the founding. And when a challenged regulation does not precisely match its historical precursors, "it still may be analogous enough to pass constitutional muster."

Id. (quoting *Bruen*, 597 U.S. at 30). This two-step inquiry frames our analysis of the federal handgun purchase ban.

A. The Second Amendment's Text

This case presents two questions at *Bruen*'s first step—whether plaintiffs are part of "the people" and whether the Second Amendment's text protects plaintiffs' proposed course of conduct.[2] 597 U.S. at 31-32; *see United*

2. In *Bruen*, the Court held that the Second Amendment's text covers weapons that are "in common use" for a lawful purpose.

States v. Price, 111 F.4th 392, 400 (4th Cir. 2024) (en banc). I address them in turn.

1. "The People"

First, are 18- to 20-year-olds part of "the people" protected by the Second Amendment? This is a question of first impression in this circuit.[3] But several circuits, after *Rahimi*, have concluded 18- to 20-year-olds are part of "the people." *See Reese v. ATF*, 127 F.4th 583, 590-95 (5th Cir. 2025); *Lara v. Comm'r Pa. State Police*, 125 F.4th 428, 435-38 (3d Cir. 2025); *Rocky Mountain Gun Owners v. Polis*, 121 F.4th 96, 114-16 (10th Cir. 2024); *Worth v. Jacobson*, 108 F.4th 677, 688-92 (8th Cir. 2024), *cert. denied*, No. 24-782, 221 L. Ed. 2d 664, 2025 WL

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597 U.S. at 32 (quoting *Heller*, 554 U.S. at 627). Our court later held that the question of whether the weapons at issue are commonly used for a lawful purpose should be considered at step one. *United States v. Price*, 111 F.4th 392, 400 (4th Cir. 2024) (en banc); *but see id.* at 415 (Quattlebaum, J., concurring in the judgment). Here, no party disputes that handguns are "in common use" for a lawful purpose. "[T]he American people have considered the handgun to be the quintessential self-defense weapon." *Heller*, 554 U.S. at 629; *see also Bianchi v. Brown*, 111 F.4th 438, 451 (4th Cir. 2024) (en banc) (contrasting "weapons of crime and war" with "the handgun").

3. Prior to *Bruen*, a panel of this Court concluded that "the Constitution's text, structure, and history affirmatively prove that 18-year-olds are covered by the Second Amendment." *Hirschfeld v. ATF*, 5 F.4th 407, 440 (4th Cir. 2021). But the panel vacated its opinion for mootness when the plaintiff turned 21. *See Hirschfeld v. ATF*, 14 F.4th 322, 326 (4th Cir. 2021).

1151242, at *1 (U.S. April 21, 2025) (mem).[4] No federal court of appeals has found "the people" excludes 18- to 20-year-olds. For good reason, the majority assumes they are part of the people. *See* Maj. Op. at 10.

In *Heller*, the Supreme Court described "the people" as referring "to all members of the political community, not an unspecified subset." 554 U.S. at 580. The *Heller* Court also referenced the Supreme Court's earlier description that "'the people' protected by the Fourth Amendment, and by the First and Second Amendments, . . . refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Id.* (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990)). Under either definition, "the people" covers 18- to 20-year-olds.[5] They enjoy—as part of "the people"—the protections of the First and Fourth Amendments. *See Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 794, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011); *New Jersey v. T.L.O.*, 469 U.S. 325, 334, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985). And the Second Amendment protects them too. *See Verdugo-Urquidez*, 494 U.S. at

4. *Lara* and *Worth* considered state laws prohibiting 18- to 20-year-olds from carrying firearms in certain circumstances. *Lara*, 125 F.4th at 432; *Worth*, 108 F.4th at 683. *Polis* considered a Colorado law prohibiting anyone younger than 21 from purchasing a firearm. 121 F.4th at 104. And *Reese* considered the federal handgun purchase ban that we review today. 127 F.4th at 586.

5. Any distinction between "political community" and "national community" makes no difference in today's case. *See Worth*, 108 F.4th at 690 n.5.

265. When read consistently across the Constitution, "the people" must include 18- to 20-year-olds. *See Polis*, 121 F.4th at 116.

The government hints that 18- to 20-year-olds are excluded from "the people" based on the term's meaning in 1791. And amicus flat out makes that argument. *See* Everytown Amicus Curiae Br., *Brown v. ATF*, Case No. 23-2275 (4th Cir. Jan. 29, 2024), ECF No. 24 at 4-5. The argument relies on the fact that during the late eighteenth century, 18- to 20-year-olds were minors who could not vote. Since they could not vote, amicus reasons, they are not part of "the people" and thus are not protected by the Second Amendment. *Id.* But that cannot be right. The logic behind that view ties "the people" to those who were part of the national or political community in the 1770s. But applying that logic consistently would not only exclude those who couldn't vote because of age; it also would exclude those who couldn't vote "based on property ownership, race, or gender." *Reese*, 127 F.4th at 592 (describing founding-era voting limitations based on property ownership and longstanding voting restrictions based on race and gender); *see also Lara*, 125 F.4th at 437 ("the people" in the late eighteenth century consisted "solely of white, landed men").

The proper inquiry is to use the principle of the relevant national or political community but apply it today. *See Heller*, 554 U.S. at 580-82; *see also Rahimi*, 602 U.S. at 692 (noting that the Court would be "mistaken" to "apply[] the protections of the right only to muskets and sabers"). Under that approach, just as the First and

Fourth Amendments apply to today's national and political communities, so does the Second Amendment.

2. "Keep and Bear"

Second, does "the plain text of the Second Amendment protect [plaintiffs'] proposed course of conduct"—purchasing a handgun from a federal licensee? *Bruen*, 597 U.S. at 32. To answer this question, we must consider whether "the regulation 'infringes' the Second Amendment right to keep and bear arms." *Md. Shall Issue, Inc. v. Moore*, 116 F.4th 211, 220 (4th Cir. 2024) (en banc). Once again, the majority assumes the answer here to be yes. *See* Maj. Op. at 9-10. But not the government. It argues the Second Amendment does not protect a right to purchase handguns from commercial sellers when they are available from other sources.

It is correct that the Amendment's plain text does not contain the word "purchase." It uses the phrase "keep and bear Arms." U.S. Const. amend. II. But an explicitly recognized right implicitly protects closely related acts needed to exercise the right itself. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 192-94 (2012) (Predicate-Act Canon). The Supreme Court has followed this interpretative canon. For example, in *Carey v. Population Services International*, the Court noted that the right to choose contraception requires the ability to purchase contraception, therefore casting doubt on a prohibition of sale. 431 U.S. 678, 687-88, 97 S. Ct. 2010, 52 L. Ed. 2d 675 (1977). In the same way, the right to keep and bear arms includes the right to

purchase them. Otherwise, the expressly granted right would be rendered hollow.

The other circuits that have addressed this question have acknowledged the Second Amendment implicitly protects "a corresponding right to acquire [firearms] and maintain proficiency in their use." *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011); *see Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017) ("[T]he core Second Amendment right to keep and bear arms for self-defense wouldn't mean much without the ability to acquire arms." (cleaned up)); *Reese*, 127 F.4th at 590 ("Because constitutional rights impliedly protect corollary acts necessary to their exercise, we hold that" the Second Amendment covers "commercial purchases"); *Polis*, 121 F.4th at 140 (McHugh, J., concurring) ("Keeping and bearing arms . . . implies the right to *acquire* arms in order to use them for self-defense."); *see also Andrews v. State*, 50 Tenn. (3 Heisk) 165, 178 (1871) ("The right to keep arms, necessarily involves the right to purchase them....").

That makes sense. If you cannot buy a handgun, it's pretty hard to keep and bear it. True, a friend or relative might give you a handgun. But are the Second Amendment's protections so cramped that they only apply to those fortunate enough to have friends or family willing and able to transfer handguns as gifts? Surely not.

Also, applying the Second Amendment to the purchase ban conforms with the ordinary meaning of "infringe" during the founding era. Recall that the amendment instructs the right "shall not be infringed."

U.S. Const. amend. II. Contemporaneous dictionaries defined "infringe" as "[t]o violate" and "[t]o destroy; to hinder." 1 Samuel Johnson, *A Dictionary of the English Language* (1st ed. 1755); *see* 1 Noah Webster, *American Dictionary of the English Language* (1828) (similarly defining "infringe"); *see also* 1 Johnson, *supra*, (defining "hinder" as "[t]o obstruct" and "to impede"); 1 Webster, *supra*, (defining "hinder" as "[t]o impose obstacles or impediments"). So, the ordinary meaning of "infringe" at the founding did not require a total deprivation. Barring "the people" from purchasing handguns from the only consistent commercial source at the very least hinders or impedes their ability to keep and bear arms. *See Nunn v. State*, 1 Ga. 243, 251 (1846) ("The right of the whole people . . . to keep and bear arms of every description . . . shall not be infringed, curtailed, or broken in upon, in the smallest degree. . . ."); *cf. United States v. Scheidt*, 103 F.4th 1281, 1284 (7th Cir. 2024) (concluding an information disclosure requirement does not "'infringe' the right to keep and bear arms").

3. Conditions and Qualifications on Commercial Sale

The government makes another argument that the purchase ban falls outside the protection of the Second Amendment. This time, it channels *Heller*'s non-exhaustive list of "longstanding," "presumptively lawful regulatory measures." 554 U.S. at 626-27 & n.26. Those measures include "laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626-27. The government argues that the federal handgun purchase ban is such a condition on commercial sale.

But this argument conflicts with our precedent. A condition or qualification on the sale of arms is a burden on the seller—"a hoop someone must jump through to sell a gun." *Hirschfeld*, 5 F.4th at 416; *see also United States v. Hosford*, 843 F.3d 161, 166 (4th Cir. 2016). This really isn't a burden on the seller though. It's a burden on would-be buyers.

And even if we were to look past that distinction, some burdens go too far. A burden may be "so prohibitive as to turn this condition or qualification into a functional prohibition." *Hosford*, 843 F.3d at 166. For example, in *Hosford*, we upheld a requirement that firearm dealers obtain a license as a condition and qualification on commercial sale; but only because it did not rise to a functional prohibition on the purchaser's right to keep and bear arms. *Id.* at 166-67.

Following *Hosford*, a sales ban that functionally prohibits the right to keep and bear arms is not a valid condition or qualification on sale. That is exactly what the federal handgun purchase ban does. While formally aimed at the seller, § 922(b) functionally prohibits an 18- to 20-year-old buyer from purchasing a handgun. *See Hirschfeld*, 5 F.4th at 417. The 18- to 20-year-old can do nothing but wait until he turns 21. Section 922(b) outright prohibits him from purchasing a handgun from a licensed dealer, leaving only private sales and gifts as realistic ways to acquire handguns. Those limited channels fail to satisfy the Second Amendment's command.

I acknowledge not all agree. The Tenth Circuit found a similar state restriction constituted a presumptively lawful condition on the commercial sale of arms. *See Polis*, 121 F.4th at 118. It reasoned that the state ban is a "narrow, objective, and definite standard that applies uniformly to all potential sellers and buyers." *Polis*, 121 F.4th at 123. I agree that such a ban would be objective and definite. But that alone cannot make it constitutional. Bans on selling to those over 25 would also be objective and definite. So would bans on selling to women and Black people. They would also be unconstitutional.

The federal handgun purchase ban, however, is neither narrow nor uniform. Admittedly, it does not preclude possessing a handgun and does not apply to the sale of other arms like rifles or shotguns. But it completely prohibits a category of "the people" from acquiring the quintessential self-defense firearm through ordinary commerce. And it singles out 18- to 20-year-olds for heightened regulation.

For all these reasons, the government's step one arguments fail. Because the federal handgun purchase ban prevents a subset of "the people" from purchasing firearms from the primary source, the Second Amendment protects plaintiffs' proposed course of conduct.

B. Principles Underpinning Our Regulatory Tradition

To justify the federal handgun purchase ban, the government must show its "consisten[cy] with this Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S.

at 34. As noted earlier, while we need not find a "dead ringer" or "historical twin," we must consider "whether the challenged regulation is consistent with the principles that underpin our regulatory tradition." *Rahimi*, 602 U.S. at 692. "Why and how the regulation burdens the right are central to this inquiry." *Id.*

Considering the relevant historical evidence, I cannot agree with the majority. The government has failed to meet its burden.

1. Founding-Era Evidence

"[W]hen it comes to interpreting the Constitution, not all history is created equal." *Bruen*, 597 U.S. at 34. "The Second Amendment was adopted in 1791; the Fourteenth in 1868." *Id.* The Supreme Court has "generally assumed that the scope of the protection applicable to the Federal Government and States is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791." *Id.* at 37; *see also Nat'l Rifle Ass'n v. Bondi*, 133 F.4th 1108, 1115 (11th Cir. 2025), *petition for cert. filed sub nom., Nat'l Rifle Ass'n v. Glass*, No. 24-1185 (U.S. May 16, 2025) (looking to founding-era evidence when assessing a similar state purchase ban). So, I begin by analyzing the founding-era evidence.

a. Contract Law Principles

The majority relies on founding-era contract law. It explains, correctly, that contracts entered by people under 21 were voidable by the minor at common law. *See* Maj. Op.

at 10-13; *see also Nat'l Rifle Assoc.*, 133 F.4th at 1117-18. Then, the majority reasons this common law contracting principle is sufficiently similar to the federal handgun purchase ban at issue here. *See* Maj. Op. at 14-15. Both, according to the majority, (1) increase the difficulty for 18- to 20-year-olds to purchase firearms (the "how") and (2) are based on a common rationale—people of that age group lack the judgment of adults (the "why"). Because of the similarities, the majority concludes that the purchase ban does not offend the Second Amendment.

For several reasons, I disagree.

First, the contract principle relied on by the majority does not share a comparable "how" and "why" with the federal handgun purchase ban. As to "how," founding-era contract law did not ban the sale of guns to 18- to 20-year-olds. In fact, it did not ban anything. It gave minors the benefit of voiding a contract they had entered. *See Nat'l Rifle Association*, 133 F.4th at 1165-67 (Branch, J., dissenting) (noting a "long recognized [] difference between forming a contract and that same contract later being declared unenforceable"). It did not impose any governmental burden on contracts.

The majority attempts to shoehorn the minor's ability to void a contract into a governmental burden by considering what the practical impact of the voidability principle may have been. Perhaps a seller of guns would hesitate to enter a contract to sell something to an 18-year-old. But any voluntary hesitancy is not a governmental regulation of such sales. It comes from a different source.

Any burden imposed on the right to buy a handgun comes not from the government, but from the seller's economic choices.

And the burdens are not similar either. Under the voidability principle, the only "risk" generated by the voidability principle was the possibility the 18-year-old might "rescind the transaction and be entitled to a full refund." Maj. Op. at 12. In a worst-case scenario, the merchant returned the money and got the gun back, losing only the time he took to sell the gun to the 18-year-old. Refunds are a standard part of commercial life with benefits to both retailers and consumers. They are not to be seriously compared with the threat of prison. So, the "how" there is distinct.

So is the "why." The contract principle "results from the inability of infants to take care of themselves." 2 James Kent, *Commentaries on American Law* 191 (O. Halsted ed., 1827). The handgun purchase ban was intended to bar "emotionally immature, or thrill-bent juveniles and minors prone to criminal behavior" from obtaining firearms. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, 225-26. Perhaps these rationales have some relationship. But they are not sufficiently similar. The former is paternalistic; the latter targets public safety. *See*, *e.g.*, *See Bruen*, 597 U.S. at 30-31 (explaining that the historical, narrow "sensitive places" regulations lack similarity to a declaration that an entire city is a gun-free zone). And no matter how the majority views it, public safety is not a matter of contract law.

Maybe in the future, the Supreme Court will permit more flexibility in the historical evidence courts can consider when reviewing modern firearm regulations. But we apply current law, rather than predict the law's evolution. *See Agostini v. Felton*, 521 U.S. 203, 237, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997); *see also Ohio v. Becerra*, 87 F.4th 759, 770 (6th Cir. 2023) ("In other words, we apply directly applicable Supreme Court precedent as it currently stands, without projecting where it may be headed."). Wayne Gretzky, perhaps the greatest hockey player of all time, owed much of his success to his ability to anticipate. He said, "I skate to where the puck is going to be, not where it's been." John Robert Colombo, *Colombo's New Canadian Quotations* 162 (1987).[6] While that worked for Gretzky, it doesn't work for us. Our job is to stay where the puck is now. That means we follow the Supreme Court's current jurisprudence. When we do so, the common law contract principle that permitted minors to void contracts does not support the constitutionality of the federal government banning 18- to 20-year-olds from buying handguns.

Second, the majority points to no evidence that the contract principle limited the ability of 18- to 20-year-olds to acquire guns in the founding era. It declares that age group lacked access to cash and would only be able to

6. The quote is famously attributed to Wayne Gretzky, but apparently his father Walter Gretzky stated it. *See* Barry Libert, *Skate to the Where the Puck is Going . . .* AI, Forbes (Feb. 21, 2025, at 8:56 ET), https://www.forbes.com/sites/libertbarry/2025/02/21/skate-to-the-where-the-puck-is-goingai/ [https://perma.cc/28PQ-CKRG].

purchase with credit. *See* Maj. Op. at 11-12. And it declares that sellers would not sell guns to minors on credit because the contracts could be voided. *Id.* But those statements are not evidence of what actually happened. It is certainly possible that the risk of an 18- to 20-year-old voiding a contract spooked some sellers. But why isn't it just as possible that sellers would have taken the risk knowing they could get the gun back from a voided contract? And isn't it also possible that if minors lacked cash, they would trade property they did have for guns? After all, bartering was an accepted form of founding-era commerce. *See*, *e.g.*, William T. Baxter, *Observations on Money, Barter and Bookkeeping*, 31 Accounting Historians J. 129, 133-36 (2004). Finally, rather than avoiding selling to minors altogether, isn't it possible that sellers might have negotiated collateral or a guarantee in selling a gun to a minor? Ultimately, the majority rests its decisions on economic speculation, not historical evidence.

In fact, we need not speculate about which of these possibilities is more likely correct. There is actual historical evidence. As Judge Branch points out, the historical record reflects merchants selling on credit to minors, including sales of firearms, despite the risk. *See Nat'l Rifle Assoc.*, 133 F.4th at 1166 (Branch, J., dissenting) (first citing *Soper v. President & Fellows of Harv. Coll.*, 18 Mass. 177, 179, 1 Pick. 177 (1822) (acknowledging that merchants "will nevertheless give credit" to "young men"); then citing *Saunders Glover & Co. v. Ott's Adm'r*, 12 S.C.L. (1 McCord) 572, 572 (1822) (concluding a minor's purchase of "pistols" and "powder" was voidable because the items were not "necessaries")). The evidence just doesn't support

the majority's claims.[7] For those reasons, I cannot agree that the contract principle expresses a relevantly similar historical tradition of firearm regulation.

b. Minority Status

The government marshals other founding-era evidence of 18- to 20-year-olds' minority status. Blackstone described the age of majority as 21. 1 William Blackstone, Commentaries *451. As a result, founding-era legislatures prohibited persons under 21 from marrying without parental approval. *See* 4 *Statutes at Large of Pennsylvania from 1682 to 1801*, at 153 (James T. Mitchell & Henry Flanders eds. 1897) (citing a 1729 act). Persons under 21 could not vote until the ratification of the Twenty-Sixth

7. The contract principle may not have even applied to firearms in some circumstances. A minor could not void contracts for "his necessary meat, drink, apparel, physic, and such other necessaries." 1 William Blackstone, Commentaries *454. Are firearms necessaries? The Constitutional Court of Appeals of South Carolina concluded pistols were not a necessary, but only on the facts of that case. *See Saunders Glover*, 12 S.C.L. at 572. And as explained in more detail below, the federal Militia Act of 1792 and contemporaneous laws in all states required militiamen—including 18- to 20-year-olds—to equip themselves with firearms. If the law required 18- to 20-year-olds to obtain arms for militia service, then those arms may have been "necessaries." *See*, *e.g.*, *Coates v. Wilson* (1807) 170 Eng. Rep. 769, 769; 5 Esp. 152, 152 (concluding a tailor could enforce a contract against a minor soldier because the soldier's uniform was a necessary); Militia Act of 1792, ch. 33, sec. 1, 1 Stat. 271, 272 (exempting "arms, ammunition and accoutrements" obtained for militia service from "all suits, distresses, executions or sale, for debt or for the payment of taxes").

Amendment in the 1970s. U.S. Const. amend. XXVI. Because jury service was often tied to the franchise, persons less than 21 could not serve on juries. *See* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 877 n.52 (1994). These restrictions were premised on the belief that "infants [had an inability] to take care of themselves; and this inability continues, in contemplation of law, until the infant has attained the age of twenty-one years." Kent, *supra*, at 191. John Adams and Gouverneur Morris—two founding fathers—expressed concerns about the "prudence" of those under 21. Gov. Br. at 13-14.

But this evidence only shows that some rights at the founding extended to those under 21 and some didn't. That's because, as already discussed, the First and Fourth Amendments extended to 18- to 20-year-olds. *See Brown*, 564 U.S. at 794; *T.L.O.*, 469 U.S. at 334.[8] So, the fact that 18- to 20-year-olds did not have the full panoply of rights as adults at the founding merely requires that we roll up our sleeves and examine the evidence on a right-by-right

8. As Blackstone's Commentaries makes clear, the relevant age of majority depended on the particular individual's capacity or activity. 1 William Blackstone, Commentaries *451; see also *id.* at *453 (noting the "different capacities which [individuals] assume at different ages"). For example, a man could take an oath of allegiance at age 12, be capitally punished in a criminal case at age 14, and serve as an executor at age 17. *Id.* at *451-52. And a woman could consent to marriage at age 12, choose a guardian at age 14, and serve as an executrix at age 17. *Id.* at *451. Both sexes had to wait until age 21 to dispose of their lands. *Id.* So while the full age of majority was 21 at common law, that only mattered for specific activities. *Id.*

basis. When we do that, the historical evidence indicates that the Second Amendment, like the First and Fourth, applied to 18- to 20-year-olds.

Also, this evidence about minority status is not evidence of firearm regulations. At most, it is evidence about how some general principles might apply to firearms. Thus, for the same reasons discussed in the previous analysis of contract law principles, this minority status evidence is not the type of evidence that *Bruen* and *Rahimi* require to overcome the presumption of unconstitutionality.

c. Constables

The government also points to a South Carolina treatise barring "infants" from serving as constables—deputized law enforcement officers—as evidence that 18- to 20-year-olds lacked access to firearms. *See* John Faucheraud Grimke, *The South-Carolina Justice of Peace* 117-18 (3d ed. 1810) (originally published in 1788). According to the government, since minors could not be constables and constables carried firearms, the exclusion of minors shows that they lacked access to guns. The government then claims the constable regulation is based on the same reasoning as the federal handgun purchase ban—that minors lack the judgment to carry firearms.

This argument is remarkably weak. First, the treatise says nothing about the ability of minors to acquire firearms. Second, it also prohibits "[j]ustices of the peace, clergyman, attornies, infants, lawyers, madmen, physicians, idiots, poor, old and sick persons" from

serving as constables. *Id.* at 117. There can be no credible argument that others ineligible to be constables—like clergyman, lawyers and physicians—lack the judgment to carry guns.[9] As a result, the constable restriction cannot share the same "why" as the federal handgun purchase ban; it's not excluding persons because of their poor judgment when carrying firearms.

Nor does it share the same "how"—it does not prohibit "infants" from purchasing or possessing firearms, but rather excludes them from performing constable duty.[10] This source does not provide a relevantly similar principle justifying the handgun purchase ban.

d. The Militia Act

In contrast to the evidence relied on by the majority and the government, the Militia Act of 1792—enacted

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9. I realize this is a bit of a hanging curveball. Many might contend that lawyers fall in the same category as madmen and idiots. But even taking lawyers out of the equation, clergyman and physicians surely possess the judgment to carry guns.

10. Amici cite several college regulations preventing students from possessing firearms. But these regulations applied to *all* students, not just minors, and required disarmament in particular locations. *See Reese*, 127 F.4th at 596-97. They appear to be "sensitive place" regulations, with a "why" of securing peace and discipline on a college campus and a "how" of temporary disarmament. *See id.; Bruen*, 597 U.S. at 30-31. What's more, to the extent these regulations affected minors, they actually demonstrate minors had access to guns. After all, why ban guns on college campuses if minor students could not obtain them?

shortly after the Second Amendment's ratification—provides strong evidence that the Second Amendment protected 18- to 20-year-olds. The Act required "[t]hat 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 of 1792, ch. 33, sec. 1, 1 Stat. 271, 271. Each militiaman had a duty to "provide himself with a good musket or firelock . . . or with a good rifle." *Id.* After Congress enacted this statute, every state set the age for militia service at 18. *See Jones v. Bonta*, 34 F.4th 704, 719, 738 (9th Cir. 2022), *vacated on reh'g and remanded in light of Bruen*, 47 F.4th 1124 (mem.); *Hirschfeld*, 5 F.4th at 428-434. As the federal and state militia laws required 18- to 20-year-olds to show up with a musket, firelock or rifle, these laws illustrate that folks of that age could acquire the weapons. Thus, the various militia laws undermine any supposed traditional principle that permits depriving 18- to 20-year-olds of their Second Amendment right.

The government and the majority offer several retorts. None are persuasive.

First, according to the majority, the Militia Act of 1792 merely required a militiaman to "provide himself" with a musket or firelock but did not require him to "purchase" one. Maj. Op. at 16. But the "provide himself" language applied to all militiamen, not just 18- to 20-year-olds. Given that, the best reading of the Act indicates all militiamen,

including 18- to 20-year-olds, had the ability to acquire firearms. Congress could not have expected all 18- to 20-year-old militiamen across the entire country to obtain firearms by gift.

Second, the majority and government point out that some states raised the militia age above 21. True, Virginia did so in 1738 before returning it to 18 or less in 1757—in the midst of the French & Indian War. *See* 5 William Waller Hening, *The Statutes at Large: Being a Collection of All the Laws of Virginia, from the First Session of the Legislature, in the Year 1619*, at 16 (1823); *see also* David B. Kopel & Joseph G.S. Greenlee, *The Second Amendment Rights of Young Adults*, 43 S. ILL. U. L.J. 495, 579 (2019). And New Jersey set a militia age of 21 for an expedition of 500 men to Canada during King George's War. *See* 3 Bernard Bush, *Laws of the Royal Colony of New Jersey*, at 15, 17 (1980); *see also* Kopel & Greenlee, *supra*, at 536 (discussing this 1746 New Jersey act); *Hirschfeld*, 5 F.4th at 431-33 (discussing Virginia, New Jersey and Pennsylvania statutes). But these isolated examples were withdrawn decades before the Second Amendment's ratification when every state required enrollment by age 18.

Third, the government and the majority believe that parental provisioning statutes imply minors could not buy firearms. And it is true that an 1810 Massachusetts act, as one example, required parents to equip minor militiamen "with the arms and equipments, required by this act." Act of Mar. 6, 1810, ch. 107, sec. 28, 1810 Mass. Acts 157, 176. I agree that meant parents had to provide a "good musket" if the minor didn't have one. *Id.* sec.

1, 1810 Mass. Acts 151, 152. But that does not establish that minors could not acquire guns themselves. In fact, under the same act, parents also had to provide "two spare flints, and a knapsack, a pouch with a box therein, to contain not less than twenty-four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball." *Id.* Surely an 18-year-old could buy a "knapsack" and a "pouch" in 1810, and yet the law required parents to provide them. Considering the state militia laws as a whole, parental provisioning requirements do not signal a firearm purchasing restriction; instead, they recognize that some minors might not have had the necessary equipment for militia service. In those instances, parents bore the financial burden of equipping.

The government makes two additional arguments that, for good reason, the majority steers clear of. The government points to militia parental consent statutes. A 1755 Pennsylvania act required parental approval for persons less than 21 to join the militia. But it applied for only one year at the start of the French & Indian War. *See* 5 *Statutes at Large of Pennsylvania from 1682 to 1801*, at 200 (James T. Mitchell & Henry Flanders eds. 1898); *see also* Kopel & Greenlee, *supra*, at 561. A 1746 New Jersey act had a similar parental consent requirement and was also enacted during wartime. *See* Bush, *supra*, at 15, 17; *see also* Kopel & Greenlee, *supra*, at 536; *Hirschfeld*, 5 F.4th at 433-34 (discussing a nineteenth-century New York statute). These consent statutes are hardly sufficient to overcome the strong, contemporaneous evidence from

the Militia Act that minors had access to guns during the founding era.

Finally, the government argues the Militia Act should not be considered because *Heller* detached the Second Amendment right from militia service. This misreads *Heller*. True, *Heller* held that the Second Amendment conferred an individual right and not a right solely tied to service in the militia. 554 U.S. at 582-83. But the Supreme Court did not completely eliminate the relationship between the Second Amendment and the militia. According to *Heller*, a purpose of the amendment was "to prevent elimination of the militia." *Id.* at 599. Although not the only reason for the right, "the threat that the new Federal Government would destroy the citizens' militia by taking away their arms was the reason that right—unlike some other [pre-existing] English rights—was codified in a written Constitution." *Id.* The people had a right to keep and bear arms so that they could form a militia to protect their interests. As jurist Thomas M. Cooley explained, "the people, from whom the militia must be taken, shall have the right to keep and bear arms." Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America* 271 (1880).

In sum, none of the evidence marshaled by the majority or the government demonstrates the federal handgun purchase ban's consistency with our Nation's historical tradition of firearm regulation so as to overcome the presumption of unconstitutionality. In contrast, the Militia Act of 1792 is "good circumstantial evidence of the public understanding at the Second Amendment's

ratification as to whether 18-to-20-year-olds could be armed." *Lara*, 125 F.4th at 444.[11]

In concurrence, Judge Heytens criticizes McCoy's reliance on militia statutes because the logical extension of McCoy's position would be the Second Amendment permits 16- and 17-year-olds to purchase firearms. I do not share his concerns.

First, because this case does not present the issue, the record before us does not sufficiently address a historical tradition of restricting 16- and 17-year-olds' access to firearms. But as we stated in *Hirschfeld*, "the history of the right to keep and bear arms, including militia laws, may well permit drawing the line at 18." 5 F.4th at 422 n.13. After all, within one year of the Bill of Rights' ratification, the Militia Act of 1792 set the age of service at 18. All states followed suit. So, immediately after the Second Amendment's ratification, the federal government and all states set a service age of 18. To be sure, some evidence exists supporting a service age younger than 18. But that

11. Justice Barrett has cautioned that relying on a dearth of eighteenth-century gun regulations to strike down a twenty-first-century regulation "assumes that founding-era legislatures maximally exercised their power to regulate." *Rahimi*, 602 U.S. at 739-40 (Barrett, J., concurring). That makes sense to me. Even so, I'm not sure what to do with it. *Bruen* and *Rahimi* say that if conduct is covered by the text of the Second Amendment, it is presumptively unconstitutional. The government must then identify evidence that supports the modern regulation. Just like a tie goes to the runner in baseball, that seems to mean silence in the historical record goes against the government when considering step two of a Second Amendment analysis.

evidence is scattered across different colonies and states at different times, most of it predating the Bill of Rights' ratification. At least on the record before us, the 16- to 17-year-old evidence is not as persuasive as the 18- to 20-year-old evidence.

Second, even if the evidence was more persuasive, *Bruen* does not permit such consequential reasoning. It requires us to assess the challenged regulation against our historical tradition of firearm regulation. If the historical tradition supports the rights of 16- to 17-year-olds to purchase firearms, then *Bruen* dictates that they have that right under the Second Amendment.

That might be jarring to some. For that matter, some may find permitting 18-year-olds to purchase handguns equally jarring. But those feelings, no matter how legitimate, really are saying a little infringement into the Second Amendment's protections is okay if it's for a good enough reason. But as we all know, *Bruen* confirmed we do not apply such means/ends analysis in the Second Amendment context. *See* 597 U.S. at 24. Courts cannot functionally resurrect means/ends analysis by avoiding the formalities of its language.

Also, these arguments, at their core, involve policy—at what age *should* persons under 21 be able to purchase handguns? Making policy decisions is outside our job description. We make decisions based on the law. That means we must follow Supreme Court precedent faithfully, wherever it takes us. We cannot stray from that obligation when we do not like the result.

2. Nineteenth-Century Evidence

The government turns to nineteenth-century evidence to meet its burden. And the majority concludes this evidence "reinforce[s]" the founding-era history. *See* Maj. Op. at 17. Admittedly, the government provides evidence of relevantly similar restrictions on 18- to 20-year-olds' ability to purchase handguns from the decades before and after the Fourteenth Amendment's ratification. For example, Alabama, Tennessee and Kentucky each passed statutes prohibiting the sale of pistols or other dangerous weapons to minors before the Civil War. *See* An Act to Amend the Criminal Law, No. 26, sec. 1, 1856 Ala. Acts 17, 17; An Act to Amend the Criminal Laws of this State, ch. 81, secs. 2-3, 1856 Tenn. Acts 92, 92; Act of Jan. 12, 1860, ch. 33, sec. 23, 1860 Ky. Acts 241, 245. The Supreme Court of Tennessee rejected a constitutional challenge to one of these statutes, explaining the statute's purpose as "suppress[ing] [] the pernicious and dangerous practice of carrying arms." *State v. Callicutt*, 69 Tenn. 714, 716 (1878). So, these statutes share a similar "how"—prohibiting sale of dangerous weapons to persons under 21, with small exceptions—and a similar "why"—public safety—with the federal handgun purchase ban. And states enacted more of these restrictions after the Civil War. *See* Maj. Op. at 17 n.3.

Were this evidence present during the founding era, this might be a different case. But it wasn't. As such, it deserves little weight under *Bruen*. That is because these mid-nineteenth-century statutes contradict the original

meaning of the Second Amendment. *See Reese*, 127 F.4th at 599. While the Supreme Court has acknowledged the importance of the Second Amendment's interpretation from immediately after ratification through the end of the nineteenth century, *Heller*, 554 U.S. at 605, "we must also guard against giving postenactment history more weight than it can rightly bear," *Bruen*, 597 U.S. at 35. A regular course of practice may demonstrate a settled meaning of a disputed constitutional phrase. *Bruen*, 597 at 35-36 (citing *Chiafalo v. Washington*, 591 U.S. 578, 592-93, 140 S. Ct. 2316, 207 L. Ed. 2d 761 (2020)). "But to the extent later history contradicts what the text says, the text controls." *Id.* at 36. Post-ratification laws *inconsistent* with the constitutional text's original meaning cannot overcome that text. *Id.* (citing *Heller v. District of Columbia*, 670 F.3d 1244, 1274 n.6, 399 U.S. App. D.C. 314 (D.C. Cir. 2011) (Kavanaugh, J., dissenting)). The government's nineteenth-century statutes contradict the founding-era understanding that 18- to 20-year-olds may buy firearms because (1) there is no evidence of a relevant restrictive principle of firearm regulation from the founding era and (2) 18- to 20-year-olds had to equip themselves with firearms under the Militia Act of 1792 and contemporaneous militia laws in every state.

The majority argues that because handguns became more common in the early nineteenth century, we must accord greater weight to the nineteenth-century evidence. *See* Randolph Roth, *Why Guns Are and Are Not the Problem*, in *A Right to Bear Arms?: The Contested Role of History in Contemporary Debates on the Second Amendment* 113, 117-24 (Jennifer Tucker et al. eds.,

2019). But the former doesn't require the latter. It is correct that *Bruen* acknowledges that "cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach." 597 U.S. at 27. At the same time, *Bruen* still instructs us to apply the historical principles analysis in those cases—"history guide[s] our consideration of modern regulations that were unimaginable at the founding." *Id.* at 28. And under a *Bruen* analysis, the mid-nineteenth-century statutes contradict the original public meaning of the Second Amendment. *See Lara*, 125 F.4th at 441-42.

Also, it is not clear that these mid-nineteenth-century regulations responded to an "unprecedented societal concern[] or dramatic technological change[]." *Bruen*, 597 U.S. at 27. Handguns existed at the founding. Some American households owned pistols in the mid-eighteenth century. Roth, *supra*, at 116. True, mid-nineteenth-century revolvers offered ease of use, speed and effectiveness that earlier muzzle-loading pistols could not. Roth, *supra*, at 121-22. And as a result, breech-loading pistols became more popular. But under the historical principles analysis, the content of the nineteenth-century statutes reveal they were not enacted to remedy this technological change. The supposedly relevantly similar nineteenth-century statutes addressed weapons like knives in addition to pistols. *See*, *e.g.*, 1856 Ala. Acts at 17 (prohibiting the sale of a pistol, air gun, "a bowie knife, or knife or instrument of the like kind or description, by whatever name called"). Those weapons existed long before the mid-nineteenth century and were not subject to a "dramatic technological

change[]" when sale to 18- to 20-year-olds was banned. *Bruen*, 597 U.S. at 27.[12]

Because the government has not shown a relevant principle of restricting 18- to 20-year-olds' access to self-defense weapons at the time of the founding, it has failed to justify the federal handgun purchase ban. I would find the ban violates the Second Amendment.

III. Remedies

For the reasons above, I would affirm the district court's Second Amendment conclusions. I would also affirm its remedy—enjoining the federal handgun purchase ban as to the class of 18- to 20-year-olds.

The government argues the district court abused its discretion by certifying a Rule 23(b)(2) class after granting summary judgment. We review the district

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12. The majority concludes that unlike the regimes struck down in *Heller* and *Bruen*, the federal handgun purchase ban is no "outlier." *See* Maj. Op. at 19. In fact, it posits that holding this law unconstitutional would be the outlier. *Id.* Not so. The Fifth Circuit found the federal handgun purchase ban to be unconstitutional, *Reese*, 127 F.4th at 600, and the Third Circuit struck down a similar state prohibition on carrying arms, *Lara*, 125 F.4th at 446. *See also Worth*, 108 F.4th at 698 (concluding age-based carry prohibition was unconstitutional); *but see Bondi*, 133 F.4th at 1130 (upholding a similar state purchase restriction); *Polis*, 121 F.4th at 118 (finding substantial likelihood that state purchasing restriction was a presumptively lawful condition and qualification on commercial sale).

court's certification of a class for abuse of discretion. *EQT Prod. Co. v. Adair*, 764 F.3d 347, 357 (4th Cir. 2014).

An earlier version of Federal Rule of Civil Procedure 23 required courts to determine class certification "[a]s soon as practicable after the commencement of an action brought as a class action." Fed. R. Civ. P. 23(c)(1) (1966). This prevented potential parties from "await[ing] developments in the trial or even final judgment on the merits" before deciding to join the class. *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 547, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974). The Supreme Court has referred to this situation as "one-way intervention." *Id.* The modern version of the rule slightly amended the timing language: "At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action." Fed. R. Civ. P. 23(c)(1)(A) (2003). The advisory committee explained that courts may need time and even limited discovery to make the certification decision. Fed. R. Civ. P. 23(c) advisory committee's notes to 2003 amendment.

According to the district court, it had wide discretion to decide whether to reach class certification before or after resolving the summary judgment question. *Fraser*, 2023 U.S. Dist. LEXIS 154061, 2023 WL 5616011, at *3. While certifying a class after granting summary judgment gives me pause, I cannot say the district court abused its discretion here. First, there is no one-way intervention concern because Rule 23(b)(2) class members have no opportunity to opt in or out. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362, 131 S. Ct. 2541, 180 L. Ed. 2d

374 (2011). Rule 23(b)(2) creates a "mandatory" class and a district court need not even notify members of the action. *Id.*; *see also Gooch v. Life Invs. Ins. of Am.*, 672 F.3d 402, 433 (6th Cir. 2012) (one-way intervention prohibition does not apply to Rule 23(b)(2) class certifications). Second, unlike many cases, this facial constitutional challenge involved no discovery before summary judgment. So, certification was at an "early practicable time." Fed. R. Civ. P. 23(c)(1)(A). Finally, there is no concern about "fairness to both sides." *Gooch*, 672 F.3d at 433 (quoting *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 559 (8th Cir. 1982)). The parties conferenced and agreed to proceed with dispositive motions—the government moved to dismiss and plaintiffs moved for summary judgment. Both parties should have understood the risks of moving forward with dispositive motions before the class certification decision. I, therefore, see no abuse of discretion in the district court's certification of a Rule 23(b)(2) class after it granted summary judgment to plaintiffs.

IV. Conclusion

For these reasons, I respectfully dissent. The federal handgun purchase ban implicates the Second Amendment's text because 18- to 20-year-olds are part of "the people," a ban on purchasing infringes the right to "keep and bear" arms and the federal handgun purchase ban is not a presumptively valid condition or qualification on commercial sale. The government has not met its burden to justify the regulation with relevant principles from our Nation's historical tradition of firearm regulation.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, FILED AUGUST 30, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 3:22cv410

JOHN COREY FRASER, *et al.*,

Plaintiffs,

v.

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

Defendants.

Filed August 30, 2023

MEMORANDUM OPINION

This matter is before the Court on PLAINTIFFS' MOTION FOR CLASS CERTIFICATION ("the Class Certification Motion") (ECF No. 56), PLAINTIFFS' SECOND MEMORANDUM OF LAW IN SUPPORT OF CLASS CERTIFICATION ("Memo in Supp. of Class Cert.") (ECF No. 69), DEFENDANTS' SECOND OPPOSITION TO PLANTIFFS' [sic] MOTION FOR

CLASS CERTIFICATION ("Opp. to Class Cert.") (ECF No. 70), and PLAINTIFFS' REPLY TO DEFENDANTS' SUPPLEMENTAL RESPONSE IN OPPOSITION TO CLASS CERTIFICATION ("Class Cert. Reply") (ECF No. 71).[1] For the reasons set forth below, PLAINTIFFS' MOTION FOR CLASS CERTIFICATION (ECF No. 56) will be granted.

BACKGROUND

This case is a constitutional challenge under the Second Amendment of the Constitution of the United States to an interlocking collection of federal laws and regulations that prevent 18-to-21-year-olds from purchasing handguns from federally-licensed firearms dealers ("FFLs"). MEMORANDUM OPINION at 4 (ECF No. 47). Plaintiffs are all men over the age of 18 but under the age of 21. *Id.* at 2; *see also* FIRST AMENDED COMPLAINT ("FAC") at ¶¶ 41-44 (ECF No. 18). Aside from their age, they are all otherwise qualified to purchase

1. In support of the Class Certification Motion, the Plaintiffs filed PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF CLASS CERTIFICATION (ECF No. 58), the Defendants responded with DEFENDANTS' OPPOSITION TO PLANTIFFS' [sic] MOTION FOR CLASS CERTIFICATION (ECF No. 61), and the Plaintiffs replied with PLAINTIFFS' REPLY TO THE DEFENDANTS' RESPONSE IN OPPOSITION TO CLASS CERTIFICATION (ECF No. 64). Unfortunately, those supporting, opposing, and reply briefs did not adequately address the class certification issues so the parties were required to replace those briefs with amended briefs that addressed the relevant issues. ORDER (ECF No. 68). The amended briefs (ECF Nos. 69, 70, and 71) are the only ones considered.

handguns. FAC ¶ 49. The Defendants (the "Government") do not dispute that assertion.

Plaintiffs originally filed this action in June 2022 and then filed the FAC in November 2022. MEMORANDUM OPINION at 3. In November 2022, the Government filed DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT ("Motion to Dismiss") (ECF No. 21) and, in December 2022, Plaintiffs filed PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ("Motion for Summary Judgment") (ECF No. 28). The Court held oral argument on the two motions on February 8, 2023. Minute Entry February 8, 2023 (ECF No. 37). On May 10, 2023, an ORDER (ECF No. 48) and accompanying MEMORANDUM OPINION (ECF No. 47) were entered denying the Motion to Dismiss and granting the Motion for Summary Judgment. In the MEMORANDUM OPINION, the Court, applying the mode of analysis specified in *New York State Rifle & Pistol Associations, Inc. v. Bruen*, 597 U.S. 1, 142 S.Ct. 2111, 213 L. Ed. 2d 387 (2021), concluded that, "[b]ecause the statutes and regulations in question are not consistent with our Nation's history and tradition, they, therefore, cannot stand." MEMORANDUM OPINION at 65.

The parties were directed to meet and confer on how best to proceed in this matter. MAY 10, 2023 ORDER (ECF No. 49). Unfortunately, the parties filed a joint status report informing the Court that they "do not agree on how to proceed." JOINT REPORT ON CLASS

CERTIFICATION at 2 (ECF No. 52).[2] On May 22, 2023 Plaintiffs filed the Class Certification Motion which, following the amended briefing and argument, is now ripe for decision.[3]

DISCUSSION

The Class Certification Motion requests certification of the following, nationwide class, pursuant to Fed. R. Civ. P. 23(b)(2):

> Natural persons and citizens of the United States of America who have attained the age of eighteen but who are not yet twenty-one and who have not been convicted of a felony, who are not fugitives from justice, have not been discharged from the Armed Forces under

2. On May 18, 2023 Plaintiffs filed PLAINTIFFS' AND PROPOSED PLAINTIFF'S MOTION TO ADD JUSTIN FRASER AS PLAINTIFF OR GRANT INTERVENTION (ECF No. 50) and the Government filed DEFENDANTS' MOTION FOR ENTRY OF JUDGMENT IN A SEPARATE ORDER (ECF No. 53). These motions are addressed in separate opinions and orders.

3. They also filed PLAINTIFFS' MOTION FOR DECLARATORY JUDGMENT AND INJUNCTION (ECF No. 57). And, on June 2, 2023, the Government filed DEFENDANTS' MOTION FOR A STAY OF INJUNCTION PENDING APPEAL (ECF No. 63). These motions are addressed in separate Memorandum Opinions. On August 24, 2023, PLAINTIFFS' AND PROPOSED PLAINTIFF'S MOTION TO ADD JUSTIN FRASER AS PLAINTIFF OR GRANT INTERVENTION (ECF No. 50) was granted. *See* MEMORANDUM OPINION (ECF No. 72); ORDER (ECF No. 73).

> dishonorable conditions, are not unlawful users of or addicted to any controlled substances, have not been adjudicated as mental defectives or committed to a mental institution, are not on parole or probation, are not under indictment or restraint.

PLAINTIFFS' SECOND MEMORANDUM OF LAW IN SUPPORT OF CLASS CERTIFICATION ("Memo in Supp. of Class Cert.") a 1-2, 9 (ECF No. 69).[4] The Government opposes class certification because: (1) it is "violates the rule against one-way intervention";[5] (2) the Plaintiffs have not established the requisites of Rule 23(a);[6] (3) certification is not appropriate under Rule 23(b)(1), (b)(2), or (b)(3);[7] and (4) class certification would prevent other courts from considering the merits of cases involving the same substantive issues.[8] Each argument will be considered in turn.

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4. Plaintiffs state that class certification may be proper under any of the three permissible avenues under Fed. R. Civ. P. 23(b) but that Fed. R. Civ. P. 23(b)(2) "is the most appropriate avenue of the three options for certification." Memo. in Supp. of Class Cert. at 9. The Court agrees and grants class certification under this provision. Thus, it is unnecessary to determine whether class certification is appropriate.

5. DEFENDANTS' SECOND OPPOSITION TO PLANTIFFS' [sic] MOTION FOR CLASS CERTIFICATION ("Opp. to Class Cert.") at 1 (ECF No. 70).

6. *Id.* at 6-7.

7. *Id.* at 7-11.

8. Opp. to Class Cert. at 11-14.

Appendix B

1. One-Way Intervention/Timeliness

The Government's first reason for opposing class certification is that "the motion violates the rule against one-way intervention because it seeks class certification after summary judgment has already been entered in favor of Plaintiffs."[9] This argument, on this record, lacks any merit.

"The rule against one-way intervention prevents plaintiffs from moving for class certification after acquiring a favorable ruling on the merits of a claim." *Costello v. BeavEx, Inc.*, 810 F.3d 1045, 1057 (7th Cir. 2016); *see also Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 547, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974). Formerly, that practice "aroused considerable criticism upon the ground that it was unfair to allow members of a class to benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one." *Am. Pipe & Const. Co.*, 414 U.S. at 547. And, in 1966, Fed. R. Civ. P. 23 was amended "specifically to mend this perceived defect in the former Rule and to assure that members of the class would be identified before trial on the merits and would be bound by all subsequent orders and judgment." *Id.; see also* Fed. R. Civ. P. 23 Notes of Advisory Committee on Rules—1966. However, Fed. R. Civ. P. 23 was again amended in 2003. Though that amendment "does not restore the practice of 'one-way intervention,'" it allows district courts considerable discretion in determining the proper timing of class certification. Fed. R. Civ. P.

9. *Id.* at 1, 2-6.

23 Notes of Advisory Committee on Rules—2003; *In re Zetia (Ezetimibe) Antitrust Litig.*, No. 2:18-MD-2836, 2021 U.S. Dist. LEXIS 263455, 2021 WL 9870367, at *4 (E.D. Va. May 7, 2021).[10]

Thus, for example, under the current law, district courts now have "discretion to decide the question of summary judgment before reaching the issue of class certification." *Ginwright v. Exeter Fin. Corp.*, 280 F.Supp.3d 674, 679 (D. Md. 2017). Indeed, in some cases, "[a]n early decision on the merits may protect both parties and the court from needless expenditure of both time and money." *White v. Bank of Am., N.A.*, No. CIV. CCB-10-1183, 2012 U.S. Dist. LEXIS 44044, 2012 WL 1067657, at *4 (D. Md. Mar. 27, 2012). But, courts "generally exercise that discretion only when a defendant consents to the procedure or otherwise waives their objection to a pre-notification ruling." *In re Zetia (Ezetimibe) Antitrust Litigation*, 2021 U.S. Dist. LEXIS 263455, 2021 WL 9870367, at *4 (*quoting Darrington v. Assessment Recovery of Wash., LLC*, No. 13-cv-0286, 2014 U.S. Dist. LEXIS 107769, 2014 WL3858363, at *4 (W.D. Wash. Aug. 5, 2014)).

The Government argues that the Class Certification Motion is untimely filed because it was not filed *before*

10. Concerns about one-way intervention are less salient when a mandatory class is certified pursuant to Fed. R. Civ. P. 23(b)(2) because class members have no ability to opt-out or to engage in any form of gamesmanship. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011) (Rule 23(b)(2) classes are "mandatory").

the Court ruled on the Motion to Dismiss and the Motion for Summary Judgment. In other words, the one-way intervention argument serves as the predicate for the Government's objection to the timeliness of the Class Certification Motion (*i.e.*, because the motion was "made after summary judgment has already been entered in favor of Plaintiffs").

Fed. R. Civ. P. 23(c)(1)(A) governs the timing of motions for class certification. It provides: "At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action."

From the beginning, Plaintiffs made clear their intention to prosecute this case as a class action. COMPLAINT (ECF No. 1); FIRST AMENDED COMPLAINT (ECF No. 18). And, with full knowledge of that fact, the parties agreed to a procedure and a schedule that presented what each side considered to be a dispositive motion[11] without ever mentioning class certification. *See* NOV. 17, 2022 ORDER (ECF No. 19). The parties agreed that no discovery was necessary in the case and that the Court should immediately decide the underlying merits of the case by deciding their respective dispositive motions. At no point did the Government raise concerns about the propriety of moving forward in that fashion before the Court had made a decision on class certification.

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11. *See* DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT (ECF No. 21) and PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT (ECF No. 28).

By agreeing to proceed as it did, by filing its Motion to Dismiss (a dipositive motion), and by responding to the Motion for Summary Judgment (also a dispositive motion) without even mentioning that class certification should be addressed before the dispositive motions, the Government "has waived the procedural safeguards of Rule 23, limiting the possible impropriety of an early decision on the merits." *White*, 2012 U.S. Dist. LEXIS 44044, 2012 WL 1067657, at *4;[12] *see also Lord v. Senex L., P.C.*, No. 7:20-CV-00541, 2023 U.S. Dist. LEXIS 93662, 2023 WL 3727003, at *2 n.2 (W.D. Va. May 30, 2023); *Schafer v. Allied Interstate LLC*, No. 1:17-CV-233, 2020 U.S. Dist. LEXIS 137019, 2020 WL 4457922, at *8 (W.D. Mich. Aug. 2, 2020).

The Class Certification Motion was timely made in accord with the procedure to which both parties agreed which assured that dispositive motions would proceed to decision before the filing of the Class Certification Motion. Moreover, not one fact in the record of this case suggests the presence of "one-way intervention" tactics. Nothing suggests that the Government was prejudiced in any way. And, indeed the Government points to no tactical advantage that the Plaintiffs secured, or that

12. Frankly, the Government's timeliness argument tests the limits of Fed. R. Civ. P. 11. If the Government truly was concerned about the timing of class certification, it should not have agreed to proceed as it did. One would think that counsel would have realized that the agreement to proceed first with dispositive motions necessarily meant deferring the class certification process until after the dispositive motions were decided. To argue otherwise, on this record, is meritless and wasteful of judicial resources.

the Government lost, because of the timing of the Class Certification Motion. The record disclosed none. The Court declines the Government's invitation to put form over substance and will consider the Class Certification Motion on its merits.

2. Rule 23(b)(2)

Plaintiffs seek class certification under Rule 23(b)(2)[13] which authorizes class actions when all the prerequisites of Rule 23(a) have been met and "'the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.'" 2 Newberg and Rubenstein on Class Actions, § 4:26 (6th ed.) (June 2023) (hereafter cited as "2 Newberg and Rubenstein, § ") (*quoting* Fed. R. Civ. P. 23(b)(2)). As the Supreme Court of the United States has explained:

> The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared only as to all of the class members or as to none of them.

Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 360, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011) (citation and quotation

13. Plaintiffs also say that class certification is appropriate under Rules 23(b)(1) and (b)(3). Memo. in Supp. of Class Cert. at 9-11, 12-13(ECF No. 69). However, it is not necessary to consider whether the requirements of those rules are satisfied because certification is authorized by Rule 23(b)(2).

marks omitted). In other words, Rule 23(b) (2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. As the treatise explains, Rule 23(b)(2) classes are required to have a particular cohesion and, because the rule authorizes class certification only in situations affecting the class as a whole and calling for either the same injunctive or declaratory relief as to the class, "unitary adjudication is not only preferable, but it is also essential." 2 Newberg and Rubenstein, § 4:26.

Rule 23(b)(2) class certification is considered to be most useful in civil rights and constitutional cases, particularly those in which an individual plaintiff may change status during the pendency of the action (at trial or on appeal) in which case the case could become moot and thus risk dismissal.

The first component of Rule 23(b)(2) is sometimes referred to as "the act requirement" which focuses on the defendant and asks whether the defendant has acted (or not) in a way that affects everyone in the proposed class in a similar fashion. 2 Newburg and Rubenstein, § 4:28. The "act requirement" is directed to an objective question: whether the proposed class consists of people affected by the defendants' challenged conduct policy.

Certification of a class under Rule 23(b)(2) is appropriate even if not all class members may have suffered the injury presented in the class complaint so long as the challenged policy or practice was generally applicable to those in the class as a whole. 2 Newberg

and Rubenstein, § 4:28. And the same is true even if not all members of the class were aggrieved by, or want to challenge, the defendants' conduct. *J.D. v. Nagin*, 255 F.R.D. 406, 416 (E.D. La. 2009); *see also M.D. ex rel Stukenberg v. Perry*, 675 F.3d 382, 847-48 (5th Cir. 2012). That is because the subjective question whether all members of the class are interested in challenging the policy is simply irrelevant to the analysis of whether the class fits within Rule 23(b)(2). In other words, "internal disagreement among class members as to the aims of the litigation is largely irrelevant to one class member's right to pursue a challenge to a policy alleged to be illegal." 2 Newberg and Rubenstein, § 4:28.

This case fits precisely within the requirements of Rule 23(b)(2)'s act requirement. The specifically identified challenged statute and rules apply across the board to all members of the proposed class. Therefore, the conduct and policy is "generally applicable to those in the class as a whole." Contrary to the Government's argument, it is irrelevant to the act requirement analysis that some 18-to-21-year-olds may not want to buy a handgun or may not be opposed to the challenged statute and regulations.

It is "immaterial that some members of the class favored a particular ordinance or opposed the action or were antagonistic toward [the named) plaintiff." 7A Wright & Miller, *Federal Practice & Procedure*, § 1771 (4th ed.) (April 2021). Thus, even if a class member may not want the "relief" sought by the class, that member is still bound as a member of that class and counted as part of the class.

The same is true for the Government's argument that members of the class may not wish to purchase a gun and thus would not have standing. In class actions prosecuted under Rule 23(b)(2), "the standing inquiry focuses on the class representatives, not the absent class members." 1 Newberg and Rubenstein, § 2:3;[14] *Carolina Youth Action Proj.; D.S. by & through Ford v. Wilson*, 60 F.4th 770, 778-79 (4th Cir. 2023). And, as the Court has already found, the named class representatives have standing. MEMORANDUM OPINION at 6-12 (ECF No. 47).[15]

The second requirement of Rule 23(b)(2) is the often called "injunctive or declaratory relief requirement." That aspect of the rule requires that the requested relief (i) be final; (ii) be either injunctive or declaratory; and (iii) be appropriate to the class as a whole. Because the relief must be appropriate to the class as a whole, the

14. It is true that recently opinions and commentators have expressed doubts about this long-standing principle. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208, 210 L. Ed. 2d 568 n.4 (2021) ("We do not here address the distinct question whether every class member must demonstrate standing *before* a court certifies a class"). Further, *Ramierez* involved a claim for money damages and was certified under Rule 23(b)(3). *Ramierez v. TransUnion, LLC*, 301 F.R.D. 408, 420 (N.D. Ca. 2014). In *TransUnion*, the record showed that some class members had suffered no damages. Here, the class all suffered the same injury (deprivation of a constitutional right) and certification is sought under Rule 23(b)(2). *See* Zachary D. Clopton, *National Injunctions and Preclusion*, 118 Mich. L. Rev. 1, 36 n.214 (2019).

15. Here too, as with the Government's timeliness contention, the "may be opposed" and "may not want to buy" argument are quite contrary to established legal principles.

Supreme Court has explained that "Rule 23(b)(2) applies only when a single injunction or a declaratory judgment would provide relief to each member of the class." *Wal-Mart Stores, Inc.*, 564 U.S. at 360.

This case also fits the "injunctive or declaratory relief" requirement. The order granting summary judgment to Plaintiffs will be final when issued and it will award final judgment to the Plaintiffs on their Second Amendment claim. The relief to be granted in the final judgment order, whether injunctive, declaratory, or declaratory and injunctive, will apply to every member of the class in exactly the same way so that "a single injunction or declaratory judgment would provide relief to each member of the class." *Wal-Mart Stores, Inc.*, 564 U.S. at 360.

The Government's Opposition to Class Certification (ECF No. 70) scarcely addresses the requirements of Rule 23(b)(2). And, when it does, there is no mention of Rule 23(b)(2)'s act requirement. That, of course, is a concession that, as the Plaintiffs argue, the act requirement is satisfied. And, indeed, as explained above, it is.

Instead, the Government rests its case on the single injunction or declaration requirement. Specifically, the Government's argument is that:

> But a single injunction or declaratory judgment would not necessarily provide relief to all of the proposed class members in this case. As mentioned above, *many states have laws* that separately *prevent 18-to-20 year* olds from

> *purchasing or possessing* certain kinds of firearms. *So* an *injunction or declaratory judgment would not provide any relief to members of the putative class in those states* because they would still be barred from purchasing handguns. At an absolute minimum, *the interactions between other states' laws and the federal laws* at *issue precludes* the *certification* of any class extending beyond the Commonwealth of Virginia.

Opp. to Class Cert. at 9 (emphasis added).

That argument fails because the claim in this case is addressed to whether federal law violates the class rights under the federal Constitution. If, indeed, the federal rights of the class are violated, declaratory or injunctive relief will redress that violation wholly apart from whatever state laws may provide. And, that satisfies the injunctive or declaratory relief requirement of Rule 23(b)(2).

To sum up, by prohibiting 18-to-21-year-olds from purchasing arms from FFLs, the Government "acted on grounds applicable to the class." Under Rule 23(b)(2), "[a]ction or inaction is directed to a class . . . even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class." Fed. R. Civ. P. 23, Notes of Advisory Committee on Rules—1966 Amendment. And, a single final injunction or declaratory order will provide relief for the class as a whole. Therefore, Plaintiffs have

met the requisites for certification of a class under Rule 23(b)(2).

3. Rule 23(a)

There remains the question whether they have satisfied the requirements of Fed. R. Civ. P. 23(a). Rule 23(a) outlines four requirements for class action certification: (1) numerosity; (2) common questions of law and fact; (3) typicality of claims and defense; and (4) fair and adequate representation by representative parties. And, for certification to be proper, Plaintiffs, even if they have satisfied Rule 23(b)(2), must meet each of these four criteria. The Fourth Circuit also has held that Rule 23 contains an "implicit threshold requirement" that the proposed class is "readily identifiable." *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014) (citation and quotation marks omitted). This is known as the "ascertainability requirement." *Id.* If that requirement is met, the Court then must find that the other four requirements of Rule 23(a) are met. *Id.* at 365.

A. Ascertainability

In the Government's view, the proposed class is not ascertainable because it "is *constantly in flux*." Opp. To Class Cert. at 10 (ECF No. 70) (emphasis added). That is because individuals daily age in and out of the group, become felons or otherwise fall into a prohibited category. *Id.* at 10-11. And, so according to the Government, "[t] his constant coming and going of class members is unmanageable as a practical matter." *Id.* at 11.

The Government's ascertainability view is also based on the related assertion that:

> [t]he proposed class definition is also *overbroad in that it includes* a large number of *individuals who meet the criteria but do not want to purchase a handgun*. These individuals likely would not have standing to pursue the claims raised in this case. Indeed, many individuals may affirmatively disavow the rights that the named Plaintiffs are seeking to protect.

Opp. to Class Cert. at 11 (emphasis added).

As explained above,[16] it is immaterial in the Rule 23(b)(2) analysis that some class members may not agree with, or may oppose, the constitutional claims so long as the challenged conduct applies generally to the class. And, here it does. The Government does not explain why a different principle applies in assessing ascertainability. Moreover, the "may not want to purchase" argument really has nothing to do with ascertainability and the Government does not explain why it thinks there is a connection except to argue that those who do not want to purchase might not have standing. That point, as discussed above, is not relevant. *Supra* at 11-12; *Carolina Youth Action Proj.; D.S. by & through Ford v. Wilson*, 60 F.4th 770, 778-79 (4th Cir. 2023).

16. *Supra* at 11-12.

It is no doubt true, as *Hirschfeld v. Bureau of Alcohol, Firearms, & Tobacco*, 5 F.4th 407 (4th Cir. 2021), *vacated as moot by*, 14 F.4th 322 (4th Cir. 2021) (a substantially similar challenge to the statute and regulations at issue here) shows, that persons can age in and out of the class over the time before final decision is reached. But, that is not relevant because Rule 23(b)(2) was put in place, in part, to address class treatment under such situations. 2 Newburg and Rubenstein § 4:26; Rules Advisory Committee Notes, 39 F.R.D. 69, 102 (1966); *Gayle v. Warden Monmouth Cnty. Correctional Inst.*, 838 F.3d 297, 311 (3d Cir. 2016).

In any event, the Government's concerns are misplaced. The "ascertainability" requirement simply demands that "members of a proposed class be readily identifiable . . . in reference to objective criteria." *EQT Production Co.*, 764 F.3d at 358 (quotation marks and citation omitted). Plaintiffs are not required "to identify every class member at the time of certification." *Id.* As long as it is "administratively feasible for the court to determine whether a particular individual is a member" of the class, the ascertainability element is met. *Id.* (*quoting* 7A Wright & Miller, *Federal Practice & Procedure*, § 1760 (3d ed. 2005)). The ascertainability requirement only necessitates that the Court can readily identify whether putative class members are members of a class. It does not necessitate that the Court, or the Plaintiffs, go out and find each and every class member before a class can be certified.

Of course, Rule 23(b)(2) does not afford members the right to opt-out so notice of such a right is not required in a class action certified under Rule 23(b)(2). 2 Newberg and Rubenstein, § 4:33. Therefore, the ascertainability requirement is not as significant in a Rule 23(b)(2) class as in class actions in which class notice is required so that putative members can opt-out. However, class members are entitled to notice of settlement and requests for attorneys' fees. 2 Newberg and Rubenstein, § 4:34. Thus, ascertainability remains a factor with which reckoning is necessary. Notice, when required, is, of course, that which is the best practicable. And, it would seem that, in a situation such as presented here, adequate notice of settlement or a request for attorneys' fees could be given by appropriate media publication with a national reach. Nonetheless, the ability to identify class members is still a matter to be assessed.

Here, determining who is and is not a member of the class can be ascertained when that becomes necessary. First, the class includes Americans between the ages of 18-to-21-years. As store clerks, bartenders, and restaurant servers across the country do thousands of times a day, the age of an individual can be easily and quickly determined by an identification ("ID") check. There is no reason why a standard ID check could not be employed in the judicial process following class certification, when that becomes necessary.

As to the defined exceptions from the class, each tracks one of the provisions of 18 U.S.C. § 922(g), which specify the individuals who are under disabilities that

prohibit them from purchasing firearms under federal law. Each time a Federal Firearm License dealer sells a firearm, the dealer is required to determine whether an individual falls within one of these categories. 18 U.S.C. § 922(b)-(d). The record supplies no reason to believe that the same cannot be done in the judicial process following class certification when that becomes necessary.

Thus, the "ascertainability" facet of Rule 23(a) is met in this case.

B. Numerosity

Plaintiffs must show that "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011). Though Plaintiffs do not provide the Court with the actual class size, Memo. in Supp. of Class Cert. at 6, the Court finds that "joinder . . . is impracticable." There are over 350,000 individuals in that category between the age of 18-to-21 in Virginia alone. U.S. Census, DP05—ACS DEMOGRAPHIC AND HOUSING ESTIMATES (Virginia); *see also Harris v. Rainey*, 299 F.R.D. 486, 490 (W.D. Va. 2014) (*finding* that Plaintiffs may meet the numerosity requirement based on United States Census data). The record suggests that nationally the class may approximate some ten million Americans between the ages of 18 to 21. Of course, some of these individuals fall within § 922(g)'s other prohibitions on handgun ownership, but there is no real doubt that joinder of all individuals in the class is impracticable and the numerosity requirement is met.

The Government's numerosity argument really boils down to a reprise of the already rejected contention that some of the people in the class might not "want to purchase a handgun" and others "may choose to lawfully obtain a handgun as a gift from their parents or guardians." Opp. to Class Cert. at 6. These people, say the Government, would not have standing. This apparently is thought somehow to render the claim sufficiently small to preclude a finding that numerosity is met. Apart from the fact that the standing argument and the "may not want to buy" argument have been rejected, those arguments just make no sense in the context of a numerosity assessment. Hence, they warrant no further analysis.

On this record, Plaintiffs have satisfied the numerosity requirement of Rule 23(a).

C. Common Questions and Typicality

Plaintiffs must show that "there are questions of law or fact common to the class," Fed. R. Civ. P. 23(a)(2), and that "the claims or defenses of the representative parties are typical of the claims or defenses of the class," Fed. R. Civ. P. 23(a)(3); *Wal-Mart Stores, Inc.*, 564 U.S. at 345. The case involves one basic constitutional issue that governs the rights, *inter alia*, of all members of the proposed class. It is difficult to comprehend a better fit for commonality and typicality.

The Government points to two reasons why these factors are not met. First, the Government argues that: "there are questions of standing that are particular to

each individual." Opp. to Class Cert. at 7. The standing twist is in three parts: "[i] does the individual wish to purchase a handgun, [ii] has the individual already tried to purchase a handgun from an FFL and been denied, [iii] can the individual lawfully obtain a handgun another way, etc." *Id.* Ground [i] is not a standing argument. Rather, it is a reprise of the previously rejected "may not want to buy" theory. *Supra*, at 11-12. That notion has no more merit in this context. Grounds [ii] and [iii] were rejected in the MEMORANDUM OPINION at 8-10, 11-12 (ECF No. 47) and are likewise rejected on this go around.

Second, the Government argues that some states have separate laws preventing 18-to-21-years olds from purchasing guns. Opp. to Class Cert. at 7. Apparently, the Government thinks that somehow defeats findings of commonality and typicality. It is no doubt true that some states prohibit purchase or possession of handguns by 18-21 year olds, but the legal issues and the relief requested in this case has nothing to do with state laws. This case only concerns the application of the challenged federal laws and regulations. Thus, the typicality and commonality requisites of Rule 23(a) are met.

D. Fair and Adequate Representation

Plaintiffs must show that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4); *Wal-Mart Stores, Inc.*, 564 U.S. at 345. "The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent." *Carolina*

Youth Action Proj.; D.S. by & through Ford v. Wilson, 60 F.4th 770, 780 (4th Cir. 2023) (*quoting Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)). The Government makes no argument that the named Plaintiffs would not fairly or adequately represent the parties and the Court finds no reason why they would not. Thus, this element is satisfied.

4. The Government's Nationwide Injunction Argument

The Government's concluding argument against the grant of the Class Certification Motion is that certification of a nationwide class would necessitate a nationwide injunction which "would prevent other courts from considering the important issues involved in this case in the same way that a nationwide injunction would." Gov. Opp. to Class Cert. at 11 (ECF No. 70). The rest of the Government's brief on this point is devoted to the emerging criticism against nationwide injunctions.

There is no categorical rule against nationwide classes and "[n]othing in Rule 23 . . . limits the geographic scope of a class action." *Califano v. Yamasaki*, 442 U.S. 682, 702, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979). But, "when asked to certify a nationwide class," courts "should take care to ensure that nationwide relief is indeed appropriate in the case before it, and that certification of such a class would not improperly interfere with the litigation of similar issues in other judicial districts." *Id.*

To begin, the Government's argument on this point erroneously conflates the Rule 23(b)(2) analysis as to

whether a case can proceed as a class action under that rule with the question whether an injunction can, or should, be awarded under the legal principles that apply to that issue.

Of course, Rule 23(b)(2) does require a court to determine whether the "injunctive relief or corresponding declaratory relief" would provide redress for the class affected by the act taken or withheld as to the class. However, contrary to the Government's argument, that requirement does not equate the certification of a Rule 23(b)(2) class with the granting of a nationwide injunction. Instead, the possibility of injunctive relief is one of the possible remedies to be considered in deciding whether the certification requirements of that subsection of Rule 23 are met.[17]

The mere possibility of a nationwide injunction does not, as the Government would have it, weigh against certification of a nationwide class. In fact, the Government's analytical approach would frustrate the operation of Rule 23(b)(2) by forbidding its application anytime a nationwide class would provide relief to the class as a whole. In the end, the availability of the injunctive relief, as an alternative to, or in addition to, declaratory relief, is simply a different question than whether injunctive relief should be granted, either as the only remedy or along with a declaratory judgment.

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17. The rule actually uses the text "injunctive relief *or* corresponding declaratory relief." (emphasis added).

Appendix B

As the Government correctly points out, national injunctions have been the subject of increasing criticism from members of the judiciary and legal scholars. Justice Thomas, for example, has condemned nationwide injunctions as beyond the power of district courts and as impeding the development of the law. *Trump v. Hawaii*, 138 S.Ct. 2392, 2424-25, 201 L. Ed. 2d 775 (2018) (Thomas, J. concurring); *see also Dept. of Homeland Sec. v. New York*, 140 S.Ct. 599, 599-601 (2020) (Gorsuch, J. concurring); *CASA de Maryland, Inc. v. Trump*, 971 F.3d 220, 256 (4th Cir. 2020), *vacated, rehearing en banc granted by* 981 F.3d 311 (4th Cir. 2020).[18]

And, there is much to be said for those criticisms, in some cases, but it is also true that:

> Congress has already created an avenue by which a group of litigants that share a common interest can obtain an *injunction protecting the entire group*—a class-action pursuant to *Federal Rule of Civil Procedure 23(b)(2)*. Quite obviously, *class actions are the appropriate way* to resolve the small subset of cases in which an injunction protecting only the plaintiff could prove too narrow. [Citation omitted.] And, unlike nationwide injunctions, Rule 23 injunctions have a clear analogue in traditional equity practice. [Citation omitted].

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18. Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Marv. L. Rev. 417 (2017) *but see* Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. Rev. 1065 (2018); Suzette M. Malveaux, *Class Actions, Civil Rights, and the National Injunction*, 131 Harv. L. Rev. F. 56 (2017).

Appendix B

> The ready availability of nationwide injunctions is difficult to square with the policy choices embodied in Rule 23. *Only those who can satisfy the rigorous requirements Congress imposed for class certification are eligible to avail themselves of Rule 23 injunctions.* But nationwide injunctions allow plaintiffs to obtain the benefits of class-wide relief without ever satisfying these criteria. [Citation omitted.] This makes no sense. Indeed, as the Seventh Circuit aptly put it, "[a] wrong done to plaintiff in the past does not authorize *prospective class-wide relief unless a class has been certified. Why else bother with class actions?*" *McKenzie v. City of Chicago*, 118 F.3d 552, 555 (7th Cir. 1997).

CASA de Maryland, 871 F.3d at 259, *vacated, rehearing en bans granted by* 981 F.3d 311 (4th Cir. 2020) (emphasis added).

Here, Plaintiffs have sought class certification under the rule cited in *CASA de Maryland*. As that thoughtful decision makes quite clear, the possibility of injunctive relief under Rule 23(b)(2) does not foreclose class certification under that rule (even a nationwide class) if the requisites of Rule 23(a) and Rule 23(b)(2) are met.

Whether an injunction is appropriate form of relief will be addressed in deciding PLAINTIFFS' MOTION FOR DECLARATORY JUDGMENT AND INJUNCTION (ECF No. 57). But the necessity to address that issue does

not foreclose a certification of a nationwide class under Rule 23(b)(2).

5. The Scope of the Class

Plaintiffs have shown that a nationwide class is appropriate because the Government's conduct (in enacting and enforcing the statutory and regulatory regime at issue) applies generally to all 18-to-21-year-old citizens who are not otherwise disabled from purchasing handguns from FFLs. The Government has not refuted the scope of its conduct.[19] Where, as here, the statutory and regulatory regime (the Government's conduct) unconstitutionally restricts the rights of every person in the class in exactly the same way, it is appropriate that to include in the class all of those whose rights are so affected if either a single order of injunction or declaratory relief will redress the constitutional wrong. In other words, in the circumstances presented on this record, "unitary adjudication is not only preferable, but it is also essential,"[20] where the requirements of Rule 23(a) and (b)(2) are satisfied. And, here they are.

The Government's principal position is that the class should be the named Plaintiffs. But, that just ignores Rule 23(b)(2) and the decisional law that governs its applicability.

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19. The Government's "may not want to buy," "may not oppose gun sales" to those in the age group, and "may get a handgun as a gift" arguments do not affect the scope of the challenged conduct.

20. 2 Newberg and Rubenstein, § 4:26.

The Government's other basis for opposing a nationwide class is that certification of such a class will foreclose the ability of other courts to weigh in on the issue and that, in turn, will thwart development of the law. The argument is based on the assumption that certification of a nationwide class equates to the issuance of a nationwide injunction. As explained above, those are two different questions. And, whether an injunction, nationwide or otherwise, will be dealt with in a separate opinion.

Whatever may be the circumstances in other cases, certification of a nationwide class certainly will not curtail judicial discourse on the Second Amendment issue that the case presents because there are several pending cases in which several other courts will express their views.[21] The pending cases that involve the federal statutory and regulatory regime at issue in this case will be excluded from the class certified here.

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21. *Brown v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, No. 1:22-cv-80 (N.D. W. Va. filed Aug. 30, 2022) (pending case concerning the same legal regime at issue here); *Reese v. ATF*, NO. 6:20-CV-01438, 2022 U.S. Dist. LEXIS 230140, 2022 WL 17859138 (W.D. La. Dec. 21, 2022), *appeal docketed*, No. 23-30033 (5th Cir. Jan. 10, 2023) (same); *see also Firearms Policy Coalition v. McCraw*, 623 F.Supp.3d 740, *appeal dismissed per stipulation*, No. 22-10898, 2022 U.S. App. LEXIS 37633, 2022 WL 19730492 (5th Cir. Dec. 21, 2022) (concerning a corollary state age-based restriction); *Worth v. Harrington*, No. 21-cv-1348, 2023 U.S. Dist. LEXIS 56638, 2023 WL 2745673, (D. Minn. March 31, 2023), *appealed docketed*, No. 23-2248 (8th Cir. May 22, 2023) (same); Nat'l Rifle Ass'n v. Bondi, 61 F.4th 1317 (11th Cir. 2023), *vacated by granting of reh'rg en banc*, 72 F.4th 1346 (11th Cir. 2023) (same).

That brings the analysis back to Rule 23(b)(2) which this case fits and which, as explained above, calls for a nationwide class. *Califano*, 442 U.S. at 702 (approving nationwide classes).

CONCLUSION

For foregoing reasons, the requirements of Rule 23(a) and Rule 23(b)(2) are satisfied. Therefore, PLAINTIFFS' MOTION FOR CLASS CERTIFICATION (ECF No. 56) will be granted. The certified class will be:

> Natural persons and citizens of the United States of America who have attained the age of eighteen but who are not yet twenty-one and who have not been convicted of a felony, who are not fugitives from justice, have not been discharged from the Armed Forces under dishonorable conditions, are not unlawful users of or addicted to any controlled substances, have not been adjudicated as mental defectives or committed to a mental institution, are not on parole or probation, are not under indictment or restraint, and are not plaintiffs in the pending cases of *Brown v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, No. 1:22-cv-80 (N.D. W. Va. filed Aug. 30, 2022); *Reese v. ATF*, NO. 6:20-CV-01438, 2022 U.S. Dist. LEXIS 230140, 2022 WL 17859138 (W.D. La. Dec. 21, 2022), *appeal docketed*, No. 23-30033 (5th Cir. Jan. 10, 2023).

It is SO ORDERED.

/s/ Robert E. Payne
Robert E. Payne
Senior United States District Judge

Richmond, Virginia
Date: August 30, 2023

APPENDIX C — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, FILED AUGUST 30, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

No. 3:22-cv-410

JOHN COREY FRASER, JOSHUA CLAY MCCOY, TYLER DALTON MCGRATH, IAN FLETCHER SHACKLEY, AND JUSTIN TIMOTHY FRASER, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED AS A CLASS,

Plaintiffs,

v.

BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, STEVEN DETTELBACH, AND MERRICK GARLAND,

Defendants.

Filed August 30, 2023

MEMORANDUM OPINION

This matter is before the Court on DEFENDANTS' MOTION FOR ENTRY OF JUDGMENT IN A

SEPARATE ORDER (ECF No. 53); PLAINTIFFS' MOTION FOR DECLARATORY JUDGMENT AND INJUNCTION ("the MOTION") (ECF No. 57), PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR DECLARATORY JUDGMENT AND INJUNCTION ("Br. in Supp.") (ECF No. 59), DEFENDANTS' OPPOSITION TO PLANTIFFS' [sic] MOTION FOR DECLARATORY JUDGMENT AND INJUNCTION ("Response") (ECF No. 62), PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSE IN OPPOSITION TO MOTION FOR DECLARATORY JUDGMENT AND INJUNCTION ("Reply") (ECF No. 67). For the reasons set forth below, DEFENDANTS' MOTION FOR ENTRY OF JUDGMENT IN A SEPARATE ORDER (ECF No. 53) will be denied and PLAINTIFFS' MOTION FOR DECLARATORY JUDGMENT AND INJUNCTION (ECF No. 57) will be granted.

BACKGROUND

This case is a constitutional challenge under the Second Amendment to an interlocking collection of federal statutes and regulations that prevent 18-to-21-year-olds from purchasing handguns from federally-licensed firearms dealers ("FFLs"). MEMORANDUM OPINION at 4 (ECF No. 47). Plaintiffs are all men over the age of 18 but under the age of 21. *Id.* at 2; *see also* FIRST AMENDED COMPLAINT ("FAC") at ¶¶ 41-44 (ECF No. 18). Aside from their age, they are all otherwise qualified to purchase handguns. FAC ¶ 49. The Defendants (the "Government") does not dispute that.

Appendix C

Plaintiffs originally filed suit in June 2022 and then filed their FAC in November of that year. MEMORANDUM OPINION at 3. In November 2022, the Government filed DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT ("Motion to Dismiss") (ECF No. 21) and, in December 2022, Plaintiffs filed PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ("Motion for Summary Judgment") (ECF No. 28). The Court held oral argument on the two motions on February 8, 2023. Minute Entry 2/8/2023 (ECF No. 37). On May 10, 2023, the Court entered an ORDER (ECF No. 48) and accompanying MEMORANDUM OPINION (ECF No. 47) denying the Motion to Dismiss and granting the Motion for Summary Judgment. In the MEMORANDUM OPINION, applying the mode of analysis specified in *New York State Rifle & Pistol Associations, Inc. v. Bruen*, 597 U.S. 1, 142 S.Ct. 2111, 213 L. Ed. 2d 387 (2021), the Court concluded that, "[b]ecause the statutes and regulations in question are not consistent with our Nation's history and tradition, they, therefore, cannot stand." MEMORANDUM OPINION at 65.

The Court ordered the parties to meet and confer on how best to proceed in this matter. MAY 10, 2023 ORDER (ECF No. 49). Unfortunately, the parties filed a joint status report informing the Court that they "do not agree on how to proceed." JOINT REPORT ON CLASS CERTIFICATION at 2 (ECF No. 52).[1] The parties

1. In addition, on May 18, 2023 Plaintiffs filed PLAINTIFFS' AND PROPOSED PLAINTIFF'S MOTION TO ADD JUSTIN FRASER *AS* PLAINTIFF OR GRANT INTERVENTION (ECF No. 50) and the Government filed DEFENDANTS' MOTION FOR

have filed dueling proposed final orders. Government's [PROPOSED] JUDGMENT (ECF No. 53-1); Plaintiffs' [PROPOSED] ORDER (ECF No. 57-1).

DISCUSSION

In their proposed order, Plaintiffs ask for a declaratory judgment that:

> Plaintiffs John Corey Fraser, Joshua Clay McCoy, Tyler Dalton McGrath, Ian Fletcher Shackley, and Justin Timothy Fraser, and all fellow members of the Class as certified, have a constitutional right to purchase handguns and ammunition from federal firearm licensees pursuant to the Second Amendment of the Constitution of the United States, notwithstanding the federal prohibition on such sales to persons between the ages of 18 and 21.

ENTRY OF JUDGMENT IN A SEPARATE ORDER (ECF No. 53). On May 22, 2023 Plaintiffs filed PLAINTIFFS' MOTION FOR CLASS CERTIFICATION (ECF No. 56). And, on June 2, 2023, the Government filed DEFENDANTS' MOTION FOR A STAY OF INJUNCTION PENDING APPEAL (ECF No. 63). Having reviewed the parties' original briefing, the Court ORDERED the parties to file amended briefs addressing Plaintiffs' Motion for Class Cert. JULY 7, 2023 ORDER (ECF No. 68). That amended briefing has also been filed. On August 24, 2023, PLAINTIFFS' AND PROPOSED PLAINTIFF'S MOTION TO ADD JUSTIN FRASER AS PLAINTIFF OR GRANT INTERVENTION (ECF No. 50) was granted. *See* MEMORANDUM OPINION (ECF No. 72); ORDER (ECF No. 73).

[PROPOSED] ORDER at 1 (ECF No. 57-1). Furthermore, Plaintiffs ask this Court for an order of permanent injunction as follows:

> federal Defendants, their officers, agents, employees, and all persons in active concert or participation with them, are hereby permanently enjoined from enforcing 18 U.S.C. §§ 922(b)(1), (c) and any derivative regulations, to include 27 C.F.R. §§ 478.99(b)(1), 478.102, 478.124(a), (c)(1) (5), (f), and 478.96(b) in any manner that obstructs, hinders, prohibits, frustrates, bars, or prevents the Plaintiffs and members of the Class from purchasing handguns or ammunition from federally licensed firearm dealers due to their age.

Id. at 1-2. As explained in a separate MEMORANDUM OPINION, the Court has certified a nationwide class of all individuals between the ages of 18 to 21 who are otherwise qualified to purchase handguns. August 30, 2023 MEMORANDUM OPINION (ECF No. 77); ORDER (ECF No. 78).

The Government takes the position that, based on the MEMORANDUM OPINION granting summary judgment (while reserving the right to appeal that ruling), Plaintiffs' alleged injuries would be remedied by a declaratory judgment The Government would limit that judgment to the named Plaintiffs. DEFENDANTS' OPPOSITION TO PLANTIFFS' [sic] MOTION FOR DECLARATORY JUDGMENT AND INJUNCTION

("Response") at 1-2 (ECF No. 62). However, the Government argues that "Plaintiffs have not satisfied their burden of demonstrating that the requirements for a permanent injunction are satisfied." *Id.* at 2. Instead, the Government, in DEFENDANTS' MOTION FOR ENTRY OF JUDGMENT IN A SEPARATE ORDER (ECF No. 53), asks the Court to declare only that "Plaintiffs John Corey Fraser, Joshua Clay McCoy, Tyler Dalton McGrath, and Ian Fletcher Shackley have a constitutional right to purchase handguns from federal firearm licensees, notwithstanding the federal prohibition on such sales to persons between the ages of 18 and 20," [PROPOSED] JUDGMENT (ECF No. 53-1).

A. Declaratory Judgment

A federal court may "declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a). The parties agree that, because summary judgment will be entered in favor of Plaintiffs, a declaratory judgment stating that the law and regulations in question are unconstitutional is appropriate. However, they disagree as to extent of that declaratory judgment. Plaintiffs ask for declaratory judgment for the entire class,[2] while the Government seeks to limit that declaratory judgment to "the parties before the Court."[3]

2. PLAINTIFFS' MOTION FOR DECLARATORY JUDGMENT AND INJUNCTION at 1 (ECF No. 57).

3. DEFENDANTS' OPPOSITION TO PLANTIFFS' [sic] MOTION FOR DECLARATORY JUDGMENT AND INJUNCTION ("Response") at 2 n.1. (ECF No. 62).

Having certified a class, every member of the class *is* a party before the Court. Afterall, class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011) (*quoting Califano v. Yamasaki*, 442 U.S. 682, 700-01, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979)). And, because a Rule 23(b)(2) class has been certified, "the relief [whether declaratory or injunctive or both] sought must perforce affect the entire class at once." *Wal-Mart Stores, Inc.*, 564 U.S. at 361-62. For the foregoing reasons, the Court will grant declaratory judgment as to the entire class.

B. Injunction

Plaintiffs ask the Court to enter an order permanently enjoining the Government from enforcing the law and regulations in question against the entire class. Plaintiffs argue that, where, as here, "a statutory provision is unconstitutional on its face, an injunction prohibiting its enforcement is proper."[4] They also take the view that "[t]he ongoing deprivation of a fundamental liberty is irreparable" and monetary damages "are entirely inadequate." *Id.* Furthermore, Plaintiffs assert that Defendants can suffer no hardship from being prohibited from enforcing the unconstitutional laws at issue and that "(i)t is always in the public interest for unconstitutional laws to be prohibited from future enforcement." *Id.*

4. PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR DECLARATORY JUDGMENT AND INJUNCTION ("Br. in Supp.") at 3 (ECF No. 59).

The Government opposes the imposition of an injunction.[5] First, the Government argues that Plaintiffs have not suffered an "irreparable" injury because they, by definition, will eventually turn 21 and "will no longer be burdened by the challenged laws". *Id.* at 2-3. And, according to the Government, a "declaratory judgment" would "provide full relief for Plaintiffs' alleged injuries," while "enjoining an act of Congress would unquestionably impose irreparable harm on the federal government and contravene the public interest." *Id.* at 3. The Government devotes the rest of its brief arguing against a nationwide injunction and states that, if injunctive relief is granted, it "should be limited to the parties before the Court." *Id.* at 3-4.

Injunctions are equitable remedies, deriving from the Court's inherent equitable authority. *Salazar v. Buono*, 559 U.S. 700, 130 S. Ct. 1803, 1816, 176 L. Ed. 2d 634 (2010). And, equitable relief "is not granted as a matter of course," *id.*, because injunctions are "regarded as an extraordinary remedy," 11A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure*, § 2942 (3d ed.) (April 2023). When fashioning appropriate injunctive relief, "a federal district court has wide discretion,"[6] but, it must "mold its decree to meet the exigencies of the particular case," *id.* (*quoting Trump v.*

5. DEFENDANTS' OPPOSITION TO PLANTIFFS' [sic) MOTION FOR DECLARATORY JUDGMENT AND INJUNCTION ("Response") at 1 (ECF No. 62).

6. *Roe v. Dept. of Defense*, 947 F.3d 207, 231 (4th Cir. 2020) (*quoting Richmond Tenants Org., Inc. v. Kemp*, 956 F.2d 1300, 1308 (4th Cir. 1992)).

Int'l Refugee Assistance Project, 582 U.S. 571, 137 S. Ct. 2080, 2087, 198 L. Ed. 2d 643 (2017)). In other words, district courts are "required to tailor the scope of the remedy to fit the nature and extent of the constitutional violation." *Ostergren v. Cuccinelli*, 615 F.3d 263, 288-89 (4th Cir. 2010) (*quoting Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 420, 97 S. Ct. 2766, 53 L. Ed. 2d 851 (1977)).

A permanent injunction is available only if the party seeking it demonstrates actual success on the merits of the claim upon which suit was brought. *Mayor of Baltimore v. Azar*, 973 F.3d 258, 274 (4th Cir. 2020) (*quoting Amoco Prod. Co. v. Village of Campbell*, 480 U.S. 531, 546 n.12, 107 S. Ct. 1396, 94 L. Ed. 2d 542 (1987)). Plaintiffs have a decision awarding them summary judgment that, when implemented by a final order, will provide them with "actual success" on the merits of COUNT I of the FAC. So, they have met the actual success requisite for a permanent injunction.

But to show that an injunction is an appropriate remedy, Plaintiffs also must demonstrate:

> (1) that [they have] suffered an *irreparable injury*; (2) that *remedies available at law*, such as monetary damages, *are inadequate* to compensate for *that injury*; (3) that, considering *the balance of hardships* between the plaintiff and defendant, a remedy in equity is warranted; and (4) that *the public interest* would not be disserved by a permanent injunction.

Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 156-57, 130 S. Ct. 2743, 177 L. Ed. 2d 461 (2010) (*quoting*

eBay, Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006)) (emphasis added). "An injunction should issue only if the traditional four-factor test is satisfied." *Id.* at 157. Each element will be addressed in turn.

1. Plaintiffs' Irreparable Injury

By infringing upon the Plaintiffs' constitutional rights, the challenged statutory and regulatory provisions inflicted an irreparable injury on Plaintiffs. "[I]t is well-established that '[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Legend Night Club v. Miller*, 637 F.3d 291, 302 (4th Cir. 2011) (*quoting Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976)). The same holds true for Second Amendment freedoms. After all, the Second Amendment "is not a second-class right." *New York State Rifle & Pistol Assoc., Inc. v. Bruen*, 597 U.S. 1, 142 S.Ct. 2111, 2156, 213 L. Ed. 2d 387 (2022) (quotation marks and citation omitted). As the Supreme Court explained in *Bruen*, because "[t]he Second Amendment is the very product of an interest balancing by the people . . . it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms for self-defense." 142 S.Ct. at 2131.

Contrary to the Government's view,[7] it does not matter that, one day, Plaintiffs will age out of the prohibited

7. *See* DEFENDANTS' OPPOSITION TO PLANTIFFS' [sic] MOTION FOR DECLARATORY JUDGMENT AND INJUNCTION ("Response") at 2-3 (ECF No. 62).

category. Since they turned 18, and at this moment and this point in their lives, their constitutional rights have been, and continue to be, denied by the Government's conduct in enforcing the challenged statutory and regulatory regime. That establishes that the Plaintiffs have suffered an "irreparable injury."

Nor is the irreparability of the constitutional injury eliminated because, as the Government argues, the Plaintiffs and class members "may lawfully obtain handguns as a gift from their parents." Response at 3. Nothing in the Second Amendment limits the Plaintiffs' exercise of their constitutional rights to what a third-party, by grace, may choose (or not) to do to help Plaintiffs exercise that right (here the right to purchase that which the Second Amendment entitles them to purchase on their own). MEMORANDUM OPINION at 7-8, 17-22 (ECF No. 47).

Moreover, the Government's suggested lack of harm addresses the right to possess, not the right to purchase. So, the argument fails for that additional reason.

2. Remedies Available at Law

The *eBay* test calls for an assessment of relief other than an injunction before the powerful remedy of an injunction can be imposed. That assessment serves to assure that the extraordinary remedy of injunction is indeed necessary.

The *eBay* test thus asks, *inter alia*, whether the Plaintiffs' injury can be redressed by an award of

monetary damages. The Plaintiffs address the point by making the assertion that "[t]he remedies available at law, such as monetary damages, are entirely inadequate."[8] The Government responds only that the Plaintiffs' statement is "cursory" and is made "without any explanation whatsoever."[9] The net result is that the Government does not argue that monetary damages are either available or adequate to redress the constitutional injury. And, for good reason: nothing in the record would permit a finding that an award of money damage could redress that deprivation of the rights enjoyed by the Plaintiffs under the Second Amendment. The Government does not argue to the contrary.

The Government does, however, argue that the Plaintiffs "do not even attempt to explain why a declaratory judgment is insufficient relief." Response at 3. That is correct, but, the Government also does not "even attempt to explain why a declaratory judgment is [] sufficient relief." In other words, neither the Plaintiffs' nor the Government's *ipse dixit* much helps the analysis of the second facet of the *eBay* test.

Nonetheless, the record shows that the Government is actively enforcing the challenged legal regime and,

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8. PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR DECLARATORY JUDGMENT AND INJUNCTION ("Br. in Supp.") at 3 (ECF No. 59).

9. DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR DECLARATORY JUDGMENT AND INJUNCTION ("Response") at 3 (ECF No. 62).

in so doing, is effecting a daily deprivation of Plaintiffs' fundamental Second Amendment right. A declaration that the law is unconstitutional, standing alone, cannot remedy the deprivation being worked by the Government because, notwithstanding the declaration, the denial of the rights persists. Nothing in the record permits a finding that, if the remedy were confined to a declaration, Plaintiffs would be allowed to exercise the right of which they are being deprived by the challenged legal regime. The only available remedy to stop the denial of the right is an order enjoining the enforcement of the legal regime that is affecting the deprivation.

That is consistent with the principle that injunctions prohibiting the enforcement of unconstitutional laws are the proper remedy when, as here, a court upholds a facial constitutional challenge. In *Americans for Prosperity Found. v. Bonta*, the Supreme Court affirmed a district court's finding the challenged state law was unconstitutional and found that the district court "correctly . . . permanently enjoined the [state] Attorney General" from enforcing a law in question. 141 S.Ct. 2373, 2389, 210 L. Ed. 2d 716 (2021); *see also Bostic v. Schaefer*, 760 F.3d 352, 384 (4th Cir. 2014) (*finding* that a permanent injunction on the enforcement of an unconstitutional statute was the proper remedy); *Legend Night Club v. Miller*, 637 F.3d 291, 302-03 (4th Cir. 2011) (same); *S.C. Freedom Caucus v. Jordan*, No. 3:23-cv-795, 2023 U.S. Dist. LEXIS 105746, 2023 WL 4010391, at *15 (D.S.C. June 13, 2023) (same). In the Second Amendment context, after finding their respective states' laws imposing age-based restrictions on the exercise of Second Amendment

rights unconstitutional, both the District of Minnesota and the Northern District of Texas issued permanent injunctions on the enforcement of those laws. *Firearms Policy Coalition, Inc v. McCraw*, 623 F.Supp.3d 740, 756 (N.D. Tex. 2022); *Worth v. Harrington*, No. 21-cv-1348, 2023 U.S. Dist. LEXIS 56638, 2023 WL 2745673, at *18 (D. Minn. March 31, 2023).

In some cases, a declaratory judgment of a law's unconstitutionality, without accompanying injunctive relief, can be sufficient relief. For instance, in *Poe v. Gerstein*, the Supreme Court upheld a district court's decision declining to issue an injunction "[b]ecause it was anticipated that the State would respect the declaratory judgment." 417 U.S. 281, 281, 94 S. Ct. 2247, 41 L. Ed. 2d 70 (1974). More recently, the District of Maryland likewise declined to enter a permanent injunction on the enforcement of a state law when the state "had made no effort to enforce it" in the past and the state "represents to the Court that it will not enforce it." *Assoc. of Am. Publishers, Inc. v. Frosh*, 607 F.Supp.3d 614, 618-19 (D. Md. 2022).

In this case, no such representation has been made and the Government has been vigorously enforcing the challenged regulations for decades. Nor has the Court received any indication from the Government that it would cease to enforce the laws absent an injunction. Indeed, the Government's proposed relief would only extend to the original four named Plaintiffs, and the Government wishes to stay even that limited relief pending appellate review, which the Government has advised that it plans

to seek as soon as a final order is entered in this matter. Thus, on this record, an injunction is necessary to prevent future enforcement of the challenged laws and regulations.

In sum, the Court finds that no remedy other than an injunction will rectify Plaintiffs' ongoing constitutional injury.

3. The Balance of Hardships Warrants Equitable Relief

Plaintiffs address the balance of hardships analysis by asserting that:

> [t]he Defendants will suffer no hardship by prohibiting them from enforcing the laws at issue, for their time and resources can be spent in more effective and constitutionally ways.[10]

However, as the Government correctly observes:

> [t]he presumption of constitutionality which attaches to every Act of Congress is not merely a factor to be considered in evaluating success on the merits, but an equity to be considered in favor of [the Government] in balancing hardships.

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10. PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR DECLARATORY JUDGMENT AND INJUNCTION ("Br. in Supp.") at 3 (ECF No. 59)

Appendix C

DEFENDANTS' OPPOSITION TO PLANTIFFS' MOTION FOR DECLARATORY JUDGMENT AND INJUNCTION at 3 (ECF No. 62) (*quoting Walters v. Nat'l ASSOC. of Radiation Survivors*, 468 U.S. 1323, 1324, 105 S. Ct. 11, 82 L. Ed. 2d 908 (1984) (Rehnquist, J. in chambers)). That is because "[a]ny time a [Government] is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable harm." *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351, 98 S. Ct. 359, 54 L. Ed. 2d 439 (1977) (Rehnquist, J., in chambers). Both *Walters* and *New Motor Vehicle Board* are in chambers opinions concerning requests for stays of injunctions pending appeal, so they are not controlling in deciding whether to issue a permanent injunction in the first place. Moreover, when determining if an injunction is appropriate in the first instance, the Fourth Circuit has found that the Government "is in no way harmed by issuance of an injunction that prevents the state from enforcing unconstitutional restrictions." *Legend Night Club v. Miller*, 637 F.3d 291, 302-03 (4th Cir. 2011); *see also Newsom ex rel. Newsom v. Albemarle Cnty.*, 354 F.3d 249, 261 (4th Cir. 2003).

As explained in the decision granting summary judgment, applying the mode of analysis prescribed by *New York State Rifle & Pistol Associations, Inc. v. Bruen*, 597 U.S. 1, 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022), the statutory and regulatory regime proposed to be enjoined offends the Second Amendment.[11] In fact, as explained

11. MEMORANDUM OPINION at 65 (ECF No. 47).

in that opinion, the Government was not able to provide any founding era support (as required by *Bruen*)[12] for the deprivation effected by the statutory and regulatory scheme at issue.

When that is the situation, any minimal hardship that may befall the Government from not being able to enforce the unconstitutional statute and regulations must yield to that harm suffered by the individual whose constitutional rights are being denied by the Government's conduct. *Legend Night Club*, 637 F.3d at 302-03. And, where, as here, the balance of hardships tips in favor of the *person who is suffering* a clearly demonstrated deprivation of a constitutional right, a remedy in equity is warranted.

4. Disservice to the Public Interest

The Plaintiffs' rather summary view is that:

> [t]here is no disservice to the public interest by enjoining such unconstitutional law permanently-quite the opposite. In it always

12. The most the Government could do was to justify the statutes and regulations by pointing to cites that were over fifty years removed from 1791. That, under *Bruen*, is not sufficient. MEMORANDUM OPINION at 54-59; *Bruen*, 142 S.Ct. at 2147 n.22 (*determining* a law passed 69 years after the ratification of the Second Amendment is of "insubstantial" value in "discerning the original meaning of the Second Amendment").

> in the public interest for unconstitutional laws to be prohibited from future enforcement.[13]

The Government does not salute this facet of the *eBay* test. But, of course, the Court must.

It is no doubt true that the public interest is never disserved by protecting individual rights conferred by the Constitution. *Legend Night Club v. Miller*, 637 F.3d 291, 303 (4th Cir. 2011) ("upholding constitutional rights is in the public interest"); *see also Newsom ex rel. Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003). And, it generally serves the public interest to assure that governmental conduct, statutes, and rules remain cabined by the constitutional principles that circumscribe their permissible reach. So, in a case such as this where the Plaintiffs have thoroughly established that the Government conduct is not cabined by the Second Amendment, it certainly does not disserve the public interest to foreclose that conduct.

Of course, the public interest also is implicated by the fact that federal government agencies and officials are parties to the case and are defending federal statutes and regulations against allegations that they offend the Constitution. And, as then Justice Rehnquist explained, an injunction against a federal statute creates a public

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13. PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR DECLARATORY JUDGMENT AND INJUNCTION ("Br. in Supp.") at 3 (ECF No. 59).

hardship, the existence of which is a matter of public interest.

The question, under *eBay*, then becomes whether the public interest is disserved by in enforcing a law that has been found to be unconstitutional. And, the answer is no.

In part, however, that response depends on the nature of the right that animates the injunctive relief. In *Bruen*, the Supreme Court held that:

> The Second Amendment 'is the very *product* of an interest balancing by the people' and it 'surely elevates above all other interests the right of law-abiding, responsible citizens to use arms for self-defense.' [*District of Columbia v. Heller*, 554 U.S. 570, 635, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008).] It is this balance-struck by the traditions of the American people-that demands our unqualified deference.

New York State Rifle & Pistol Assoc., Inc. v. Bruen, 597 U.S. 1, 142 S.Ct. 2111, 2131, 213 L. Ed. 2d 387 (2022). In sum, the Second Amendment right that is the subject of the claim in this case is itself a matter of great public interest. That, of course, is because "[t]he constitutional right to bear arms in public for self-defense is not a 'second class right.' . . . " *Id.* at 2156 (citation omitted). To implement that right by enjoining a legal regime that trenches upon it can hardly be said to disserve the public interest.

Even though the Government ignored the public interest factor in its brief opposing injunctive relief, it pointed the Court to its forthcoming brief a proposed stay pending appeal,[14] wherein it would address the public interest. That brief is DEFENDANTS' MOTION FOR A STAY OF INJUNCTION PENDING APPEAL ("Br. in Supp. of Injunction") (ECF No. 63), does mention the term "public interest" when reciting the factors to be considered, and in later arguing that the Government's interest and the public interest is the same. Br. in Supp. of Injunction at 2. How the two interests equate is not explained so the reader is left to speculate what argument the Government is actually making. It seems that the Government is really relying on the *Walters* in chamber opinion by Justice Rehnquist and the fact that "the restrictions at issue represent a public safety measure that Congress determined was necessary to fight crime." *Id.* at 3.

There is little doubt that the statutes at issue were passed to implement what Congress considered to be measures that would help to fight the unlawful use of guns. And, there can be little doubt that fighting unlawful conduct is in the public interest. But, that was also true of the statutes in *New York State Rifle & Pistol Associations, Inc. v. Bruen*, 597 U.S. 1, 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022); *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008); and *McDonald v. Chicago*. 561 U.S. 742, 130 S. Ct. 3020, 177 L. Ed. 2d

14. That clue is planted in a footnote in DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR DECLARATORY JUDGMENT AN INJUNCTION at 3 n.2 (ECF No. 62).

894 (2010), all of which were found to be contrary to the Second Amendment and the public interest that it serves. The Government's reliance on the crime-fighting objective of Congress in enacting the statutes at issue here is likewise contrary to the Second Amendment and to the public interest that it serves.

Furthermore, a consideration of Congress's objectives in passing the statute would run counter to *Bruen*'s express rejection of "the application of any judge empowering interest-balancing inquiry that asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests." *Bruen*, 142 S.Ct. at 2129 (citation and quotation marks omitted). For that reason, the Court decline the Government's invitation to engage, by indirection, in the means-ends test that was specifically rejected by *Bruen*.

Lastly, the Government contends that the scope of the injunction is to be considered as a matter of public interest. No authority is cited for the argument, but it does seem to be an aspect of the exercise of common sense that, of necessity, must accompany the exercise of equitable authority.

It is true that, to redress the harm to the class certified under Rule 23(b)(2), an injunction here (if otherwise appropriate under *eBay*) will be nationwide in scope. And, it is also true that some nationwide injunctions have increasingly (and rightly) been subject to criticism from courts and scholars as consistent neither with the

public interest in the proper development of the law nor in assuring that the federal judicial system operates within its proper scope.[15] Although, many of those critiques are well-founded, even the most strident of them acknowledge the propriety of nationwide injunctions when a Rule 23(b)(2) class has been certified.[16] Such a class has been certified in this case. August 30, 2023 MEMORANDUM OPINION (ECF No. 77); ORDER (ECF No. 78).

Moreover, the Fourth Circuit has, on numerous occasions, endorsed the use of nationwide injunctions,

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15. *Dept. of Homeland Sec. v. New York*, 140 S.Ct. 599, 599-601 (2020) (Gorsuch, J. concurring); *Trump v. Hawaii*, 138 S.Ct. 2392, 2424-25, 201 L. Ed. 2d 775 (2018) (Thomas, J. concurring) (National "injunctions are beginning to take a toll on the federal court system—preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch"); *CASA de Maryland, Inc. v. Trump*, 971 F.3d 220, 256 (4th Cir. 2020), *vacated by* 981 F.3d 311 (4th Cir. 2020); *see generally* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417 (2017); *but see* Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. Rev. 1065 (2018); Suzette M. Malveaux, *Class Actions, Civil Rights, and the National Injunction*, 131 Harv. L. Rev. F. 56 (2017).

16. Zachary D. Clopton, *National Injunctions and Preclusion*, 118 Mich. L. Rev. 1, 6 n.27 (2019) ("[c]ritics of national injunctions frequently argue that nonparty protection is inappropriate because the plaintiffs could have sought a national class action instead"); *CASA de Maryland*, 971 F.3d at 259 ("[q]uite obviously," Rule 23(b)(2) is "the appropriate way to resolve the small subset of cases in which an injunction protecting only the plaintiff could prove too narrow"); Bray, *Multiple Chancellors*, 131 Harv. L. Rev. at 475-76.

including against the federal government. *Roe v. Dept. of Defense*, 947 F.3d 207 (4th Cir. 2020); *Va. Society for Human Life, Inc. v. FEC*, 263 F.3d 379, 393 (4th Cir. 2001) *overturned on other grounds by The Real Truth About Abortion, Inc. v. Fed. Election Comm'n*, 681 F.3d 544 (4th Cir. 2012) ("Nationwide injunctions are appropriate if necessary to afford relief to the prevailing party"); *Richmond Tenants Org., Inc. v. Kemp*, 956 F.2d 1300, 1308-09 (4th Cir. 1992). In doing so, the Fourth Circuit explicitly rejected the argument that a nationwide injunction "exceeds a court's authority under both Article III and fundamental principles of equity." *Roe*, 947 F.3d at 232. As such, it is within this Court's authority to authorize a nationwide injunction in this class action under Rule 23(b)(2).

Of course, as described above, "[o]nce a constitutional violation is found, a federal court is required to tailor the scope of the remedy to fit the nature and extent of the constitutional violation." *Ostergren v. Cuccinelli*, 615 F.3d 263, 288-89 (4th Cir. 2010) (*quoting Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 420, 97 S. Ct. 2766, 53 L. Ed. 2d 851 (1977)). But, "the fact that the class is nationwide in scope does not necessarily mean that the relief afforded the plaintiff's will be more burdensome than necessary to redress the complaining parties." *Califano v. Yamasaki*, 442 U.S. 682, 702, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979). When determining the extent of the *remedy*, courts look to the extent of *the harm. Ostergren*, 615 F.3d at 288-89 (*quoting Missouri v. Jenkins*, 515 U.S. 70, 88, 115 S. Ct. 2038, 132 L. Ed. 2d 63, (1995) ("[T]he nature of the . . . remedy is to be determined by the nature and scope of the constitutional violation.")).

In this case, the harm (the violation of the Plaintiffs' Second Amendment rights) extends to all members of the class. So, the remedy must too. The Court found the challenged law and regulations facially unconstitutional thereby carrying out its "duty . . . to declare all acts contrary to the manifest tenor of the Constitution void." Federalist 78 (Hamilton). This voided legal regime may, therefore, not be enforced at all. In other words, the Court's ruling does, and must, apply to protect the Second Amendment rights of *all citizens* between the ages of 18 to 21 who are otherwise eligible to buy a handgun (*i.e.*, the class). In no way was either the substantive decision or the class certification decision in this case limited or influenced by the fact that the named Plaintiffs live in the Eastern District of Virginia, the Commonwealth of Virginia, or the Fourth Circuit. Indeed, aside from the procedural question of venue, this case's substantive outcome on the merits would be the same if the individuals resided on the opposite side of the country.

In sum, people between the ages of 18 and 21 in the Eastern District of Virginia suffer an equal burden as people of the same age in the Southern District of New York, the Central District of California, or any other district. The Government's policies affect-and harm-each of them equally. Therefore, "[t]he categorical policies relied upon by the Government call for categorical relief." *Roe*, 947 F.3d at 232. Only a nationwide injunction will "prevent irreparable injury to plaintiffs," who, since as class has been certified, include all American citizens between the ages of 18 to 21 who are otherwise qualified to purchase a gun. *Richmond Tenants Org., Inc.*, 956 F.2d at 1309.

However, in recognition of the currently pending parallel litigation concerning the challenge legal regime,[17] the injunction will not apply to the Western District of Louisiana[18] and the Northern District of West Virginia.[19]

While this nationwide injunction may be geographically broad, it is no greater than necessary to afford relief to the certified class.

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17. *Brown v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, No. 1:22 cv-80 (N.D. W. Va. filed Aug. 30, 2022); *Reese v. ATF*, NO. 6:20-CV-01438, 2022 U.S. Dist. LEXIS 230140, 2022 WL 17859138 (W.D. La. Dec. 21, 2022), *appeal docketed*, No. 23-30033 (5th Cir. Jan. 10, 2023).

18. The Western District of Louisiana is comprised of the following parishes in the State of Louisiana: Acadia, Allen, Avoyelles, Beauregard, Bienville, Bossier, Caddo, Calcasieu, Caldwell, Cameron, Catahoula, Claiborne, Concordia, Jefferson Davis, De Soto, East Carroll, Evangeline, Franklin, Grant, Iberia, Jackson, Lafayette, La Salle, Lincoln, Madison, Morehouse, Natchitoches, Ouachita, Rapides, Red River, Richland, Sabine, Saint Landry, Saint Martin, Saint Mary, Tensas, Union, Vermilion, Vernon, Webster, West Carroll, and Winn.

19. The Northern District of West Virginia is comprised of the following counties in the State of West Virginia: Barbour, Berkeley, Braxton, Brooke, Calhoun, Doddridge, Gilmer, Grant, Hampshire, Hancock, Hardy, Harrison, Jefferson, Lewis, Marion, Marshall, Mineral, Monongalia, Morgan, Ohio, Pendleton, Pleasants, Pocahontas, Preston, Randolph, Ritchie, Taylor, Tucker, Tyler, Upshur, Webster, and Wetzel.

Appendix C

CONCLUSION

For the reasons set forth above, PLAINTIFFS' MOTION FOR DECLARATORY JUDGMENT AND INJUNCTION (ECF No. 57) will be granted and DEFENDANTS' MOTION FOR ENTRY OF JUDGMENT IN A SEPARATE ORDER (ECF No. 53) will be denied.

/s/ REP
Robert E. Payne
Senior United States District Judge

Richmond, Virginia
Date: August 30, 2023

APPENDIX D — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION, FILED MAY 10, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

No. 3:22-cv-410

JOHN COREY FRASER, *et al.*, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED AS A CLASS,

Plaintiff,

v.

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

Defendants.

Filed May 10, 2023

MEMORANDUM OPINION

This matter is before the Court on the DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT (ECF No. 21) and PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT (ECF No. 28).

Appendix D

For the reasons set forth below, the DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT (ECF No. 21) will be denied and PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT (ECF No. 28) will be granted.

BACKGROUND

Factual Background[1]

Plaintiffs John "Corey" Fraser, Joshua Clay McCoy, Tyler Dalton McGrath, and Ian Fletcher Shackley ("Plaintiffs") want to buy handguns. First Amended Complaint ("FAC") at ¶ 54 (ECF No. 18). All four men are over the age of 18 but less than 21. FAC at ¶¶ 41-44. Federal law prohibits them from purchasing handguns from Federal Firearm Licensed Dealers ("FFL") solely because of their age. FAC ¶ 49. They "are all law-abiding, responsible adult citizens who are otherwise qualified to own a handgun and but for the laws at issue, they would purchase a new handgun and handgun ammunition from a federally-licensed firearm dealer." *Id.*

In May 2022, Fraser attempted to purchase a Glock 19x handgun from an FFL. FAC ¶ 50. Because of Fraser's age and in accordance with federal law, the FFL refused to allow Fraser's putative purchase. FAC ¶¶ 50-51. The other three Plaintiffs-McCoy, McGrath, and Shackley—"also

1. The analysis of the motion to dismiss under Fed. R. Civ. P. 12(b)(6) necessitates that the alleged facts be taken as established. As for the summary judgment motion, the alleged material facts are not disputed.

desire to purchase a similar handgun from an FFL" but "have not attempted to make such a purchase due to their awareness of the laws at issue and the inevitable futility of such an exercise as seen by Mr. Fraser." FAC ¶ 53. Plaintiffs are challenging the federal laws as violative of the Second Amendment (Count I) and the Due Process Clause of the Fifth Amendment (Count II). FAC at 13-14.

Also, they sue on behalf of other similarly situated members of a class defined as:

> Natural persons and citizens of the United States of America who have attained the age of eighteen but who are not yet twenty-one and who have not been convicted of a felony, who are not fugitives from justice, have not been discharged from the Armed Forces under dishonorable conditions, are not unlawful users of or addicted to any controlled substances, have not been adjudicated as mental defectives or committed to a mental institution, are not on parole or probation, are not under indictment or restraint.

FAC ¶ 20. So, they are also requesting class certification. FAC ¶¶ 20-22.

Procedural Background

Fraser originally filed this action in June 2022 (ECF No. 1). The Court held an initial pre-trial conference on November 16, 2022. On the same day, Plaintiffs filed the

FAC (ECF No. 18). On November 30, the Government filed a Motion to Dismiss the FAC (ECF No. 21). On December 15, 2022, the Plaintiffs filed a Motion for Summary Judgment (ECF No. 28). There are two amicus briefs, one from the Brady and Gifford Law Center to Prevent Gun Violence ("Brady and Gifford Amicus Br.") (ECF No. 25) and one from Everytown for Gun Safety ("Everytown Amicus Br.") (ECF No. 26), both in support of the Government. The Court heard oral argument on February 8, 2023, Minute Entry (ECF No. 37), and thereafter ordered the parties to file replacement briefs and responses to address the issues as required by controlling law and to respond to questions raised during oral argument, ORDER (ECF No. 38).

Laws at Issue

Plaintiffs challenge the constitutionality of an interlocking collection of federal law and regulations that prevent 18-to-20-year-olds from purchasing handguns from FFLs. The legal prohibitions begin with 18 U.S.C. § 922(a)(1)(A) which specifies that anyone who "engage[s] in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive[s] any firearm in interstate or foreign commerce" is required to obtain a federal firearms license.

Then, 18 U.S.C. § 922(a)(5) specifies that only FFLs are allowed to engage in the interstate transfer of firearms and ammunition. And, it is:

> *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*.

18 U.S.C. § 922(b)(1) (emphasis added).

Plaintiffs also challenge several derivative regulations which mirror and implement those statutes. Those regulations are: 27 C.F.R. §§ 478.99(b)(1); 478.102; 478.124(a), (c)(1)-(5), (f); and 478.96(b). FAC at 15.

In 1983, the Chief Counsel of the Bureau of Alcohol, Tobacco, and Firearms ("ATF") issued a written opinion clarifying the Government's interpretation of those federal gun control statutes and regulations as applied to 18-to-20-year-olds. In pertinent part, that opinion states:

> Federal firearms licensees are *prohibited from selling or delivering handguns to person under the age of 21.* However, a minor or juvenile is *not prohibited* by Federal law from *possessing, owning, or learning the proper usage of* firearms since any firearm that the parents or guardian desire the minor to have can be obtained by the parents or guardian.

"Purchasing, possession of firearms by minors," 23362.0 ATF (Dec. 5, 1983) ("ATF Opinion") at 1-2 (emphasis added) (ECF No. 22-1).

In sum, these federal laws and regulations preclude the "sale of handguns and handgun ammunition" to the Plaintiffs – indeed, anyone aged 18-to-20 is prohibiting from purchasing a handgun from an FFL. FAC ¶ 39. This is a blanket age-based restriction. The Government does not contend otherwise.

DISCUSSION

I. The Standing Issue

The Government first posits that the Plaintiffs do not have standing to bring this action because they failed to plead a sufficient injury in fact. In *Lujan v. Defenders of Wildlife*, the Supreme Court of the United States articulated the three canonical, irreducible requirements for standing:

> *First*, the plaintiff must have suffered an *injury in fact—an invasion of a legally protected interest* which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical. . . . *Second*, there must be a *causal connection between the injury and the conduct complained of*—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the

> court. . . . *Third*, it must be *likely*, as opposed to merely speculative, that the *injury will be redressed* by a favorable decision.

504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (emphasis added) (cleaned up). The burden is on the Plaintiff(s) to prove standing. *Id.* at 561. The Government challenges only the first facet of the test—whether Plaintiffs have successfully pled an injury in fact.[2]

Plaintiffs take the view that they have suffered an "injury in fact" because all of them wish to, but are prohibited from, purchasing handguns from FFLs. Compl. ¶¶ 50, 53-54. And, of course, Fraser has attempted to purchase a pistol from an FFL and has been turned down. The Government argues that this is not an injury because Plaintiffs can legally receive and possess handguns as gifts from parents or guardians. Gov. Memo in Supp. of Motion to Dismiss at 8.[3]

For their part, the Plaintiffs acknowledge that, according to the ATF Opinion, 18-to-20-year-olds can obtain a new handgun from an FFL purchased by their

2. Gov. Memo in Supp. of Motion to Dismiss at 8-10 (ECF No. 22); Gov. Op. to Pls. Motion for Summary Judgment at 3-4 (ECF No. 30).

3. Under the ATF Opinion and the Government's argument, one of the Plaintiffs could supply the entirety of the purchase money to a parent or guardian who could buy the handgun at the FFL's store and walk outside and hand it to the Plaintiff. That is otherwise known as a "straw purchase," and is, but for the ATF Opinion, illegal. 18 U.S.C. § 922(a)(6).

parent or guardian. Pl. Replacement Br. at 24 (ECF No. 44). But, they say, that is simply not the point. Eighteen-to-twenty-year-olds *themselves* cannot purchase the handguns from an FFL dealer. And, it is undisputed that parents or guardians may, for whatever reason, decide not to buy an 18-to-20-year-old a handgun. It is also undisputed that there is no recourse from such a parental refusal.

It is beyond question that the deprivation of a right conferred by the Constitution is an injury in fact. So, if, as they allege, the Plaintiffs have a right under the Second Amendment to buy handguns, and if the challenged laws and regulations infringe that right, they are injured. It is of no moment that a parent, as a matter of grace, might help the Plaintiffs to skirt the statutory and regulatory prohibition.

The Government's argument assumes that requiring an adult, law-abiding citizen to exercise the claimed right through, and at the grace of, a third-party is not an infringement of the alleged right. The Government, however, cited no decision that has gone so far. Nor do there appear to be any.[4] And, indeed, in *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 802, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011) the Supreme Court rejected a similar argument on the merits in the First Amendment context, wherein the Supreme Court struck down a California law

4. In fact, the Government's briefing on the standing issue is bereft of any decision on the topic except for a citation setting forth the standing factors and a decision commenting generally on an effort to manufacture standing.

prohibiting the sale (but not the possession) of violent video games to children under the age of 18. Like this statute, the California law allowed parents (or aunts and uncles) to purchase and provide the games to children. *Id.* Yet, the Supreme Court found that this prohibition on the sale of games implicated children's First Amendment rights and proceeded to strike down the regulation under a strict scrutiny analysis. *Id.* at 805.

Furthermore, the Government's argument is predicated on a limited, and erroneous reading, of the fundamental right protected by the Second Amendment. As explained *infra*, Discussion § 11(A)(1), the Second Amendment protects the right to *purchase*, not just to *possess*, a firearm. So, even though an 18-to-20-year-old can possess a gun given by a parent, the constitutional right of the 18-to-20-year-old to purchase that gun would still be implicated by the regulations.

The Government next attempts to downplay the significance of the infringement wrought by the challenged laws. Rather surprisingly, the Government alternatively suggests that the Plaintiffs lack standing to challenge the laws and regulations governing the right to purchase new handguns (which are safe and warranted by the manufacturer) because the Plaintiffs could buy used handguns from a private person or at a gun show. While "[t]here is, of course, a *de minimis* level of imposition with which the Constitution is not concerned," *Bell v. Wolfish*, 441 U.S. 520, 540 n.21, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) (citation and quotation marks omitted), that concept does not come into play as part of the standing

analysis. Instead, it is considered at the merits stage of the analysis. *See e.g. United States v. Jacobsen*, 466 U.S. 109, 125-26, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984) (finding that any intrusion on defendant's privacy interests was *de minimis* and constitutionally reasonable but not questioning plaintiff's standing). In any event, that concept is not implicated in this case, because, as explained *infra*, Plaintiffs are subject to an age-based, blanket prohibition from buying a certain type of gun and the challenged statutes and regulations present more than a *de minimis* intrusion on the right to "keep and bear arms." U.S. Const, amend. II.

Moreover, there are well-reasoned decisions that support a finding that these Plaintiffs have standing. For example, in *Reese v. ATF*, the court addressed the same argument made by the Government here. _ F.Supp.3d _, No. 6:20-cv-1438, 2022 U.S. Dist. LEXIS 230140, 2022 WL 17859138 (W.D. La. Dec. 21, 2022). Citing a decision of the United States Court of Appeals for the Fifth Circuit, the district court in *Reese* found that the plaintiffs there had adequately satisfied the injury in fact requirement by alleging that, "but for the challenged laws, they would be eligible to purchase handguns from FFLs and would in fact do so." 2022 U.S. Dist. LEXIS 230140, [WL] at *3.

In *NRA of Am. v. BATFE*, 700 F.3d 185, 191-92 (5th Cir. 2012), the Fifth Circuit held that the plaintiffs there, who were similarly situated to the Plaintiffs here, had standing. On that point, the Fifth Circuit explained that, "by prohibiting FFLs from selling guns to 18-to-20 year-olds, the laws cause those persons [18-to-20-year-olds]

a concrete particularized injury – i.e., the injury of not being able to purchase handguns from FFLs." *Id.* at 191-92. In so doing, *NRA*, like *Reese*, rejected precisely the parental gifting and purchasing at a gun show (or from a private seller) arguments on which the Government bases its standing position in this case.

The reasoning in *NRA* and *Reese* are persuasive, and, considering that the Government cites no authority to the contrary, *NRA* and *Reese* stand unopposed.[5] The decision of the Fourth Circuit in *Lane v. Holder*, 703 F.3d 668 (4th Cir. 2012), is informative. In *Lane*, the Court of Appeals considered the question of standing in the Second Amendment context. Although the Court of Appeals held that the *Lane* plaintiffs (would-be firearms purchasers) had no standing, it reached the conclusion by contrasting the regulations in question there with regulations that would burden consumers "directly." *Id.* at 672. The statute and regulations here at issue do just that.

Furthermore, there is no requirement that, to have standing, Plaintiffs must attempt to purchase the guns and risk criminal penalties. A plaintiff does not first need to "expose himself to actual arret or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitution rights." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 134 S. Ct. 2334, 189 L. Ed.

5. Mindful that standing is a jurisdictional doctrine that should be raised by a court *sua sponte*, it is significant that the Fourth Circuit did not raise the issue in *Hirschfeld v. ATF*, 5 F.4th 407 (4th Cir. 2021), *vacated as moot*, 14 F.4th 322, 328 (4th Cir. 2021).

2d 246 (2014) (*quoting Steffel v. Thompson*, 415 U.S. 452, 459, 94 S. Ct. 1209, 39 L. Ed. 2d 505 (1974)). In this case, as shown by Fraser's attempt to purchase a handgun, there has been "past enforcement against the same conduct" which is "good evidence that the threat of enforcement is not "chimerical.'" *Id.* at 164. There thus "exists a credible threat of prosecution" if an under-aged Plaintiff attempts to purchase a handgun when age-based prohibitions are fixed by law. *Id.* at 159 (*quoting Babbitt v. Farm Workers*, 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979)). For that additional reason, the Plaintiffs have satisfied the imminence requirement of injury in fact. *See also Worth v. Harrington,* __ F.Supp.3d __, No. 21-cv-1348, 2023 U.S. Dist. LEXIS 56638, 2023 WL 2745673, at *19 (D. Minn. March 31, 2023).

For the foregoing reasons, the Plaintiffs have suffered an injury in fact that is "concrete and particularized" and "actual or imminent." *Lujan*, 504 U.S. at 560-61. And, they have met all of the other *Lujan* requirements. Accordingly, they have standing to bring this action and the Court has subject matter jurisdiction to decide the pending motions.

II. Second Amendment

The Second Amendment to the Constitution of the United States 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.

U.S. Const. amend. II. In *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008) and *McDonald v. Chicago*, 561 U.S. 742, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010), the Supreme Court "recognized that the Second and Fourteenth Amendments protect the rights of ordinary, law-abiding citizens to possess a handgun in the home for self-defense." *N.Y. State Rifle & Pistol Associations, Inc. v. Bruen*, 142 S. Ct. 2111, 2122, 213 L. Ed. 2d 387 (2021). In *Bruen*, the Supreme Court held, "consistent with *Heller* and *McDonald*, that the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home." *Id.*[6]

And, importantly for today's case, the Supreme Court in *Bruen* clarified the proper framework for analyzing asserted violations of the Second Amendment caused by regulatory statutes. Specifically, *Bruen* explains:

> We reiterate that *the standard for applying the Second Amendment* is as follows: When the Second *Amendment's plain text covers* an individual's conduct, the *Constitution presumptively protects that conduct*. The *government* must then *justify its regulation by demonstrating that it is consistent with the* Nation's historical tradition of firearm *regulation*. Only then may a court conclude that

6. In so doing, the Supreme Court invalidated a state law that conditioned the exercise of the Second Amendment right on satisfaction of a state licensing regime which infringed the Second Amendment. *N.Y. State Rifle & Pistol Associations, Inc. v. Bruen*, 142 S. Ct. 2111, 2122, 213 L. Ed. 2d 387 (2021).

> the individual's conduct falls outside the Second Amendment's 'unqualified command.'

142 S. Ct. at 2129-30 (emphasis added).[7]

In other words, *Bruen* requires two distinct analytical steps. *First*, it must be determined if "the Second Amendment's plain text covers an individual's conduct." *Bruen*, 142 S.Ct. at 2126 (citation and quotation marks omitted). If it does, "the Constitution presumptively protects that conduct." *Id. Second*, if the conduct is presumptively protected, "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.* To do so, the Government "must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at 2127.

When establishing that analytical construct, *Bruen* explicitly prohibited courts from engaging in any means-end scrutiny. The Supreme Court also "expressly rejected the application of any judge-empowering interest-balancing inquiry that asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests." *Bruen*, 142 S.Ct. at 2129 (cleaned up). *Bruen* marks a sea-change in Second

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7. As explained in *Bruen*, that standard is consistent with how the Supreme Court has protected other constitutional rights under the First and Sixth Amendments. 142 S.Ct. at 2129-30.

Amendment law, throwing many prior precedents into question. *See United States v. Rahimi*, 61 F.4th 443, 450 (5th Cir. 2023) ("*Bruen* clearly fundamentally changed our analysis of laws that implicate the Second Amendment") (cleaned up).

When determining if federal regulations are "consistent with the Nation's historical tradition of firearm regulation," *Bruen* instructs courts first to look to evidence from the Founding-era because "[c]onstitutional rights are enshrined with the scope they were understood to have *when the people adopted them*." *Bruen*, 142 S.Ct. at 2130, 2136 (*quoting District of Columbia v. Heller*, 554 U.S. 570, 634-35, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008)). In the Second Amendment context, that necessitates an examination of evidence from (and around) 1791 when the Second Amendment was adopted. Moreover, when evaluating the scope of the right at issue, the Court must be wary of "[h]istorical evidence that long predates" 1791 and "guard against giving postenactment history more weight than it can rightly bear." *Id.* The further the evidence is removed from 1791, in either direction, the less salient the evidence becomes. In other words, the strongest evidence concerning the scope of the right here at issue comes from the late-eighteenth and early-nineteenth centuries.

To uphold its burden, the Government must "identify a well-established and representative historical *analogue*, not a historical *twin*. So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster."

Bruen, 142 S.Ct. at 2133. When determining if the Government's proffered analogous restrictions pass constitutional muster, the analysis considers "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id.*

Mindful of these instructions from *Bruen*, the following analysis proceeds in the format that *Bruen* specified.[8]

A) Does The Restricted Conduct Falls Within the Text of the Second Amendment?

The first step of the *Bruen* analytical framework is to determine if the relevant conduct falls within the plain text of the Second Amendment. In this case, that question is a two-fold one:

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8. It is also well to remain mindful that, in *Heller*, the Supreme Court explained that:

> 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.

554 U.S. at 626-27. This list from *Heller* was not reiterated in *Bruen*. So, it is not clear how these "longstanding prohibitions" fit within the *Bruen* framework. 554 U.S. 570, 626-67, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008). But, the absence of this list from *Bruen* does not mean that the "longstanding prohibitions" mentioned in *Heller* were removed by *Bruen*. *Infra* Discussion, § II(C); *see Bruen*, 142 S.Ct. at 2162 (Kavanaugh, J. concurring); at 2189 (Breyer, J. dissenting).

(1) Does the right to "keep and bear arm" include the right to purchase arms? and

(2) Are law abiding 18-to-20-year-olds part of the "the people" protected by the Second Amendment?

1. The Right to Keep Arms Includes the Right to Purchase Arms

Plaintiffs argue that the right to *purchase* or *receive* a handgun falls within the Second Amendment's textual right to "keep and bear arms." Pl. Replacement Br. at 12 (ECF No. 44). According to Plaintiffs, "[t]he plain meaning of the verbs 'have' or 'possess' inherently include the act of receipt." *Id.* The Government, however, takes the view that the right to "keep and bear" arms does not include "a right to *purchase* arms, let alone the right to purchase a handgun from a particular source." Gov. Replacement Br. at 13 (ECF No. 43). "This conclusion," says the Government, "is consistent with *Heller*, which held that 'laws imposing conditions and qualification on the commercial sale of arms' are 'presumptively lawful.'" *Id.* at 14 (*quoting District of Columbia v. Heller*, 554 U.S. 570, 626-27, n.26, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008)).

When conducting a textual interpretation of the Amendment, courts "are guided by the principle that . . . its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *District of Columbia v. Heller*, 554 U.S. 570, 576, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008) (citation and quotation marks omitted). Based on this guiding principle, the

Supreme Court concluded that "the most natural reading of 'keep Arms' in the Second Amendment is to 'have weapons" and to "bear arm" means "simply the carrying of arms." *Id.* at 582, 589. At its core, the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." *Id.* at 592.

Commonsense and logic tell us that, unless one is a maker of guns, the right to "keep"/have a gun necessarily means that one must purchase it, steal it, be given it by another, or find one that another has lost. That, of course, includes a handgun which was the subject "arms" in *Heller.* 554 U.S. at 628. Thus, given its ordinary, commonsense, and logical meaning the right to "keep arms" (the right to "have") of necessity includes the right, *inter alia*, to purchase arms. That then puts an end to the textual inquiry with the conclusion that the conduct at issue is protected by the plain text of the Second Amendment.

However, it must be acknowledged that the text of the Second Amendment does not specifically contain the word "purchase." Several courts have held that, to determine whether the textural phrase "keep and bear arms" in the Second Amendment includes a right to purchase, it is appropriate to consider other parts of the text of the Second Amendment and assess whether that text supports a right to purchase. *See* Joseph E. Sitzmann, "High-Value, Low-Value, and No-Value Guns: Applying Free Speech Law to the Second Amendment," 86 U. Chi. L. Rev. 1981, 2015-16 (Nov. 2019).

The Second Amendment accords protection of "the right of the people to keep and bear Arms," by providing

that the right "shall not be *infringed*." U.S. Const. Amend. II (emphasis added). The Second Amendment is unique in its use of "infringed" for the word does not appear anywhere else in the Constitution. Despite its uniqueness, the term "infringed" has received little attention by scholars or courts. However, *Heller* took the view that "infringed" "implicitly recognizes the pre-existence of the right." 554 U.S. at 592. As articulated in *Heller*, the Second Amendment does not serve to grant a right but rather preserves a right that the people already possessed. Therefore, to "keep and bear" serves to *identify* the right protected, not to *define* the right in the first instance.

The definition of "infringe" further supports the conclusion that the pre-existing right includes a right to purchase. "Infringe" is defined in modern dictionaries as "to encroach upon in a way that violates law or the rights of another." "Infringe," *Merriam-Webster.com*. "Encroach," in turn, has two definitions: "to enter by gradual steps or by stealth into the possessions or rights of another" and "to advance beyond the usual or proper limits." "Encroach," *Merriam-Webster.com*. Those words have possessed the same meaning since the sixteenth century and the Founders would have understood them in the same way.[9] Not simply protecting the heartland of the preserved right, the Second Amendment protects the environs surrounding it to prevent any encroachment on the core protections. Thus, by virtue of the word

9. Merriam-Webster identifies the first use of "infringe" in 1513 with the meaning as defined above. "Encroach" was first used in 1528 with the meaning defined first above. "Infringe" and "Encroach," *Merriam-Webster.com*.

"infringed," the Second Amendment's protective textual embrace includes the conduct necessary to exercise the right ("to keep and bear") and that, as explained above, includes the right to purchase arms so that one can keep and bear them.

This is fully consistent with discussions of numerous federal courts of appeal which, when ascertaining the textual reach of the Second Amendment, "have held that the Second Amendment protects ancillary rights necessary to the realization of the core right to possess a firearm for self-defense." *Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017). Among these rights is "the ability to acquire arms." *Id.* at 677-78 (*citing to Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011)); *but see NRA v. Bondi*, 61 F.4th 1317, 1324-25 (11th Cir. 2023) (*declining* to decide the question). So too have district courts. *United States v. Quiroz*, 629 F.Supp.3d 511, PE:22-CR-00104-DC, 2022 U.S. Dist. LEXIS 168329, 2022 WL 4352482, at *3 (W.D. Tex. Sept. 19, 2022); *Ill. Ass'n of Firearms Retailers v. City of Chi.*, 961 F.Supp.2d 928, 930 (N.D. Ill. 2014).[10] As the Northern District of Illinois concluded, "the ban on guns sales and transfers prevents [individuals] from fulfilling . . . the *most fundamental* pre-requisite of legal gun ownership-that of simple acquisition." *Ill. Ass'n of Firearms Retailers*, 961 F.Supp.2d at 938.

10. State courts have reached the same conclusion. *Andrews v. State*, 50 Tenn. 165, 178 (1871); *Elhert v. Settle*, 105 Va. Cir. 326, CL20000582, at *3 (2020) (unpublished) ("The lack of a right to buy and sell arms would negate the right to keep arms") (*interpretating* the Virginia constitutional right which is co-extensive with the federal Second Amendment).

The Fourth Circuit has not explicitly ruled on this question, but its precedent supports a finding that the right to purchase a firearm is corollary to the right to keep a firearm. In *United States v. Hosford*, 843 F.3d 161, 166 (4th Cir. 2016), the Fourth Circuit found that the Second Amendment does not include a right to sell firearms. Citing to the four "longstanding" *Heller* exceptions, the Fourth Circuit determined in *Hosford* that the "the prohibition against unlicensed firearm dealing is a longstanding condition or qualification on the commercial sale of arms and is thus facially constitutional." *Id.* But, the Fourth Circuit did not extend its holding to the purchasing of firearms. And, notably, the oft-quoted language of *Heller*, on which *Hosford* relied, extends only to the commercial sale, not the commercial purchase, of arms. *Hosford* also distinguished the constitutional regulations in question, governing the commercial sale of firearms, from regulations infringing on individuals' ability to "purchase or sell firearms owned for personal, self-defensive use." *Id.* at 168. This teaches that the Fourth Circuit too considers the right to purchase a firearm corollary to the right to keep one. One able commentator has reached that conclusion. Sitzmann, "High-Value, Low-Value, and No-Value Guns," 86 U. Chi. L. Rev. at 2023 ("the Fourth, Ninth, and Seventh Circuits all support a single, underlying message: there is no individual right to sell a firearm conferred by the Constitution, even though there is a right to acquire and use one").

For the foregoing reasons and, consistent with the text and logic of the Second Amendment, the Court finds that the right to purchase a gun falls within the Second Amendment's plain text.

2. Eighteen to Twenty-One-Year-Olds Fall Within "the people" the Second Amendment Protects

The Second Amendment protects the right of "the people" to keep and bear arms. U.S. Const. amend. II. But, who are the people to whom this right extends?

Plaintiffs argue that "[l]aw abiding citizens who are eighteen and older fall within the 'the [sic] people' due to their unqualified presence as law-abiding adults within the body-politic and political community." Pl. Replacement Br. at 4. According to Plaintiffs, the "age of majority" is the determinative factor for whether an individual is one of "the people" and that, in many contexts, 18 *is* the age of majority today. *Id.* at 4-5. The Government, on the other hand, argues that "individuals under the age of 21 are not included in the phrase 'the people' within the meaning of the Second Amendment." Gov. Replacement Br. at 11. This, says the Government, is because, at the time of the Founding, 21—not 18—marked the divide between minority and majority. *Id.* at 16.

Although the Supreme Court "has not precisely defined" the meaning of "the people" in the Second Amendment, it has provided guidance as to the reach of the term as used in the Constitution. *United States v. Jackson*, No. ELH-22-141, 2023 U.S. Dist. LEXIS 33579, 2023 WL 2499856, at *6 (D. Md. March 13, 2023). Thus, in *United States v. Verdugo-Urquidez*, the Supreme Court explained that:

> "the people" protected by the *Fourth* Amendment, and by the *First* and *Second* Amendments, . . . refers to a class of persons who are *part of a national community* or who have otherwise *developed sufficient connection with this country to be considered part of that community.*

494 U.S. 259, 265, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990) (emphasis added). Moreover, in *Heller*, the Supreme Court began its analysis "with a strong presumption that the Second Amendment right is exercised individually and belongs to *all Americans*." *District of Columbia v. Heller*, 554 U.S. 570, 581, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008) (emphasis added). Further, citing *Verdugo-Urquidez*, the Supreme Court in *Heller* instructed that the term "the people" "unambiguously refers to all members of the political community, not an unspecified subset." *Id.* at 580. *Heller* also identifies Second Amendment rightsholders as "all Americans," "citizens," "Americans," and "law-abiding citizens" at various points. Pratheepan Gulasekaram, ""The People" of the Second Amendment: Citizenship and the Right to Bear Arms," 85 N.Y.U. L. Rev. 1521, 1530-31 (2010) (*quoting Heller*, 128 S.Ct. at 2790, 2791, 2815 n.24, 2816, 2818).

Even with this language, *Heller* does not settle the inquiry because the definition of the "political community" is no more specific than that of "the people." Dictionaries provide no help on the inquiry because the term "political community" is not defined by Merriam-Webster, the Oxford English Dictionary or any other contemporary dictionary.

In its telling, *Bruen* does not provide much further guidance. Nor does *Bruen* contain a thorough discussion of the definition of "the people." But, *Bruen* does deem it "undisputed" that "ordinary, law-abiding, adult citizens" are part of "the people." *N.Y. State Rifle & Pistol Assoc. v. Bruen*, 142 S.Ct. 2111, 2134, 213 L. Ed. 2d 387 (2022).[11]

Taken as a whole, Supreme Court precedent teaches that "the people" comprise all "members of the political community," *Heller*, 554 U.S. at 580, which includes, at a minimum, all "ordinary, law-abiding, adult citizens," *Bruen*, S.Ct. at 2134. *See also* Robert H. Churchill, "Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment," 25 Law & Hist. Rev. 139, 159 (2007) (the Founding generation "attempt[ed] to preserve the connection between the right to keep arms and membership in the body politic"). With the foregoing in mind, the inquiry turns to whether ordinary, law-abiding 18-to-20-year-olds are considered part of the "political community."

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11. In his *Bruen* concurrence, Justice Alito noted "[the *Bruen* decision] does 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." 142 S.Ct. at 2157-58. However, in so stating, Justice Alito did not conduct a historical analysis. Because that observation is in a concurrence and is a cursory comment at that, the Court notes it but gives it no analytical weight.

Appendix D

a) What is the "Political Community"

The first task in determining who is a member of the "political community" is to determine at which point in time to base the analysis-in 1791 (the date the Second Amendment was adopted) or 2023.

At its base, the position taken by the Government and amicus Everytown for Gun Safety requires the Court to consider the definition of "the people" at the time of Founding. The Government argues that Congress has the authority to select the minimum age to directly purchase a handgun and it is within Congress's authority to vest this right at 21 because "[t]he Constitution established only one right that vests at the age of 18: voting." Memo. in Supp. of Motion to Dismiss at 10 (ECF No. 22). To support its conclusion, the Government argues that 21 was the age of majority at the time of Founding and, that therefore, the Second Amendment allows for the regulation of the sale of firearms to those under that age. *Id.* at 10-11. Though the Government does not explicitly make this point, it is, in effect, asking the Court to apply Founding-era principles in determining to whom the Second Amendment applies. Everytown does too, stating "those younger than 21 are [not] considered part of 'the people' covered by the Amendment's text." Everytown Amicus Br. at 9.

The Plaintiffs, on the other hand, urge the Court to adopt today's understanding of 18 as the age of majority. Pl. Response in Opp. to Motion to Dismiss at 6 (ECF No. 27). Under this view, "the people" applies to everyone considered part of the political community today, not just those considered part of it in 1791.

Without exploring the full implications of the argument, other courts have accepted some version of the Government's argument. The Fifth Circuit tentatively suggested, but refused to hold, that the Second Amendment did not protect the ability of 18-to-20-year-olds to purchase handguns citing to the fact that 21 was the age of majority at the Founding. *Nat'l Rifle Ass'n. v. BATFE*, 700 F.3d 185, 201, 203 (5th Cir. 2012).[12] After *Bruen*, a district court reiterated this determination in 2022. *Reese v. BATFE*, _ F.Supp.3d _, No. 6:20-cv-01438, 2022 U.S. Dist. LEXIS 230140, 2022 WL 17859138, at *10 (W.D La. Dec. 21, 2022).

Evaluating a state law, the Western District of Pennsylvania also determined that "age-based restrictions limiting the rights of 18-20-year-old adults to keep and bear arms fall under the 'longstanding' and 'presumptively lawful' measures . . . evading Second Amendment scrutiny" and pointed to a "strong consensus" among lower courts "that such restrictions fall outside the scope of the rights protected by the Second Amendment." *Lara v. Evanchick*, 534 F.Supp.3d 478, 489, 491 (W.D. Pa. 2021). Having so found, those courts concluded that such regulations are not subject to any further scrutiny.

While *Reese* and *Lara* are informative, they certainly are not dispositive. Other district courts have come to the opposite conclusion and have held that 18-to-20-year-olds are part of "the people." For instance, the Northern District of Texas held that law-abiding 18-to-20-year-olds

12. See Appendix A.

are part of the national community and thus part of "the people." *Firearms Policy Coalition v. McCraw*, 623 F.Supp.3d 740, No. 4:21-cv-1245, 2022 U.S. Dist. LEXIS 152834, 2022 WL 3656996, at *4 (N.D. Tex. August 25, 2022). And, earlier this year, the District of Minnesota determined that those aged 18 and up are part of the people. *Worth v. Harrington*, __ F.Supp.3d __, No. 21-cv-1348, 2023 U.S. Dist. LEXIS 56638, 2023 WL 2745673, at *7, *9 (D. Minn. March 31, 2023). *Worth* looked to the "normal and ordinary meaning of 'the people'" and determined it "includes all Americans who are part of the national community." 2023 U.S. Dist. LEXIS 56638, [WL] at *7. The analysis in *Worth* is an especially well-reasoned approached.

No federal appellate court, much less the Supreme Court, has squarely determined that the Second Amendment's rights vest at age 21. To date, three circuits, the Fifth, Seventh, and Eleventh, have looked at this question head-on and have declined to answer it. *Nat'l Rifle Ass'n.*, 700 F.3d at 203-04; *Horsley v. Trame*, 808 F.3d 1126, 1131 (7th Cir. 2015); *NRA v. Bondi*, 61 F.4th 1317, 1324 (11th Cir. 2023). Both the Fourth and the Ninth Circuit held that 18-to-20-year-olds are part of "the people" protected by the Second Amendment. *Hirschfeld v. ATF*, 5 F.4th 407 (4th Cir. 2021), *vacated by* 14 F.4th 322 (4th Cir. 2021); *Jones v. Bonta*, 34 F.4th 704 (9th Cir. 2022), *opinion vacated on reh'g*, 47 F.4th 1124 (9th Cir. 2022). *Hirschfeld* and *Bonta* were decided before *Bruen*. *Hirschfeld* was vacated as moot because the plaintiff turned 21 when the case was on appeal. 14 F.4th 322 at 326-27. *Bonta* was vacated and remanded to the district court because of *Bruen*. 47 F.4th at 1124.

The analysis of the issue in *Hirschfeld* is especially instructive. After reviewing the use of "the people" in rights enumerated in the First and Fourth Amendments and less analogous rights, such as due process, equal protection, and to be free from cruel and unusual punishment, the Fourth Circuit expressed the view that "it is hard to conclude that 18-to-20-year-olds have no Second Amendment rights where almost every other constitutional right affords them that protection." *Hirschfeld*, 5 F.4th at 424. Although that decision has been vacated and thus is neither binding nor of precedential effect, the analysis of the issue is sound and logically persuasive on the point. And, the analyses and the conclusions are the views compelled by the record here.

Nor has any district court within the Fourth Circuit decided this question. Thus, the only decisions determining whether 18-to-20-year-olds fall outside, or within the protection of, the Second Amendment are out-of-circuit district courts. The decisions in *McCraw* and *Worth* are more persuasive and better-reasoned on the point so the Court here follows their lead.

Moreover, their view is in keeping with what the Supreme Court has done not to restrict the analysis of the term "the people" to the Founding-era. That is because: (1) taken to its logical extent, the Government's argument would remove Second Amendment protections for vast swaths of the American population; and (2) *Heller* and *Bruen* support adopting a modern understanding of the definition of "the people."

First, taken to its full extent, the Government's argument leads to a constitutionally untenable result. It is no secret that the American political community has not always been as inclusive as it is today. Throughout our Nation's history, the definition of "the people" has evolved and changed-for the better. *See generally* A.E. Dick Howard, "Who Belongs: The Constitution of Virginia and the Political Community," 37 J. Law & Pols. 99 (2022) (*evaluating* this question in the context of the Virginia Constitution). Also, "if 'members of the political community' is taken to mean 'eligible voters' – which is not an unreasonable definition, though certainly not the only one," the political community at the time of the Founding only included white, landed men – the lauded independent (white, male) yeoman farmers. "The Meaning(s) of 'The People' in the Constitution," 126 Harv. L. Rev. 1078, 1085 (2013).[13]

It is well to recall that, since the early days of the Republic, we have gone from a Nation whose Supreme Court firmly declared that the free descendants of slaves

13. *See also* Sanford Levinson, "The Embarrassing Second Amendment," 99 Yale L.J. 637, 647 (1989); Churchill, "Gun Regulation, the Police Power, and the Right to Keep Arms in Early America," 25 Law & Hist. Rev. at 156, 166 (2007) (*arguing* that the right extended to all free white men, regardless of property status); *but see Op. of Judge Appleton*, 44 Me. at 523 (*determining* that minors and married women are members of the political community despite "labor[ing] under numerous disabilities of person and property" and lacking suffrage and *observing* "Were the right of suffrage necessary to constitute citizenship, three-fourths of the free people of the country would, by reason of age, sex, or the poverty of their condition, be disfranchised").

were not citizens, *Dred Scott v. Sandford*, 60 U.S. 393, 406, 15 L. Ed. 691 (1857), to one that bestows citizenship regardless of race, U.S. Const. amend. XIV. We have also gone from a Nation where a husband's legal status subsumed his wife's to one where women are treated as full and equal members of society. Blackstone, 1 *Commentaries*, ch. 15, at 430 ("the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs everything"); Hargaves & Butler, 2 *First Part of the Institutes of the Laws of England, Notes on Lord Coke's First Institute, Or Commentary Upon Littleton*, ch. 11 § 183; Saul Cornell, "'Infants' and Arms Bearing in the Era of the Second Amendment: Making Sense of the Historical Records," 40 Yale L. & Pol'y Rev. 1, 21 (Fall, 2021). In fact, at the time of the Founding, as one scholar-ironically arguing in favor of a 1791 interpretation of the meaning of "the people"-noted, "[i]n many respects, the situation of minors under twenty-one resembled that of married women under coverture." Cornell, "'Infants" and Arms Bearing in the Era of the Second Amendment," at 9. Membership in the political community has grown to include numerous groups-women, minorities, and minors-that were denied inclusion at the time of the Founding.

This observation is not to disparage the Founders or their times. Instead, it is a testament to the ideals engrained in our Constitution by the Founders that our Nation has greatly expanded its definition of "the people" in the 232 years since the adoption of the Second

Amendment. Tara Smith, "Originalism's Misplaced Fidelity: Original Meaning is Not Objective," 26 Const. Comment. 1, 13-14 (2009) ("[T]he 'will of the people' [as articulated in the Constitution] at best reflects the will of some people, but far from all"). But it is to say that, if the Court were to accept the Government's position of limiting the definition of "the people" to those understood to fall within it at the time of the Founding, the Second Amendment would exclude protections for vast swaths of the American population who undoubtably are members of the political community today.[14]

The Supreme Court's language in *Heller* and *Bruen* further reinforces this conclusion. When *Heller* used the term "the people," it did not limit "the people" to only the members of the political community at the time of Founding. Instead, *Heller* clarified that the term included "all members . . . not an unspecified subset." *Heller*, 554 U.S. at 580. The Court specifically rejected limiting the political community to those who were members of the militia, a group consisting of "free able-bodied white male citizens [within the ages of 18 and 45]," that may loosely map on to the Founding-era understanding of political community. *Id.* at 596. Instead, *Heller* held that there is

14. This is neither the time nor place to thoroughly define and discuss each contour of "the people" at the time of the Founding. But, it appears that, at the minimum, all those of African descendent (many of whom were still enslaved), Native Americans, and likely many white married women would not be included. Though this is doubtlessly not the Government's intent, this is the logical end of the Government's argument, and it is a view to which the Court simply cannot subscribe.

a "strong presumption that the *Second Amendment right . . . belongs to all Americans.*" *Id.* at 581 (emphasis added).

In *Bruen*, the Supreme Court did not conduct a historical analysis of the meaning of "the people." It treated the question as a simple one and concluded that, at least, the term applied to all "adult citizens," and the Court did not make any attempt to determine if the petitioners in question would have been considered "adult citizens" at the time of the Founding. *Bruen*, 142 S.Ct. at 2134. The approach manifest in *Heller* and *Bruen* supports a finding that today's understanding of "the people" is appropriate when considering the reach of the Second Amendment in the context presented by the motions under consideration.[15]

b) Eighteen-to-Twenty-year-olds are Members of the Political Community

With that conclusion in mind, the analysis now turns to whether, under today's standards, 18-to-20-year-olds are members of the political community.

The text of the Constitution does little to guide the inquiry because the Second Amendment itself includes no reference to age. U.S. Const. amend. II. And the

15. There is, of course, a logical inconsistency in applying an Originalist understanding of "keep and bear arms" and a modern understanding of "the people." But, fealty to the teachings of *Heller* and *Bruen* and the need to avoid the unacceptable reach of the Government's position warrants the result reached here.

Constitution "does not set forth an age of majority." *Horsley v. Trame*, 808 F.3d 1126, 1130 (7th Cir. 2015).

Of course, the Founders made reference in the Constitution to age and, in so doing, made age a criterion for enjoyment of rights. For example, they imposed age limits on the right to hold offices.[16] Later amenders twice referenced age in terms of voting. U.S. Const. amend. XIV § 2 (*granting* the right to vote to male citizens over the age of 21); amend. XXVI (*granting* the right to vote to all citizens over the age of 18). From these facts, we know that, when they thought it necessary to do so, the Founders used age to regulate access to important rights. That the Founders choose not to so circumscribe access to the Second Amendment rights to keep and bear arms is probative of their intent as to the age limit (or lack thereof) on the access to the right itself. However, that is certainly not dispositive of the issue. Therefore, it is necessary to look beyond the text of the Constitution itself.

It is true that the age of 18 is an arbitrary age to determine adulthood and the full vesting of the rights of citizenship. This has always been true. Blackstone himself admits that the age of majority is "merely arbitrary." 1 Blackstone *Commentaries*, ch. 17, at 452; *see also In re Dewey*, 28 Mass. 265, 268, 11 Pick. 265 (Mass. 1831) ("The age of maturity or full age is a matter of arbitrary regulation"); *United States v. Blakeney*, 44

16. The Constitution set forth the minimum age for holding certain offices: 25 for members of the House of Representatives, U.S. Const. art. 1, § 2; 30 for Senators, U.S. Const. art. 1, § 3; and 35 for President, U.S. Const. art. II, § 1.

Va. 405, 3 Gratt. 405, 415 (Va. 1847) (op. of Baldwin, J.) ("It is a matter of substance and not of form; and a man has as much dicretion [*sic*] at the age of twenty years, eleven months and twenty-five days, as he has at the full age of twenty-one"). But, "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood." *Roper v. Simmons*, 543 U.S. 551, 574, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).

Today, many of the rights and responsibilities of citizenship fall upon the shoulders of 18-year-olds. At 18, individuals receive the franchise, the most fundamental symbol of membership in the political community. U.S. Const. amend. XXVI. Voting is a key right of citizenship but, with it, come various obligations. When young men turn 18, they are required to register with the Selective Service. 50 U.S.C. § 3802(a). Eighteen is also the age that individuals are eligible to enlist in the military without their parents' or guardians' permission. 10 U.S.C. § 505(a).[17] Likewise, individuals become eligible for federal jury duty at 18. 28 U.S.C. § 1865(b)(1). And, at 18, they lose the Eighth Amendment's shield from the death penalty and become fully answerable for their crimes as adults. *Roper*, 543 U.S. at 574. These examples teach that, upon achieving their eighteenth birthday, individuals have gained admittance into the political community.

It is, of course, true that some privileges of citizenship are denied to individuals under the age of 21. To the

17. Individuals may join the military at 17 with their parents' or guardians' permission. 10 U.S.C. § 505(a).

continued consternation of college students across the country, the drinking age remains 21. *See South Dakota v. Dole*, 483 U.S. 203, 205-06, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987). And, Congress recently raised the age to purchase tobacco products to 21. 21 U.S.C. § 387(d)(5)(f).

These delayed privileges of citizenship are distinguishable from the right to keep and bear arms because that right is enshrined in the Constitution. There is no similar constitutional right to consume alcohol or to use tobacco. Therefore, when it comes to controlled substances and health, legislatures constitutionally may regulate these matters within reason and their determinations are due significant judicial deference. In contrast, in the Second Amendment context, "judicial deference to legislative interest balancing . . . is not deference that the Constitution demands." *N.Y. State Rifle & Pistol Assoc. v. Bruen*, 142 S.Ct. 2111, 2131, 213 L. Ed. 2d 387 (2022). "The Second Amendment 'is the very product of an interest balancing by the people' and it 'surely elevates above all other interests the right of law-abiding, responsible citizens to use arms' for self-defense." *Id.* (*quoting District of Columbia v. Heller*, 554 U.S. 570, 635, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008)). This accords the Second Amendment the same respect as other constitutional rights.

If the Court were to exclude 18-to-21-year-olds from the Second Amendment's protection, it would impose limitations on the Second Amendment that do not exist with other constitutional guarantees. It is firmly established that the rights enshrined in the First, Fourth, Fifth, Eight, and Fourteenth Amendments vest before the age of 21. *See Firearms Policy Coal. Inc. v. McCraw*, 623

F.Supp.3d 740, No. 4:21-cv-1245-P, 2022 U.S. Dist. LEXIS 152834, 2022 WL 3656996 at *4-5 (*finding* that the Second Amendment includes 18-to-20-year-olds because the First, Fourth, Fifth, Eight, and Fourteenth Amendments apply to all Americans regardless of age) (*citing to W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943) (free exercise); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506, 89 S. Ct. 733, 21 L. Ed. 2d 731, (1969) (free speech); *New Jersey v. T.L.O.*, 469 U.S. 325, 334, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985) (Fourth Amendment); *Fisher v. Univ. of Tex.*, 579 U.S. 365, 136 S. Ct. 2198, 195 L. Ed. 2d 511 (2016) (equal protection); *Goss v. Lopez*, 419 U.S. 565, 574, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975) (due process); *Kent v. Dulles*, 357 U.S. 116, 78 S. Ct. 1113, 2 L. Ed. 2d 1204 (1958) (travel); *Roper v. Simmons*, 543 U.S. 551, 574, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (Eighth Amendment); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493, 74 S. Ct. 686, 98 L. Ed. 873 (1954) (equal educational opportunities)); *see also Worth v. Harrington*, F.Supp.3d , No. 21-cv-1348, 2023 U.S. Dist. LEXIS 56638, 2023 WL 2745673, at *7 (D. Minn. March 31, 2023) ("Although one can find certain limitations upon the rights of young people secured by both the First and Fourth Amendments, neither has been interpreted to exclude 18-to-20-year-olds from their protections"); *Carey v. Pop. Servs. Int'l.*, 431 U.S. 678, 692 n.14, 97 S. Ct. 2010, 52 L. Ed. 2d 675 (1977).

Like these other rights, the Second Amendment's protections apply to 18-to-20-year-olds.[18] By adopting

18. This, of course, does not mean that the Second Amendment applies to individuals under the age of 18 who have not yet attained full admittance into the political community.

the Second Amendment, the people constrained both the hands of Congress and the courts to infringe upon this right by denying ordinary law-abiding citizens of this age the full enjoyment of the right to keep and bear arms unless the restriction is supported by the Nation's history.[19] That is what *Bruen* tells us. To that inquiry, we now turn.

B) Prohibitions on the Rights of 1B-to-20-year-olds to Purchase Handguns are not Supported by our Nation's History and Tradition

Having determined that the conduct in question, the purchasing of handguns by individuals between the ages of 18-to-20-years, is covered by the Second Amendment, the next step is to determine if the regulating statute and implementing regulations are "consistent with this Nation's historical tradition." *N.Y. State Rifle & Pistol Assoc. v. Bruen*, 142 S.Ct. 2111, 2135, 213 L. Ed. 2d 387 (2022). The burden is on the Government to "affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to

19. Furthermore, it is not at all clear that the age of majority at the Founding is the appropriate measure for measuring the reach of the Second Amendment. On that score, it should be kept in mind that the Second Amendment, although not confined to the militia did nonetheless consider the militia as a factor prompting its enhancement. *Heller*, 554 U.S. at 582-83. And, as explained below in, Discussion § II(B)(1), the age of 18, not the age of 21, was the relevant age for membership in the militia. That fact cuts against a finding that the age of majority was what the Founders had in mind as a limitation on the reach of the Second Amendment.

keep and bear arms." *Id.* at 2127.[20] The Government has not met its burden.

When determining if a regulation is part of our Nation's historical tradition, "not all history is created equal." *Bruen*, 142 S.Ct. at 2136. The Court must most heavily credit the historical sources from around the time of the ratification of the Second Amendment (1791).[21] *Id.*

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20. As many of our sister courts have done, the Court "pause[s] to note the challenges created by *Bruen's* assignment." *United States v. Jackson*, No.: ELH-22-141, 2023 U.S. Dist. LEXIS 33579, 2023 WL 2499856, at *10 (D. Md. March 13, 2023); *see for example NRA of Am. v. BATFE*, 700 F.3d 185, 204 (5th Cir. 2012) ("we face institutional challenge in conducting a definitive review of the relevant historical record"); *Worth v. Harrington*, F.Supp.3d, No. 21-cv-1348, 2023 U.S. Dist. LEXIS 56638, 2023 WL 2745673, at *9 (D. Minn. March 31, 2023); *Bruen*, 142 S.Ct. at 2177 (Breyer, J. dissenting). The Court is staffed by lawyers who are neither trained nor experienced in making the nuanced historical analyses called for by *Bruen*. There is a reason that historians attend years of demanding schooling and that their scholarship undergoes a rigorous peer-review process before publication. And, history is a vocation itself. The analytical construct specified by *Bruen* is thus a difficult one for non-historians. Of course, *Bruen* lessens the difficulty to some extent by requiring the parties to assemble the historical record. *Bruen*, 142 S.Ct. at 2130 n.6. But, that approach is itself problematic because, as this case shows, important parts of the historical record can be overlooked or ignored by the parties. And, of course, the role of advocate is not conducive to objective presentation of what counsel considers to be the historical record. Nevertheless, *Bruen* clearly prescribes the approach to be taken, and the Court will proceed as instructed.

21. Amicus Everytown for Gun Safety argues that 1868, when the Fourteenth Amendment was adopted, is the correct focus for Second Amendment analysis. Everytown Amicus Br. at 5. It argues that the ratification of the Fourteenth Amendment requires courts

at 2135-36; *see also id.* at 2163 (Barret, J. concurring) ("today's decision should not be understood to endorse freewheeling reliance on historical practice from the mid-to-late 19th century to establish the original meaning of the Bill of Rights"); *United States v. Rahimi*, 61 F.4th 443, 456 (5th Cir. 2023).

The analysis now proceeds on the basis of the record created by the parties: (1) militia laws and (2) laws regulating the age of purchasing handguns.[22]

1. Militia Laws

The militia laws in the record do not support a finding that prohibiting the purchase of handguns by individuals

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to apply an "updated 1868 understanding of the Bill of Rights" even when considering federal law. *Id.* (*quoting* Kurt T. Lash, "Respeaking the Bill of Rights: A New Doctrine of Incorporation," 97 Ind. L.J. 1439, 1441 (2022)). But, because this case concerns federal law, the Court is bound, under *Bruen*, to give the most weight to Founding-era evidence. The Fourteenth Amendment did nothing to affect the meaning of the Second Amendment when adopted. Unlike when considering the constitutionality of state laws, the Court does not need to assess the understanding of the Second Amendment at the time of the passage of the Fourteenth Amendment. *Bruen*, 142 S.Ct. at 2136; *see NRA v. Bondi*, 61 F.4th 1317, 1321-22 (11th Cir. 2023) (*considering* Reconstruction-era laws when discussing the Second Amendment as applied to the states) *in contrast to United States v. Rahimi*, 61 F.4th 443, 456 (5th Cir. 2023) (*considering* Founding-era laws when discussing the Second Amendment as applied to the federal government).

22. In collecting these sources that Court has mostly, but not exclusively, relied on the historical sources compiled by the parties. *Bruen*, 142 S.Ct. at 2130 n.6.

between the ages of 18 and 20 comports with our Nation's history and traditions.

Although *District of Columbia v. Heller* determined that, textually, "the right to 'keep Arms' . . . [is] unconnected with militia service," 554 U.S. 570, 582, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008), the age of militia enrollment is relevant in helping to determine the history and tradition of firearms regulations. The fact that an individual could, or was required to, serve in the militia indicates that society believed that he lawfully could, and should, keep and bear arms. Furthermore, because militiamen generally were responsible for providing their own firearms, it is logical to conclude that 18-to-20-year-olds were not prohibited from purchasing them.

The Government rightly points out that possessing guns in a militia setting is not identical to having the constant use of them. Gov. Memo in Supp. of Motion to Dismiss at 17 n.17. The Court is also cognizant of the Eleventh Circuit's admonition not to confuse the legal *obligation* to perform militia service with the *right* to bear arms. *NRA v. Bondi*, 61 F.4th 1317, 1331 (11th Cir. 2023); *see also Worth v. Harrington*, __ F.Supp.3d __, No. 21-cv-1348, 2023 U.S. Dist. LEXIS 56638, 2023 WL 2745673, at *8 (D. Minn. March 31, 2023). Therefore, militia laws are not the sole source to be considered. But, they are important circumstantial evidence in understanding society's view of armed 18-to-20-year-olds.

The Government has presented numerous examples of militia laws from around the time of the Founding.[23] But, notwithstanding the volume of that historical material, the Government has failed to demonstrate that 21 was the age for militia service. Instead, the historical sources show that, at the time surrounding ratification of the Second Amendment, 16 or 18 was the age of majority for militia service throughout the nation. *See* Exhibits C, D, & E (ECF Nos. 30-3, 30-4, 30-5); Notice of Supplemental Authority on State Militia Laws ("Notice of Supp. Authority") (ECF No. 36-1).

Further, the Government's cited statutes show that, during the colonial and Revolutionary periods, the age of militia service dipped down to 16 in many states. Exhibit G; Notice of Supp. Authority; *see also United States v. Blakeney*, 44 Va. 405, 3 Gratt. 405, 441 (Va. 1847) (opinion of Brooke, J.) ("During the war of the revolution, sixteen was the military age").[24] According

23. *See* Exhibits C (states enrolling in their militias only individuals over 21) (ECF No. 30-3), D (states requiring parental consent for individuals under 21 to serve in the militia) (ECF No. 30-4), E (early New Jersey and Virginia militia laws) (ECF No. 30-5), F (states requiring parents to furnish minors enrolled in the militia with arms) (ECF No. 30-6), and G (early state militia laws allowing those younger than 18-years-old to serve) (ECF No. 30-7); Notice of Supplemental Authority on State Militia Laws (ECF No. 36; Exhibits 1-22) (state militia laws).

24. It is also relevant to note that many of these laws were adopted in the midst of the Revolutionary War, a war fought on American soil and requiring additional manpower. Adopting 16 at the age for militia service may be more of a reaction to the necessities of war than anything else.

to the historical record provided by the Government, *see* ECF No. 36-1, and stipulated to by the Plaintiffs, *see* ECF No. 39, on June 8, 1789 (the date Congress proposed the Second Amendment to the states), 10 of the 13 states[25] specify 16 as the age for militia duty.[26] ECF

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25. Vermont became a state in 1791. When the Amendment was proposed, Vermont's age of militia service was 16. "An Act Regulating the Militia of the State of Vermont" § 1 *in Statues of the State of Vermont* 94, 94 (George Hugh & Alden Spooner, 1787).

26. These states are Connecticut, Georgia, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Rhode Island, and South Carolina. "An Act for Forming, Regulating, and Conducting the Military Force of this State" *in* 1 *Acts and Laws of the State of Connecticut, in America* 144, 144 (Elisha Babcock, 1786); "An Act for Regulating the Militia of the State, and for Repealing the Several Laws Heretofore Made for that Purpose" (August 1786) at manuscript page 2, https://llmc.com/docDisplay5.aspx?set=39343&volume=1786&part=080 (Georgia); "An Act for the Better Security of the Government," (Oct. Sess. 1777) *in Laws of Maryland Made and Passed at a Session Assembly* ch. 20 (Frederick Green); "An act for regulating and governing the Militia of the Commonwealth of Massachusetts, and for repealing all laws heretofore made for that purpose" (1784), *in Acts and Resolves of Massachusetts, 1784-1785*, ch. 55, 140, 140 (Wright & Potter Printing Company); "An Act for Forming and Regulating the Militia Within this State, and for Repealing All the Laws Heretofore Made for that Purpose" § 2 (1786) *in Temporary Acts and Laws of New Hampshire*, 408, 408 (Daniel Fowle), https://heinonline.org/HOL/P?h=hein.ssl/ssnh0079&i=15; "An Act for the Regulating, Training, and Arraying of the Militia, and for Providing More Effectually for the Defence and Security of the State" § 10 (1781) *in Acts of the Fifth General Assembly of the State of New Jersey* 39, 42 (Collins, 1781); "An Act to Regulate the Militia," (1786) *in* 2 *Laws of the State of New York, Ninth Session*,

No. 36-1. The other three states began militia duty at 18. ECF No. 36-1.[27]

In the five years before 1789, only two states altered their age of militia service. In 1785, Virginia joined the minority of states by moving from a militia age of 16 to one of 18. Notice of Supp. Authority (Virginia) (ECF Nos. 36-21, 36-22).[28] Vermont passed the last of the

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ch. 25, 220, 220 (Weed, Parson and Company, Printers, 1886); "An Act to Establish a Militia in this State" § 2 (1777), *in* Clark, Walter, ed., 24 *Act of the North Carolina General Assembly, 1777* 1, 1 (1905); "The Act for Better Forming, Regulating and Conducting the Military Force of this State," (1779) *in* Rhode Island Sessions Laws (Oct. 1779 Reg. Sess.) 29, 31-32, https://heinonline.org/HOL/P?h+hein.ssl/ssri0435&i=29; "An Act for the Regulation of the Militia of this State," (Feb. Sess. 1782) *in Acts Passed at a General Assembly Begun and Holden at Jacksonburgh, South Carolina*, ch. 12 20, 20-24 (John Dunlap).

27. The other three states are Delaware, Pennsylvania, and Virginia. "An Act for Establishing a Militia Within This State," (1782) in Del. Acts, Jan. Adjourned Sess. 1782, 1, 1 https://heinonline.org/HOL/Page?handle=hein.ssl/ssde0069&collection=ssl&id=1&startid=1&endid=16; "An Act for the Regulation of the Militia of the Commonwealth of Pennsylvania" § 6 (1780) *in The Statutes at Large of Pennsylvania From 1682 to 1801*, ch. CMII 144, 146 (Wm. Stanley Ray, 1904); "An Act to Amend and Reduce into One Act, the Several Laws for Regulating and Disciplining the Militia, and Guarding Against Invasions and Insurrections" § 3 (1785) *in* 12 *The Statutes at Large; Being a Collection of All the Laws of Virginia, from the First Session of the Legislature, in the Year 1619*, ch. 1., 9, 10-12 (William Waller Hening, 1823).

28. "An Ordinance for Raising and Embodying a Sufficient Force, for the Defence and Protection of this Colony" (1775), *in*

pre-ratification laws establishing 16 as the date of militia duty in 1787, only four years before the Ratification of the Second Amendment. Notice of Supp. Authority (Vermont) (ECF No. 36-20).[29]

In the decade following the ratification of the Second Amendment, however, Congress and *every* state then in the Union passed a militia law requiring almost all able-bodied white men between the ages of 18 and 45 to serve in the militia. Within a few months of the ratification of the Second Amendment, the Second Congress passed the Second Militia Act of 1792. 1 Stat. 271 (1792). The Militia Act required:

> 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 (except as herein exempted)

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9 *The Statutes at Large; Being a Collection of All the Laws of Virginia, from the First Session of the Legislature, in the Year 1619*, 9, 16-17 (William Waller Hening, 1821) (*establishing* 16 as the age of militia service) *in contrast to* "An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections," §3 (1785) *in* 12 *The Statutes at Large; Being a Collection of All the Laws of Virginia, from the First Session of the Legislature, in the Year 1619*, 9, 16-17 (William Waller Hening, 1823) (*establishing* 18 as the age of militia service).

29. "An Act Regulating the Militia of the State of Vermont," § 1 (Feb. & Mar. Sitting 1787) *in Statutes of the State of Vermont, Passed by the Legislature in February and March 1787*, 94, 94 (George Hough & Alden Spooner, 1788).

> shall severally and respectively be enrolled in the militia.

Second Militia Act of 1792 § 1.[30] The Militia Act further required every member of the militia to "provide himself with a good musket or firelock . . . or with a good rifle." *Id.* Over the next few years, every state revised its existing militia laws to conform with the federal statute. In each of these state statutes, the states adopted a militia age of 18 and required militiamen to arm themselves.[31]

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30. Exempted individuals included civil government officials and members of professions necessary in a time of war. Second Militia Act of 1792 § 2. The states adopted similar lists of exempted individuals.

31. "An Act for establishing the militia in this state" §§ 1-2 (June 18, 1793), *in* 2 *Laws of the State of Delaware from the Fourteenth Day of October, One Thousand Seven Hundred, to the Eighteenth Day of August, One Thousand Seven Hundred and Ninety-Seven*, Ch. XXXVI, 1134-47 (only requiring the service of individuals between the ages of 18-to-21-years-old "in cases of rebellion, or an actual or threatened invasion of this or any of the neighbouring [sic] states"); "An Act for the Regulation of the Militia of the Commonwealth of Pennsylvania," §§ 1-2 (April 11, 1793) *in* James T. Mitchell, et al. Compilers, 14 *Statutes at Large of Pennsylvania from 1682 to 1801*, Ch. MDCXCVI 454-481, (same); "An Act for the regulation of the militia of New-Jersey" § 1 (June 13, 1799), *in* William Paterson, 1 *Laws of the State of New-Jersey*, 436-48; "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 an uniform militia throughout the United States'" § 1 (December 14, 1792),

in Robert Watkins, *Digest of the Laws of the State of Georgia. From Its First Establishment as a British Province down to the Year 1798, Inclusive, and the Principal Acts of 1799*, 458-67; "An Act for forming and conducting the Military Force of this State, conformable to the Act of Congress, passed the eighth Day of May, A. D. 1792, which is as follows: 'An Act more effectually to provide for the National Defence, by establishing an uniform Militia throughout the United States'" § 2 (October 1792), *in Acts and Laws of the State of Connecticut, in America*, 298-311 (exempting college students); "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 Rule and Articles for governing the Troops stationed in Forts and Garrisons within this Commonwealth, and also the Militia when called into actual Service,'" (June 22, 1793) *in* 2 *Laws of the Commonwealth of Massachusetts from November 28, 1780 to February 28, 1807*, 579-98, (same); Herty, Thomas, *Digest of the Laws of Maryland, Being an Abridgment, Alphabetically Arranged, of All the Public Acts of Assembly Now in Force, and of General Use*, 367-73 (1799) (citing to 1793, c. 53); "An Act to Organize the Militia Throughout the State of South Carolina, in Conformity with the Act Of Congress," (May 10, 1794) *in* Thomas Cooper; McCord, David, eds, 8 *Statutes at Large of South Carolina*, 485-501 (1836-1873) (exempting college students); "An Act for forming and regulating the militia within the State, and for repealing all the laws heretofore made for that purpose," (December 28, 1792) *in Constitution and Laws of the State of New-Hampshire; Together with the Constitution of the United States*, 251-60 (1805); "An Act for regulating the Militia of this Commonwealth," (December 22, 1792) *in Collection of All Such Acts of the General Assembly of Virginia, of a Public and Permanent Nature, as Are Now in Force*, Ch. CXLVI, 293-301 (1794) (creating an annex to each militia battalion for young men between the age of eighteen to twenty-five and providing an exception for college students); "An Act to organize the Militia of

It is true that five of these Founding-era militia laws required parents or guardians to supply arms to their minor sons. *See e.g.* Delaware, Pennsylvania, Massachusetts, New Hampshire, and Vermont.[32] Two other states levied fines on the parents or guardians of 18-to-20-year-old militiamen who failed to report to muster with the proper firearms. *See e.g.* New Jersey and Rhode Island. But, from the Congressional legislative history provided by the Government about the federal Militia Act, it appears that the provisions were adopted out of concern that 18-to-20-year-olds would be unduly financially burdened if required to outfit themselves. *See* Exhibit H at 5 (ECF No. 30-8) (*citing* 2 *Annals of Congress* 1851, 1856 (debates of December 16, 1790)).[33]

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this State" § 1 (March 9, 1793), *in* Thomas Greenleaf, 3 *Laws of the State of New-York, 16th Session*, Ch. XLV, 58-68; "An act to revise and amend the Militia Law," (1793) *in* Iredell, James, Martin, & Francois-Xavier, 2 *Public Acts of the General Assembly of North-Carolina*, ch. 1, 36 (1804); "An Act to organize the Militia of this State" (1798) *in* 1 *The public laws of the state of Rhode-Island and Providence Plantations: as revised by a committee*, 424-44 (1798) (providing an exception for students at Rhode Island College); "An Act, for regulating and governing the militia of this state," (March 10, 1797) *in* 2 *Laws of the State of Vermont, Digested and Compiled*, Ch. LXXXI, 122-46 (1808).

32. In 1806, North Carolina joined this group. Gov. Replacement Br. at 18 (citing to Exhibit F at 4 (ECF No. 30-6)); *see also* "An act to revise and amend the Militia Laws" § 3168 (1806) *in* 2 *The Code of North Carolina*, 346-47 (William T. Dortch, John Manning, John S. Henderson, 1883).

33. The concern about the financial burden of providing militia arms persisted. In the 1810s, Congress debated providing

Nothing in those federal or state statutes suggests that 18-to-20-year-olds could not provide (or purchase) their own guns, just that their parents were *also* responsible for providing the necessary armaments. In sum, within a few short years of adopting the Second Amendment, the states revised their laws and demonstrated the nationwide understanding that militia service should begin at age 18.

The Government then turns to making the argument that, after the Founding, the age of militia service began to hover around 21 or service under 21 required parental consent. The Government points to a total of eleven laws in ten states to prove its point. Exhibits C & D. However, of the cited laws, only two were passed within 19 years of the ratification of the Second Amendment (Delaware's 1807 law and Pennsylvania's 1793 law).[34] And both of

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federally funded arms to volunteer militiamen. Both those who opposed and supported the plan spoke in terms of taxation and where the financial burden of providing appropriate weaponry should fall. David Thomas Konig, "Arms and the Man: What Did the Right to Keep Arms Mean in the Early Republic," 25 Law & Hist. Rev., 177, 183-84 (2007) (*quoting The National Intelligencer and Washington Advertiser*, 8 February 1812).

34. Gov. Exhibit C (ECF No. 30-3) (*see* "An Act to establish an Uniform Militia throughout this State," §§ 1-2, 4, *in* 4 *Laws Of The State Of Delaware* ch. XLIX, 123, 123-24, 125-26 (M. Bradford & R. Porter, 1816); "An Act for the Regulation of the Militia of the Commonwealth of Pennsylvania," §§ I-II, *in* 14 James T. Mitchell & Henry Flanders, eds., *The Statutes At Large Of Pennsylvania From 1682 to 1801* ch. MDCXCVI, 454, 455-56 (1909)); *see* Thomas Jefferson to James Madison (Sept. 6, 1789), https://jeffersonpapers.princeton.edu/selected-documents/thomas-jefferson-james-madison (*defining* a generation as lasting for 19 years).

those statutes actually *do* require 18-year-olds to join the militia. They merely state that, unless in times of rebellion or invasion, those under the age of 21 are exempt from militia drill. Thus, under those statutes, 18-to-20-year-olds were still considered members of the militia and expected to arm themselves.

The later laws cited by the Government are similarly unhelpful to its argument. An 1818 New York law only restricts 18-to-20-year-olds from enrolling in certain militia companies (cavalry, artillery or flying artillery) without parental permission but not others (for example, infantry).[35] That law still retained 18 as the age of general militia service. *Id.* at § 1, 211. The next state statute cited by the Government, New Jersey (1829), comes 38 years after the ratification of the Second Amendment.[36] Like Delaware and Pennsylvania, New Jersey also required 18-year-olds to join the militia but excused them from muster during times of peace. The earliest law that the Government points to actually establishing 21 as the age of militia service is Ohio's 1843 law, coming 52 years after the

35. Gov. Exhibit D (ECF No. 30-4) (*citing to* "An Act to organize the Militia," § XXXIII (1818) *in Laws of the State of New-York, Passed at the Forty-First Session of the Legislature*, ch. CCXXII, 210, 225 (J. Buel, 1818).

36. Gov. Exhibit C (*citing to* "An Act to exempt minors from Militia Duty in time of peace" § 1 (1829), *in* Josiah Harrison, ed., *A Compilation Of The Public Laws Of The State Of New-Jersey Passed Since The Revision In The Year 1820*, 266, 266 (J. Harrison, 1833)).

ratification of the Second Amendment.[37] Like the statutes of New York, New Jersey, and Pennsylvania, the Ohio law does not show that, at the time of the Founding, there was any doubt about the age that militia duty began.

Though dating from the nineteenth-century and thus afforded less weight, judicial opinions in the Early Republic support that conclusion. The Supreme Court of Pennsylvania, one of the states exempting 18-to-20-year-olds from muster in times of peace, underscored the notion that those individuals were still considered part of the militia. In an 1813 opinion, the Supreme Court of Pennsylvania observed that: "[i]n every section of the union, military duty is required from eighteen to forty-five. Every where [*sic*] then the law disregards minority upon the question of military service." *Commonwealth v. Barker*, 5 Binn. 423, 425-26 (Pa. 1813). The Supreme Court of Massachusetts was even more explicit. It declared: "[w]e think that under our militia laws for all purposes connected with the performance of military service, the age of maturity is eighteen." *In re Dewey*, 11 Pick. 265, 271-72 (Mass. 1831).[38] This opinion was echoed elsewhere. Justice Baldwin, sitting on the Supreme Court of Appeals of Virginia, noted in 1847:

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37. Gov. Exhibit C (*citing to* "An Act to regulate the Militia," § 2 *in* 42 *Acts of a General Nature Passed by the Forty Second General Assembly of the State of Ohio* 53, 53 (Samuel Medary, 1844)).

38. *But see Commonwealth v. Cushing*, 11 Mass. 67, 71 (1814) (*requiring* parental or guardian consent for individuals under 21 to enlist in Army).

> We know, as a matter of fact, that at the age of eighteen, a man is capable intellectually and physically of bearing arms; and that it is the military age recognized by the whole legislation of Congress, and of the State of *Virginia*, and of all the States of the Union, perhaps without exception.

Blakeney, 3 Gratt. at 418 (opinion of Baldwin, J.). In his opinion, Justice Baldwin explicitly rejected the argument that the common law infancy age of 21 should control the age of military majority. *Id.* at 409.[39] These judicial opinions, combined with the legislation of every state, show a broad (though perhaps not universal) consensus that 18 was the age of majority for membership in the militia, membership which required its members to supply their own arms.

The rest of the Government's evidence is even further removed from the Founding. When later evidence "contradicts earlier evidence," it "cannot provide much insight into the meaning of the Second Amendment." *N.Y. State Rifle & Pistol Assoc. v. Bruen*, 142 S.Ct. 2111, 2154, 213 L. Ed. 2d 387 (2022). Because the Founding-era sources establish that 18 was the age of militia service, the Court cannot accord significant credit to this later evidence.

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39. Though Justice Baldwin's view prevailed, it was not universally shared. In the same case, his colleague Justice Allen wrote that the general rule of contracts, which deemed 21 the age of majority, should apply in the military context. *Blakeney*, 3 Gratt. at 429 (opinion of Allen, J.).

From the historical evidence before the Court, it appears that the Founders understood that militia service began at the age of 18. At that age, men were considered to have reached the age of majority for military service and society not only allowed but required them to begin to keep and bear firearms. Historic legislative records support that conclusion.

2. Historical Restrictions on the Ability of 18-to-20-year-olds to Purchase Firearms

We now turn to the core question, whether our Nation's history and tradition contains "analogous" restrictions on the ability of 18-to-20-year-olds to purchase firearms. The Government once again comes up short. *N.Y. State Rifle & Pistol Assoc. v. Bruen*, 142 S.Ct. 2111, 2133, 213 L. Ed. 2d 387 (2022).

The Government has not presented any evidence of age-based restrictions on the purchase or sale of firearms from the colonial era, Founding, or Early Republic. *See* Exhibit B (ECF No. 30-2); Gov. Replace Br. at 17-18 ("there were no laws during [the] period [from 1776 to 1789] explicitly prohibiting the sale of firearms or handguns to individuals under the age of 21"). Nor has the Government offered evidence of such regulation between then and 1791 or in relevant proximity thereafter. For that reason alone, it has failed to meet the burden imposed on it by *Bruen*.

The earliest such laws to which the Government points were passed in 1856 by Alabama and Tennessee. Exhibit B at 1, 17; Gov. Replacement Br. at 18. Alabama's

law provided for a fine for "any one who shall sell or give or lend, to any male minor, . . . [an] air guns or pistol."[40] "An Act to Amend the Criminal Law," § 1 (1856) *in Acts of the Fifth Biennial Session of the General Assembly of Alabama*, No. 26, 17, 17 (Bates & Lucas, 1856). A violation of Tennessee's prohibition against the sale, gift, or loan of a "pistol, bowie-knife, dirk or Arkansas tooth-pick, or hunter's knife" to a minor came with a fine and the threat of prison time. "An Act to amend the Criminal Laws of this State," § 2 *in Acts of the State of Tennessee Passed at the First Session of the Thirty-First General Assembly*, ch. 81, 92, 92 (G.C. Torbett & Co. 1856). The Tennessee law did, however, provide a carve out for guns provided to a minor for hunting. *Id.*

The Court has identified one additional age-based restriction on the sale of firearms before the Civil War.[41]

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40. It is unclear why this law only applies to "male" minors and the how it defines minors. The Court was unable to identify any case law interpretating the meaning of minor within the statute. *See Coleman v. State*, 32 Ala. 581, 582 (1858) (*referring* to the individual the defendant loaned a handgun to as a "minor" but not supplying an age). Perhaps to clarify confusion or simply to change the law, by 1867, the Alabama legislature had revised the law to only apply to "any boy under eighteen years of age." A.J. Walker. *Revised Code of Alabama*, part four, title 1, ch. 10, § 3751, p. 712 (1867).

41. The only other related law comes from Louisville, Kentucky. In 1853, the city prohibited the sale of gunpowder-but apparently not firearms-to minors under fifteen. Oliver H. Strattan, *City Clerk A Collection of the State and Municipal Laws, in Force, and Applicable to the City of Louisville, Ky. Prepared*

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In 1859, Kentucky passed a law prohibiting anyone other than a parent or guardian from selling, gifting, or loaning "any pistol . . . slung-shot, colt, cane gun, or other deadly weapon, which is carried concealed" to a minor.[42]

None of these antebellum laws provide a definition of "minor" and it is unclear to whom exactly they applied. However, it seems most probable that they applied to all individuals under the age of 21, because, at this time, the common law age of majority remained 21. *NRA of Am. v. BATFE*, 700 F.3d 185, 201 (5th Cir. 2012) ("it was not until the 1970s that States enacted legislation to lower the age of majority to 18"); *see also NRA v. Bondi*, 61 F.4th 1317, 1325-26 (11th Cir. 2023).

When determining original intent, the Eleventh Circuit, in *Bondi*, proposed evaluating an additional source-type: public universities' regulations. In its canvas of that source, the Eleventh Circuit noted that the University of Georgia (1810), the University of Virginia (1824), and the University of North Carolina (1838) all prohibited students from possessing firearms on campus (or on Grounds in the case of the University of Virginia) in the first half of the nineteenth century. *Bondi*, 61 F.4th at 1327. But, universities' regulations limiting the

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and Digested, under an Order from the General Council of Said City 175, Image 176 (1857) *in* Duke Center for Firearms Law, https://firearmslaw.duke.edu/repository/search-the-repository.

42. "An Act to Amend An Act Entitled 'An Act to Reduce to One the Several Acts in Relation to the Town of Harrodsburg,'" § 23 in 1859 Ky. Acts 245, 245.

ability of students to carry firearms on campus are not "analogous" to the wholesale prohibition on 18-to-20-year-olds from purchasing firearms manifest in the statutes and regulations here at issue.

More importantly, the Supreme Court "has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker v. Des Moines*, 393 U.S. 503, 507, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969). Though outside the scope of the question presented in the motions presently before the Court, the carrying of firearms on university campuses could well be considered an "action that intrudes upon the work of the schools or the rights of other students," *id.* at 508, and thus the prohibition of such conduct might be permissible under the Second Amendment. And, taken as a whole, these regulations support the assumption that, *outside* of the public university setting, college-aged students could, and did, regularly possess firearms.[43]

Thus, by the eve of the Civil War, only three states had passed any form of restrictions on the ability of minors to purchase firearms and each of these was passed 65 years or more after the ratification of the Second

43. In 1800, Yale College prohibited students from possessing guns and gun powder. This regulation provides even less support as Yale is a private, rather than public, institution. *See Worth*, 2023 U.S. Dist. LEXIS 56638, [WL] at *12 (*citing to The Laws of Yale-College, in New-Haven, in Connecticut, Enacted by the President and Fellows, the Sixth Day of October, A.D. 1795*, at 26 (1800)).

Amendment. *See also Bondi*, 61 F.4th at 1325-27. This legislation therefore tells us nothing about the Founders' understanding of the Second Amendment. *Bruen*, 142 S.Ct. at 2147 n.22 (*determining* a law passed 69 years after the ratification of the Second Amendment is of "insubstantial" value in "discerning the original meaning of the Second Amendment"). The other laws cited by the Government all date from Reconstruction and beyond Gov. Replacement Br. at 18-22. And, thus, they are not helpful in determining the situation at and around the Founding. *Bruen*, 142 S.Ct. at 2154 n.28 (*declining* to consider late-19th or 20th century evidence because it "does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence").[44]

Finally, the lack of analogous evidence of Founding-era regulations demonstrates that the statutes and regulations at issue are inconsistent with the Second Amendment. Since time immemorial, teenagers have been, well, teenagers.[45] The "general societal problem"

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44. The Eleventh Circuit determined that a similar Florida-state law prohibiting 18-to-20-year-olds from purchasing guns did comport with our Nation's history and tradition. *Bondi*, 61 F.4th at 1325. But it did so by evaluating Reconstruction-era historical analogues. *Id.* The Eleventh Circuit reasoned that this was proper because the Second Amendment only applies to the states through the Fourteenth Amendment. *Id.* at 1322-23. Therefore, so it says, it looks to Reconstruction, not the Founding, to understand original intent. Whether that is a sound rationale will be tested on appeal. However, this case is readily distinguishable because this case concerns a federal, rather than state, law, and thus this Court's review is governed by Founding-era sources.

45. Amius Brady and Gifford present compelling scientific evidence that teenagers biologically are more impulsive than

of teenage impetuousness and rashness far proceeded the Founding. *Bruen*, 142 S.Ct. at 2131. Yet, that fact notwithstanding, the Government has not demonstrated that the Founders dealt with this problem in a "distinctly similar" way to the statutes and regulations at issue. *Id.* The lack of analogous regulations permits a finding that the Founders considered age-based regulations on the purchase of firearms to circumscribe the right to keep and bear arms confirmed by the Second Amendment.

3. Conclusion

Under the analytical framework established in *Bruen*, the Government simply has not met its burden to support the finding that restrictions on the purchasing of firearms by 18-to-20-year-olds is part of our Nation's history and tradition. Founding-era militia laws provide circumstantial evidence that 18-to-20-year-olds could purchase, own, and use arms. These militia laws and the cases interpreting them further support the finding that 18 was the age of majority for acquiring and possessing firearms in the Founding period. There is no direct evidence of age-based firearms restrictions. The Government, the party which bears the burden, fails to point to any Founding-era laws to support the challenged law and implementing regulations. The only laws it can point to date from more than a half-century *after* ratification. And, that does not discharge the burden that *Bruen* imposes.

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adults because their prefrontal cortexes are still developing. This supports the notion that teenage impulsivity long pre-dates modern society. Brady & Gifford Amicus Br. at 6.

C) Prohibiting 18-to-20-year-olds from Purchasing Guns is not a Presumptively Lawful Restriction

In *Heller*, the Supreme Court stated that its holding did not "cast doubt on longstanding prohibitions" including "laws imposing conditions and qualifications on the commercial sale of arms." *District of Columbia v. Heller*, 554 U.S. 570, 626-27, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008). The Government claims that this exception applies to the regulations in question which, in its words, are "a narrow, commercial restriction on the sale of handguns by FFLs to individuals under the age of 21." Gov. Replacement Br. at 9. Assuming that the restriction is narrow, it is not properly classified as a condition or qualification on the commercial sale of arms. That is because, in effect, the laws operate to limit the right of the purchaser in the exercise of rights conferred by the Second Amendment, not the conditions or qualifications of the seller to enter the marketplace.

As the Plaintiffs suggest, the continued vitality of the *Heller* exceptions is not clear. The Supreme Court re-affirmed *Heller's* list of exceptions in *McDonald v. Chicago*. 561 U.S. 742, 786, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010). However, it did not repeat this list in *Bruen*. But, throughout *Bruen*, the Supreme Court routinely cites *McDonald* and *Heller* without questioning the validity of the list of *Heller* exceptions, so the Court assumes that these exceptions still apply. *See e.g., N.Y. State Rifle & Pistol Assoc. v. Bruen*, 142 S.Ct. 2111, 2129, 213 L. Ed. 2d 387 (2022). Other courts have reached the same conclusion and continue to apply these exceptions.[46] But, assuming

46. *United States v. Rahimi*, 61 F.4th 443, 452 (5th Cir. 2023); *United States v. Price*, 635 F.Supp.3d 455, No. 2:22-cr-97, 2022

that these exceptions survive *Bruen*, they do not save the statutes and regulations at issue in this case.

When considering whether a regulation "impos[es] conditions and qualifications on the commercial sale of arms," courts have separated regulations that impose limitations on consumers from those that impose limits on sellers. For example, the Ninth Circuit cited this *Heller* exception when it determined that firearms retailers did not have a freestanding right to sell firearms. *Teixeira v. Cnty of Alameda*, 873 F.3d 670, 682 (9th Cir. 2017). In its reasoning, the Ninth Circuit pointed out that "restrictions on a commercial actor's ability to enter the firearms market may . . . have little or no impact on the ability of individuals to exercise their Second Amendment right to keep and bear arms." *Id.* at 687. On the inverse, regulations on consumers would impact individuals' Second Amendment rights. The Fourth Circuit similarly determined that a prohibition on unlicensed firearms dealing falls within the commercial sale exception. *United States v. Hosford*, 843 F.3d 161, 166 (4th Cir. 2016). In making this determination, the Fourth Circuit stressed that that the challenged regulation "affects only those who regularly sell firearms" and is only a requirement on "those who engage in the commercial sale of firearms." *Id.* Like the Ninth Circuit, the Fourth Circuit upheld the regulation because it affected *sellers*, not *purchasers*.

U.S. Dist. LEXIS 186571, 2022 WL 6968457, at *7 (S.D. W.Va. Oct. 12, 2022); *United States v. Nutter*, 624 F.Supp.3d 636, No. 2:21-CR-00142, 2022 U.S. Dist. LEXIS 155038, 2022 WL 3718518, at *4 (S.D. W. Va. Aug. 29, 2022); *Reese v. BATFE*, __ F.Supp.3d __, No. 6:20-CV-01438, 2022 U.S. Dist. LEXIS 230140, 2022 WL 17859138, at *6 (W.D. La. Dec. 21, 2022).

Those constitutionally acceptable regulations contrast with regulations affecting the purchasing or acquisition of firearms that courts have found unconstitutional. After considering a Chicago regulation that banned "virtually all sales and transfers of firearms inside the City's limits," the Northern District of Illinois held it unconstitutional. *Ill. Ass'n. of Firearms Retailers v. Chicago*, 961 F.Supp.2d 928, 930 (N.D. Ill. 2014). In so doing, the court determined that the regulation did not fall under the *Heller* exception because it had the effect of "outright banning legal buyers and legal dealers from engaging in lawful acquisitions and lawful sales of firearms." *Id.* Likewise, the Southern District of West Virginia invalidated a federal law requiring serial numbers on firearms. In so doing, the court concluded that the regulation was "far more than [a] mere commercial regulation. it is a blatant prohibition on possession." *Price*, 2022 U.S. Dist. LEXIS 186571, 022 WL 6968457 at *3. By prohibiting the ability of individuals to *acquire* or *possess* arms, those regulations crossed the bounds of a presumptively constitutional commercial regulation to an impermissible infringement on the Second Amendment.

Differentiating restrictions on buyers from restrictions on sellers is consistent with the broader understanding of the Second Amendment. As explained, the Second Amendment protects the rights of individuals. Because of this, the Second Amendment includes the corollary right to purchase firearms but not the corollary right to sell firearms. The regulations are a blanket prohibition, rather than a mere condition or qualification, on who can purchase arms and cannot be considered commercial limitations on the sale of firearms. The *Heller* exceptions do not apply.

D) Conclusion

Because the statutes and regulations in question are not consistent with our Nation's history and tradition, they, therefore, cannot stand.

IV. Equal Protection

Plaintiffs also challenge these regulations on equal protection grounds. As these motions are decided on Second Amendment grounds, there is no reason to conduct an equal protection analysis.

CONCLUSION

For the foregoing reasons, the DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT (ECF No. 21) will be denied and the PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT (ECF No. 28) will be granted.

/s/ REP
Robert E. Payne
Senior United States District Judge

Richmond, Virginia
Date: May 10, 2023

Appendix D

APPENDIX A

Both parties, many courts, and legal scholars generally accept as fact that 21 was the age of majority at the time of the Founding, simply citing William Blackstone's *Commentaries. See* William Blackstone, 1 *Commentaries on the Laws of England*, ch. 16, at 441 ("The legal power of a father (for a mother, as such, is entitled to no power, but only to reverence and respect) the power of a father, I say, over the persons of his children ceases at the age of twenty one: for they are then enfranchised by arriving at years of dis[c]eretion, or that point which the law has established (as some must nec[e]ssarily be established) when the empire of the father, or other guardian, gives place to the empire of reason"). But, it is not entirely clear that 21 was the age at which one attained membership in the Founding-era political community or at least in terms military service.

The use of the age of 21 to mark the divide between childhood and adulthood arose in the Middle Ages. During the chivalrous period, young men of noble birth could not become knights until they reached the age of 21, thus marking their transition from childhood to adulthood. T.E. James, "The Age of Majority," 4 Am. J. Legal Hist. 22, 26 (1960). However, throughout the medieval period, men who were tenants in socage (agricultural tenure), reached the age of majority at a considerably younger age: fourteen or fifteen. *Id.* at 30. It was not until the reign of King Charles II in the second half of the seventeenth-century that English fathers could appoint guardians for their children, regardless of social status or gender, until they

attained the age of 21. *Id.* at 31. As various Founding-era commentators, including Blackstone, observed, the age of majority is set by positive, rather than divine or natural, law. *See* Blackstone, 1 *Commentaries*, ch. 17, at 452. As a result, the legislature was empowered to determine and change the age of majority. *In re Dewey*, 28 Mass. 265, 11 Pick. 265, 268 (Mass. 1831).

Though they do say that an individual is an "infant" until the age of 21 under the common law of England, the *Commentaries* themselves underscore the difficulty of determining the definitive age of "adulthood" at the time of the Founding and reflect an eventual accumulation of the legal rights and responsibilities that we today associate with adulthood. Blackstone, 1 *Commentaries*, ch. 17, at 451-52; *see also Worth v. Harrington*, __ F.Supp.3d __, No. 21-cv-1348, 2023 U.S. Dist. LEXIS 56638, 2023 WL 2745673, at *8 (D. Minn. March 31, 2023) ("Although the full age of majority was often 21, 'that only mattered for specific activities'; for others, such as taking an oath (12), selling land (21), receiving capital punishment (14), serving as an executor or executrix (17), being married (for a woman 12), choosing a guardian (for a woman 14), the age of majority varied widely") (*citing to Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco, and Explosives*, 5 F.4th 407, 435 (4th Cir. 2021), *vacated as moot*, 14 F.4th 322, 328 (4th Cir. 2021)).

The *Commentaries* are not alone in reflecting the varied stages of majority and infancy. For example, Sir Edward Coke remarked that there was legal uncertainty over guardianship for orphaned infants over the age of

14. Francis Hargaves & Charles Butler, 2 *The First Part of the Institutes of the Laws of England, Notes on Lord Coke's First Institute, Or Commentary Upon Littleton*, Ch. 5 § 123, note 70 (1794). This fluidity with determining the age of majority in different contexts continued. In 1831, the Supreme Court of Massachusetts observed that "[t]he age of maturity or full age is . . . different in different countries; and it is different for different purposes in the same country." *In re Dewey*, 11 Pick. at 268.

Furthermore, Blackstone writes that the common law established different ages for certain steps in adulthood based on gender. Blackstone, 1 *Commentaries*, ch. 17, at 451-52. Differentiating based on sex did not end at the Founding. It was not until 1975 that the Supreme Court struck down a Utah provision that established 18 as the age of majority of women and 21 for men. *Stanton v. Stanton*, 421 U.S. 7, 95 S. Ct. 1373, 43 L. Ed. 2d 688 (1975).

Some scholars have also made the argument that "the people" and "the militia" were synonymous terms in the Founding. Therefore, any member of the militia was a member of "the people." Since 18-to-20-year-old (able-bodied white men) were members of the militia, they would fall under the Founders' definition of "the people." *See* Sanford Levinson, "The Embarrassing Second Amendment," 99 Yale L.J. 637, 646-47 (1989) ("There is strong evidence that 'militia' refers to all of the people, or at least all of those treated as full citizens of the community"). This view is also supported by various Loyalty Oath laws passed shortly after the Declaration of Independence. Those laws required men under the

age of 21 to swear allegiance to the new nation in order to exercise certain rights including, in some cases, the right to bear arms. Robert H. Churchill, "Gun Regulation, the Police Power, and the Right to Keep Arms in Early America," 25 Law & Hist. Rev. 139, 159 (2007).[47]

Finally, there is also an interesting and robust scholarly debate on the importance of "virtue" and who was deemed "virtuous" in determining full membership in the political community at the time of the Founding.

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47. *See also* "An Act for the executing in the Colony of the Massachusetts Bay, in New England, one Resolve of the American Congress, dated March 14, 1776, recommending the disarming of such persons as are notoriously disaffected to the cause of America," (Mar. 14, 1776) in 1775-1776 Mass. Act ch. VII, 31-32, 35 (applying to men aged 16 and above); "An Act, obliging the male white inhabitants of this state to give assurances of allegiance to the same, and for other purposes therein mentioned" §§ 1, 2, 4 (1777) in 9 *The Statues at Large of Pennsylvania From 1682 to 1801*, ch. DCCLVI, 110, 111 (Wm. Stanley Ray, 1903) (applying to men aged 18 and above); "An act to oblige the free male inhabitants of this state above a certain age to give assurance of Allegiance to the same, and for other purposes" (1777), in 9 *The Statutes at Large Being a Collection of all the Laws of Virginia*, ch. 3, 281, 281-82 (William Hening, 1821) (applying to men 16 and above); "An Act for the Better Security of the Government," (1777) in 23 *A Digest of the Laws of Maryland*, 187 (Thomas Herty, 1799) (applying to men aged 18 and above); "An Act to amend an Act for declaring what Crimes and Practices against the State shall be Treason, and what shall be Misprison of Treason, and providing Punishments adequate to Crimes of both Classes, and for preventing the Dangers which may arise from Persons disaffected to the State" § VIII (1777) in 24 *Acts of the North Carolina General Assembly*, ch. VI, 84, 88-89 (applying to men aged 16 and above).

NRA of Am. v. BATFE, 700 F.3d 185, 201 (5th Cir. 2012). But, the importance of virtue at the time of the Founding belies any simple answer and is far better left to historians than lawyers.

Of course, all of this assumes that the Founding generation had a uniform view of "the people." Just as we today have robust and spirited debates, so too did the Founders. *See e.g. Op. of Judge Appleton*, 44 Me. 521, 575 (1857) (*determining* that the Supreme Court's opinion in *Dred Scott* was erroneous and that "the people of Maine, in the exercise of their sovereign power, have conferred citizenship upon those of African descent"). We cannot expect or act as if the Founding generation uniformly agreed on the meaning of "the people."

Having determined that a modern understanding of "the people" is appropriate for this case, the Court need not further investigate this point, but it does observe that there is uncertainty about the definition of "the people" at the time of the Founding.