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Young Guns: The Constitutionality of Raising the Minimum Purchase Age for Firearms to Twenty-One

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YOUNG GUNS: THE CONSITUTIONALITY OF RAISING THE MININIMIUM PURCHASE AGE FOR FIREARMS TO TWENTY-ONE

Abstract: In 2008, in *District of Columbia v. Heller*, the United States Supreme Court held that the Second Amendment protects the right of "law-abiding, responsible citizens" to keep and bear arms to defend their home. The Court's decision in *Heller*, however, left novel questions about the scope of the right unanswered, including at what age it vests. Federal law prohibits federally-licensed dealers from selling handguns to persons under twenty-one, but it permits persons over eighteen to possess and use handguns and acquire them through private sales. In 2018, in response to the mass shooting at Marjory Stoneman Douglas High School, Florida raised its minimum purchase age for all firearms to twenty-one. The National Rifle Association immediately challenged the law in federal court, claiming that it violated the Second Amendment rights of young adults aged eighteen to twenty. In 2021, in *National Rifle Ass'n v. Swearingen*, the U.S. District Court for the Northern District of Florida held that the law is consistent with the Second Amendment. This Note discusses how federal and state statutory regimes interact with the Court's Second Amendment jurisprudence to govern young adults' access to firearms. It examines arguments concerning the constitutionality of Florida's minimum purchase-age provision and contends that the measure is valid because it is analogous to the "presumptively lawful" restrictions identified in *Heller* and because it survives intermediate scrutiny.

INTRODUCTION

More than her words, it was Emma González's silence that captured the nation's attention on March 24, 2018.[1] Just one month after a nineteen-year-old gunman killed fourteen of her classmates, the senior at Marjory Stoneman Douglas High School addressed thousands of protestors who descended on Washington, D.C. to demand that Congress enact new gun-safety measures.[2]

[1] *See* Louis Lucero II, *What Emma González Said Without Words at the March for Our Lives Rally*, N.Y. TIMES (Mar. 24, 2018), https://www.nytimes.com/2018/03/24/us/emma-gonzalez-march-for-our-lives.html [https://perma.cc/4N4Z-KUFN] (providing an overview of González's remarks at the March for Our Lives Rally in Washington, D.C.).

[2] Audra D.S. Burch & Patricia Mazzei, *Death Toll Is at 17 and Could Rise in Florida School Shooting*, N.Y. TIMES (Feb. 14, 2018), https://www.nytimes.com/2018/02/14/us/parkland-school-shooting.html [https://perma.cc/UEX7-BJK6]; Lucero, *supra* note 1; Laurel Wamsley & Richard Gonzales, *17 People Dead in the Parkland Shooting. Here Are Their Names*, NPR (Feb. 15, 2018), https://www.npr.org/sections/thetwo-way/2018/02/15/586095587/17-people-died-in-the-parkland-shooting-here-are-their-names [https://perma.cc/YV3Q-WSEB]. On February 14, 2018, Nikolas Cruz used a semiautomatic rifle to attack his former high school in Parkland, Florida. Burch & Mazzei, *supra*. He reportedly began shooting outside and then entered a classroom building, where he continued firing. *Id.*

González read the name of each victim and then stood quiet for more than four minutes.[3] She ended her silence by declaring, "Since the time that I came out here, it has been six minutes and 20 seconds. The shooter has ceased shooting . . . . Fight for your lives, before it's someone else's job."[4]

In 2018, in the aftermath of the Parkland shooting, Congress adopted narrow measures aimed at reducing gun violence, including the Fix NICS (National Instant Criminal Background System) Act to bolster the federal background-check system.[5] State leaders, however, were much more active; state legislatures enacted at least fifty new gun restrictions in 2018.[6] Notably, Florida, a traditionally pro-gun state, enacted legislation that raised the minimum purchase age for all firearms from eighteen to twenty-one.[7] Florida was not

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Cruz escaped the school's campus by blending in with students fleeing. *Id.* Police arrested him several miles from the school approximately an hour later. *Id.* In response to the shooting, Emma González, Cameron Kasky, and other surviving students launched the #NeverAgain campaign aimed at reducing gun violence. Charlotte Alter, *The School Shooting Generation Has Had Enough*, TIME (Mar. 22, 2018), https://time.com/longform/never-again-movement/ [https://perma.cc/6DU5-CXC2]. The students used their social media savvy to criticize the National Rifle Association (NRA), then-Florida-Governor Rick Scott, U.S. Senator Marco Rubio, and other opponents of reforming state and national gun laws. *Id.* On March 14, 2018, they organized the National School Walkout, in which almost one million students cut class to protest inaction on school shootings. *Id.* The group also planned the March for Our Lives Rally on March 24, 2018. *Id.*

[3] Lucero, *supra* note 1.

[4] *Id.*

[5] Russell Berman, *Congress's 'Baby Steps' on Guns*, THE ATLANTIC (Mar. 22, 2018), https://www.theatlantic.com/politics/archive/2018/03/congress-guns-fix-nics-baby-steps/556250/ [https://perma.cc/SD5N-U5M6] (discussing congressional action on the issue of gun safety, including passage of the Fix NICS (National Instant Criminal Background System) Act and measures to provide additional funding for school security grant programs). Congress enacted the Fix NICS Act shortly before the March for Our Lives demonstrators arrived in Washington, but the timing was the product of an impending government-funding deadline, not pressure from activists. *Id.* Congress included the Act in a $1.3 trillion omnibus spending bill, which also clarified that the Centers for Disease Control and Prevention may study the "causes of gun violence." *Id.* U.S. Senator John Cornyn, a Republican from Texas, and U.S. Senators Chris Murphy and Richard Blumenthal, Democrats from Connecticut, designed the Fix NICS Act to ensure that federal agencies and the military input certain conviction records into the federal background check database. Ella Nilsen, *Here's What Congress Might Actually Do on Gun Control*, VOX, https://www.vox.com/policy-and-politics/2018/2/20/17027738/gun-control-bills-congress-parkland-florida-marjory-stoneman-douglas-shooting [https://perma.cc/VRJ7-MX87] (Feb. 21, 2018). They drafted the bill in response to a shooting at a church in Sutherland Springs, Texas that left twenty-six people dead. *Id.* The gunman had a previous domestic violence conviction that should have barred him from purchasing or possessing a firearm, but the U.S. Air Force never uploaded the record into the criminal background check system. *Id.*

[6] Matt Vasilogambros, *After Parkland, States Pass 50 New Gun-Control Laws*, STATELINE (Aug. 2, 2018), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/08/02/after-parkland-states-pass-50-new-gun-control-laws [https://perma.cc/AD5N-EHRT] (discussing gun laws that state legislatures passed following the shooting in Parkland, Florida). Vermont, for example, enacted a prohibition on firearms in schools and high-capacity magazines, among other measures. *Id.* Five states—Florida, Louisiana, New Jersey, Oregon, and Tennessee—joined Vermont in expanding background checks. *Id.*

[7] Patricia Mazzei, *Florida Governor Signs Gun Limits into Law, Breaking with the N.R.A.*, N.Y. TIMES (Mar. 9, 2018), https://www.nytimes.com/2018/03/09/us/florida-governor-gun-limits.html

alone; California followed its lead, raising its minimum purchase age for long guns from eighteen to twenty-one.[8] Proponents of minimum-purchase-age laws claim that they are a commonsense response to the fact that people under twenty-five are inordinately responsible for gun homicides.[9]

The National Rifle Association (NRA) immediately criticized the Florida law.[10] Some gun-rights proponents argue that restricting eighteen-year-olds' access to handguns may be permissible but bans or near bans on all firearms are patently unconstitutional.[11] Indeed, even some supporters of greater firearm regulation question whether such purchase-age restrictions can pass constitutional muster.[12] Sure enough, in 2018, the NRA challenged the Florida law in

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[https://perma.cc/V3TV-2HQP]. Florida's previously lax approach to gun safety led some to refer to it as the "Gunshine State." *Id.* Florida's minimum-purchase-age requirement applies to both licensed and private sales, but it contains exceptions for law enforcement and corrections officers, as well as for members of the military. FLA. STAT. § 790.065(13) (2021).

[8] Doug Stanglin, *California Governor Signs Bill Raising Age Limit for Purchase of Long Guns from 18 to 21*, USA TODAY (Sept. 29, 2018), https://www.usatoday.com/story/news/2018/09/29/gun-laws-calif-governor-oks-bill-raising-age-buying-long-guns/1470447002/ [https://perma.cc/HV85-S77U]. California law already prohibited the sale of handguns to persons between ages eighteen and twenty. *Id.* The new law includes exceptions for law enforcement, military personnel, and persons with hunting licenses. *Id.*; *see* CAL. PENAL CODE § 27510 (West 2022) (prohibiting licensed dealers from providing firearms to persons under twenty-one and identifying certain exceptions). A long gun generally refers to any firearm, for example a rifle, that contains an extended barrel and that shooters place against their shoulder to fire. *Long Gun*, DICTIONARY.COM, https://www.dictionary.com/browse/long-gun [https://perma.cc/45NQ-C5PA].

[9] *See* Adam Winkler & Cara Natterson, *There's a Simple Way to Reduce Gun Violence: Raise the Gun Age*, WASH. POST (Jan. 6, 2016), https://www.washingtonpost.com/posteverything/wp/2016/01/06/there-a-simple-way-to-fight-mass-shootings-raise-the-gun-age/ [https://perma.cc/5GB9-TG28] (noting that persons under twenty-five are responsible for almost half of American gun homicides).

[10] *See* Mazzei, *supra* note 7 (explaining that the NRA described the new age restriction as a "blanket ban" that violated young adults' Second Amendment rights, and that the organization challenged the law in federal court just hours after it was enacted).

[11] *See, e.g.*, David B. Kopel & Joseph G.S. Greenlee, *The Second Amendment Rights of Young Adults*, 43 S. ILL. U. L.J. 495, 498 (2019) (suggesting that the government may limit eighteen- to twenty-year olds' access to firearms, but that it violates the Second Amendment to ban or effectively ban their ability to obtain them).

[12] *See* Michael C. Dorf, *Do 18 Year Olds Have a Constitutional Right to Guns?*, TAKE CARE BLOG (Feb. 27, 2018), https://takecareblog.com/blog/do-18-year-olds-have-a-constitutional-right-to-guns [https://perma.cc/9NW6-RFA3] (analyzing the constitutionality of a hypothetical minimum purchase age of twenty-one and concluding that it would likely fail under the standard of scrutiny that the U.S. Supreme Court established in its 1976 case, *Craig v. Boren*); *see also* Craig v. Boren, 429 U.S. 190, 197, 204 (1976) (holding that an Oklahoma law that distinguished based on gender to regulate alcohol sales was not "substantially related" to the state's "important governmental objectives" in preventing drunk driving). *But see* Kurtis Lee, *Q&A: The NRA Says Florida's Law Raising the Age Limit on Buying Guns Is Unconstitutional. But Is It?*, L.A. TIMES (Mar. 13, 2018), https://www.latimes.com/nation/la-na-florida-gun-law-20180312-htmlstory.html [https://perma.cc/83GE-JZTV] (noting that one well-known constitutional scholar described the NRA's challenge to Florida's minimum-age provision as primarily a public relations tactic and suggesting that federal courts will uphold the law). The law at issue in *Craig* prohibited males under twenty-one from purchasing "nonintoxicating" beer while permitting females over eighteen to do so. 429 U.S. at 191–92. The Court invalidated the law and created so-called "intermediate scrutiny." *Id.* at 210; *see id.* at 218 (Rehnquist, J., dissent-

federal court.[13] It alleged that raising the minimum purchase age on all firearms to twenty-one violates the Second Amendment because it bars "law-abiding, responsible" adults between ages eighteen and twenty from purchasing a firearm for self-defense.[14] On June 24, 2021, in *National Rifle Ass'n v. Swearingen*, the U.S. District Court for the Northern District of Florida held that the state's minimum purchase age is constitutional.[15]

This Note contends that the Florida law warrants and withstands intermediate scrutiny because it is a public safety measure grounded in brain science and criminological data.[16] The U.S. Supreme Court's 2008 decision in *District of Columbia v. Heller*, interpreting the Second Amendment to guarantee "law-abiding, responsible citizens" the right to keep firearms in the home for self-defense, does not bar states from implementing commonsense, age-based regulations.[17]

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ing) (characterizing the majority's approach as applying "intermediate" scrutiny); *infra* note 91 and accompanying text (providing an explanation of intermediate scrutiny).

[13] Complaint for Declaratory and Injunctive Relief at 3, Nat'l Rifle Ass'n v. Swearingen, No. 4:18cv137 (N.D. Fla. Mar. 9, 2018).

[14] *See* District of Columbia v. Heller, 554 U.S. 570, 635 (2008) (holding that the Second Amendment protects the rights of "law-abiding, responsible citizens"); Complaint for Declaratory and Injunctive Relief, *supra* note 13, at 3 (arguing that the Florida minimum purchase age is unconstitutional under the Second Amendment and Fourteenth Amendment). This Note only addresses the plaintiff's Second Amendment challenge. The Firearms Policy Coalition (FPC) and others are leading a separate challenge to California's law raising its minimum purchase age on long guns to twenty-one. Jones v. Becerra, 498 F. Supp. 3d 1317, 1322 (S.D. Cal. 2020) (stating that the plaintiffs' claim that California's minimum purchase age for long guns infringes young adults' Second Amendment rights), *appeal docketed*, No. 20-56174 (9th Cir. Nov. 9, 2020). The district court denied the plaintiffs' motion for preliminary injunctive relief. *Id.* at 1332. It concluded that the plaintiffs failed to demonstrate that they were likely to succeed on the merits because age-based gun regulations are "longstanding, do not burden the Second Amendment, and are therefore presumptively Constitutional." *Id.* at 1327. The FPC routinely files legal challenges to laws that limit access to firearms. *See* Jim Grant, *Firearms Policy Coalition Sues City of Philadelphia Over Carry Laws*, AMMOLAND (Nov. 22, 2020), https://www.ammoland.com/2020/11/firearms-policy-coalition-sues-city-of-philadelphia-over-carry-laws [https://perma.cc/RDS9-DGL6] (noting that FPC lawsuits include challenges to Pennsylvania's, Maryland's, and New Jersey's public carry schemes).

[15] 545 F. Supp. 3d 1247, 1250 (N.D. Fla. 2021), *appeal docketed*, No. 21-12314 (11th Cir. July 8, 2021).

[16] *See* Defendants' Motion for Summary Judgment and Incorporated Memorandum of Law at 25–26, *Swearingen*, 545 F. Supp. 3d 1247 (No. 4:18cv137) [hereinafter Defendants' Motion for Summary Judgment] (explaining that brain research demonstrates that eighteen- to twenty-year olds are more reckless than older adults because their brains are not fully developed, and providing data showing that the age group commits a disproportionate amount of violent crime); *see also* Mai v. United States, 952 F.3d 1106, 1109 (9th Cir. 2020), *cert denied*, 141 S. Ct. 2566 (2021) (holding that intermediate scrutiny applied to 18 U.S.C. § 922(g)(4), which prohibits persons with prior involuntary commitments from purchasing or possessing firearms); United States v. Williams, 616 F.3d 685, 691–92 (7th Cir. 2010) (concluding that intermediate scrutiny applied to 18 U.S.C. § 922(g)(1), which bars convicted felons from purchasing or possessing firearms).

[17] *See* U.S. CONST. amend. II (guaranteeing "the right of the people to keep and bear Arms"); *Heller*, 554 U.S. at 626–27 & n.26, 635 (describing certain restrictions, including those on gun sales,

Part I of this Note provides an overview of the legal framework that governs eighteen- to twenty-year olds' firearm rights, particularly the Supreme Court's seminal decision in *Heller*.[18] It also explores how federal courts have interpreted and applied *Heller* to evaluate subsequent Second Amendment challenges, including two circuit court decisions that upheld other age-based restrictions.[19] Part II explores the parties' legal arguments in *Swearingen* within the context of the prevailing two-step test for Second Amendment challenges and explains the district court's application of that test.[20] Part III avers that the court in *Swearingen* properly determined that the historical evidence concerning the firearm rights of young adults is ambiguous and largely unhelpful in discerning the scope of the right.[21] It further contends that the court reached the correct result, but it argues that federal courts should proceed to apply intermediate scrutiny if a law is "longstanding" under *Heller*.[22]

I. THE CONSTITUTIONAL AND STATUTORY SCHEME GOVERNING YOUNG ADULTS' ACCESS TO FIREARMS

Although federal law permits eighteen-year-olds to purchase long guns, some states have enacted more restrictive age requirements.[23] Accordingly, young adults' ability to purchase and possess firearms is largely a function of state law.[24] The courts have the responsibility to determine whether a challenged restriction is constitutionally permissible.[25]

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as "presumptively lawful," and emphasizing that the Amendment protects "law-abiding, responsible citizens").

[18] *See infra* notes 23–124 and accompanying text.

[19] *See infra* notes 23–124 and accompanying text.

[20] *See infra* notes 125–251 and accompanying text.

[21] *See infra* notes 252–311 and accompanying text.

[22] *See infra* notes 252–311 and accompanying text.

[23] *See* McDonald v. City of Chicago, 561 U.S. 742, 750 (2010) (providing for Second Amendment protections vis-à-vis the states); Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives (*BATFE*), 700 F.3d 185, 189–90 (5th Cir. 2012) (summarizing how federal statutes regulate eighteen- to twenty-year olds' access to firearms); *Who Can Have a Gun: Minimum Age to Purchase and Possess*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, https://giffords.org/lawcenter/gun-laws/policy-areas/who-can-have-a-gun/minimum-age [https://perma.cc/B5ST-7ND4] [hereinafter *Who Can Have a Gun*] (explaining that many states have gun restrictions that go further than federal law).

[24] *See Who Can Have a Gun*, *supra* note 23 (providing an overview of federal and state age-based firearm laws). This Note uses the term "young adults" to refer to persons between ages eighteen and twenty. For example, Maryland prohibits nineteen-year-olds from possessing assault rifles but nearby Virginia does not. *See* MD. CODE ANN., PUB. SAFETY § 5-133(d) (LexisNexis 2021) (prohibiting all persons, with certain limited exceptions, from possessing an assault weapon); VA. CODE ANN. § 18.2-308.7 (2022) (barring persons *under eighteen* from possessing an assault weapon). Rather than define "assault weapon" generally, Maryland law classifies certain semiautomatic firearms, such as the AK-47, and its imitations as assault weapons. MD. CODE ANN., PUB. SAFETY §§ 4-301(d), 5-101(r)(2). Virginia classifies a semiautomatic firearm that contains a folding stock or a magazine capable of

Section A of this Part discusses how federal and state statutory regimes restrict eighteen- to twenty-year olds' ability to purchase and possess certain kinds of firearms and ammunition.[26] Section B summarizes the U.S. Supreme Court's approach to the Second Amendment during the nineteenth and twentieth centuries.[27] Section C introduces the Court's contemporary Second Amendment jurisprudence, in which it aimed to clarify the scope of the right and applied it against the states.[28] Section D discusses how courts have interpreted and applied the Supreme Court's 2008 seminal decision in *District of Columbia v. Heller* and examines two federal appellate court decisions that upheld other, more limited firearm restrictions on eighteen- to twenty-year-olds.[29] Section E discusses the background and procedural history of the NRA's constitutional challenge to Florida's minimum purchase-age law.[30]

A. Federal and State Age-Based Firearm Requirements

1. Federal Law Overview

In 1968, Congress enacted the Omnibus Crime Control and Safe Streets Act, that, among other restrictions, made it unlawful to import, manufacture, or deal firearms without a license.[31] One provision of the Act, codified at 18 U.S.C. § 922(b)(1), prohibits federal firearm licensees from selling any firearm or ammunition to persons under eighteen.[32] The provision also bars federally-

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holding "more than 20 rounds of ammunition," or that is compatible with a silencer, as an assault weapon. VA. CODE ANN. § 18.2-308.7.

[25] *See, e.g.*, Nat'l Rifle Ass'n v. McCraw, 719 F.3d 338, 343 (5th Cir. 2013) (explaining that courts review the constitutionality of state firearm restrictions *de novo*).

[26] *See infra* notes 31–46 and accompanying text.

[27] *See infra* notes 47–56 and accompanying text.

[28] *See infra* notes 57–76 and accompanying text.

[29] *See infra* notes 77–118 and accompanying text.

[30] *See infra* notes 119–124 and accompanying text.

[31] Pub. L. No. 90-351, 82 Stat. 197 (1968) (codified as amended in scattered sections of 18 & 34 U.S.C.); *see* Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives (*BATFE*), 700 F.3d 185, 189 (5th Cir. 2012) (discussing the legislative history of the federal scheme that prohibits licensed firearm dealers from selling handguns to young adults). Persons must obtain a license from the Federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) to participate in the firearms industry as either a dealer, manufacturer, importer, or collector. *Types of Federal Firearms Licenses (FFLs)*, ATF, https://www.atf.gov/resource-center/types-federal-firearms-licenses-ffls [https://perma.cc/5XM4-FZKX]. Later in 1968, Congress passed the Gun Control Act to expand the Omnibus Crime Control and Safe Streets Act. Gun Control Act, Pub. L. No. 90-618, 82 Stat. 1213 (1968); Adam Winkler, *The Secret History of Guns*, THE ATLANTIC (Sept. 2011), https://www.theatlantic.com/magazine/archive/2011/09/the-secret-history-of-guns/308608/ [https://perma.cc/AV8U-BVPQ].

[32] 18 U.S.C. § 922(b)(1); *see BATFE*, 700 F.3d at 189–90 (explaining that 18 U.S.C. § 922(b)(1) works in concert with other federal provisions to limit persons between ages eighteen and twenty from accessing handguns). Persons under eighteen are generally referred to as "juveniles." *Juvenile*, BLACK'S LAW DICTIONARY (11th ed. 2019). This Note refers to persons between ages eighteen and twenty as "young adults."

licensed dealers from selling handguns and handgun ammunition to persons under twenty-one, but it authorizes the sale of shotguns and rifles and shotgun and rifle ammunition to persons over eighteen.[33] Section 922(c)(1) is a complimentary measure that prohibits a federal firearm licensee from selling a handgun to any person not physically present unless the customer submits a sworn statement certifying that they are at least twenty-one-years old.[34] Notably, these restrictions only govern federal firearm licensees; persons between the age of eighteen and twenty may, nonetheless, purchase a handgun in a private sale or receive a handgun from their parent or guardian.[35]

Approximately twenty-five years after passage of the 1968 Act, Congress enacted additional age qualifications as part of the Violent Crime Control and Law Enforcement Act of 1994.[36] Among other provisions, the 1994 Act prohibits persons under the age of eighteen from possessing a handgun and makes it unlawful to transfer a handgun to persons under eighteen.[37] The law, however, does permit adults to temporarily transfer a handgun and/or handgun ammunition to persons under eighteen for particular activities, such as "hunting," "ranching," and "target practice."[38] Federal law does not impose a minimum-age requirement to possess a long gun.[39]

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[33] 18 U.S.C. § 922(b)(1). Prior to the legislation's enactment, Congress conducted a robust investigation over several years into violent crime and the firearms market. *BATFE*, 700 F.3d at 198. It concluded that it was far too easy for young people to obtain handguns without parental consent, which it identified as a driver of violent crime throughout the country. *Id.* at 198–99. Congress chose to distinguish between rifles, that persons typically use for sport, and handguns, that lawbreakers use in most crimes involving firearms. Aaron Mak, *Why It's Legal for a Teen to Buy an Assault Rifle but Not a Handgun*, SLATE (Feb. 16, 2018), https://slate.com/news-and-politics/2018/02/a-brief-history-of-the-laws-that-make-it-easier-for-teens-to-buy-ar-15s-than-handguns.html [https://perma.cc/DD9B-DQAH]. In 1968, assault rifles were not in common use like they are today. *Id.* Congress later closed the gap and enacted an assault weapons ban in 1994, but it expired ten years later. *Id.*

[34] 18 U.S.C. § 922(c)(1).

[35] *Id.* § 922(b)(1), (c)(1); *see BATFE*, 700 F.3d at 189–90 (explaining that, under federal law, eighteen- to twenty-year olds may possess or use a handgun, accept one as a gift, or purchase one from an unlicensed dealer).

[36] Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of 12, 18 & 42 U.S.C.); *see BATFE*, 700 F.3d at 189 (summarizing the legislative history of federal laws that prohibit juveniles from acquiring handguns).

[37] 18 U.S.C. § 922(x)(1)–(2); *see BATFE*, 700 F.3d at 189 (explaining that the 1994 Act created additional firearm restrictions, including 18 U.S.C. § 922(x), that make it unlawful, with certain exceptions, for persons younger than eighteen to possess a handgun). In 2009, in *United States v. Rene E.*, the U.S. Court of Appeals for the First Circuit considered a Second Amendment challenge to 18 U.S.C. § 922(x). 583 F.3d 8, 12 (1st Cir. 2009). The court upheld the restriction, reasoning that it is consistent with the longstanding historical practice of restricting juveniles' access to firearms to promote public safety. *Id.* at 16.

[38] 18 U.S.C. § 922(x)(3)(A)(i); *see Who Can Have a Gun*, *supra* note 23 (summarizing federal age-based firearm requirements).

[39] *See Who Can Have a Gun*, *supra* note 23 (noting that federal law does not govern at what age a person can lawfully possess a long gun or long gun ammunition). Most states also do not impose a minimum age for possessing a long gun. *See id.* (indicating that twenty-seven states do not impose a minimum age for possessing long guns). That means that in much of the United States, it is lawful for

2. The Marjory Stoneman Douglas High School Public Safety Act

A number of states and the District of Columbia have enacted minimum age requirements that go further than federal law.[40] In addition to Florida, California, Hawaii, Illinois, Vermont, and Washington also prohibit persons younger than twenty-one from purchasing firearms.[41] Florida raised its minimum purchase age in March 2018, less than a month after a nineteen-year-old gunman killed fourteen students and three faculty members in Parkland, Florida with a legally purchased AR-15-style rifle.[42] The Marjory Stoneman Douglas High School Public Safety Act makes it a felony for a person under twenty-one

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a school-age child to own a firearm. Dylan Matthews, *The 6 Craziest State Gun Laws*, WASH. POST (Dec. 16, 2012), https://www.washingtonpost.com/news/wonk/wp/2012/12/16/the-6-craziest-state-gun-laws/ [https://perma.cc/JUD2-Y7SP] (observing that in states without a minimum age for firearm possession, a grade-school student can legally own a firearm).

[40] *See Who Can Have a Gun*, *supra* note 23 (listing state age-based firearm restrictions). In addition to state laws, some gun retailers, most notably Dick's Sporting Goods and Walmart, have instituted policies that prohibit their stores from selling firearms to persons under twenty-one. Julie Creswell & Michael Corkery, *Walmart and Dick's Raise Minimum Age for Gun Buyers to 21*, N.Y. TIMES (Feb. 18, 2018), https://www.nytimes.com/2018/02/28/business/walmart-and-dicks-major-gun-retailers-will-tighten-rules-on-guns-they-sell.html [https://perma.cc/EBF7-HXU5]. Dick's and Walmart both cited the shooting at Marjory Stoneman Douglas High School as the motivation for the policy. *Id.*

[41] *See Who Can Have a Gun*, *supra* note 23 (providing a table categorizing states' age-based firearm laws). In California, for example, it is unlawful for licensed dealers to sell firearms to persons under twenty-one. CAL. PENAL CODE § 27510(a) (West 2022); *see Minimum Age to Purchase & Possess in California*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, https://giffords.org/lawcenter/state-laws/minimum-age-to-purchase-possess-in-california [https://perma.cc/BCJ6-MXE9] (Sept. 27, 2021) (providing an overview of California's age-based firearm restrictions). In 2018, Vermont made it unlawful to sell a firearm to persons younger than twenty-one. VT. STAT. ANN. tit. 13, § 4020(a) (2021). The law includes limited exceptions, including for individuals who have completed a state-approved hunting safety class. *Id.* § 4020(b)(3). Some other states, like Hawaii, require a permit prior to obtaining a firearm. HAW. REV. STAT. § 134-2(a) (2021). The scheme authorizes county chiefs of police to issue firearm permits but prohibits them from issuing permits to persons under twenty-one, with certain limited exceptions. *Id.* § 134-2(d); *see Minimum Age to Purchase & Possess in Hawaii*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, https://giffords.org/lawcenter/state-laws/minimum-age-to-purchase-possess-in-hawaii [https://perma.cc/N4AX-Q3QG] (summarizing Hawaii's age-based firearm restrictions).

[42] Ch. 2018-3, § 21, 2018 Fla. Laws 6; Wamsley & Gonzales, *supra* note 2; *see* Mazzei, *supra* note 7 (noting that Florida Gov. Rick Scott signed the Act despite the NRA's opposition). The AR-15 is the most popular rifle in the United States. John Schuppe, *America's Rifle: Why So Many People Love the AR-15*, NBC NEWS, https://www.nbcnews.com/news/us-news/america-s-rifle-why-so-many-people-love-ar-15-n831171 [https://perma.cc/CNY2-88CW] (Feb. 15, 2018). It is the "civilian sibling" of the military's M16 automatic rifle, and it is especially lethal. *Id.* A Texas trauma surgeon told NBC News, "The higher muzzle-velocity projectiles, if they strike an organ, you're more likely to have severe injury and bleeding and dying than with lower muzzle-velocity munitions." *Id.* (quoting Dr. Donald Jenkins, trauma surgeon at the University of Texas Health Science Center at San Antonio). Gunmen have used the AR-15 or imitations of it in several high-profile mass shootings, leading some elected officials to consider banning it. *Id.*

to purchase a firearm, but it includes exceptions for law enforcement officers, correctional officers, and members of the military.[43]

Unlike the purchase-age requirements prescribed under federal law, the Act bars persons under twenty-one from purchasing handguns *and* long guns, and it applies to *all* firearm transactions, not just those that federal firearm licensees facilitate.[44] Legislators were particularly concerned about the ability of teenagers to legally purchase semiautomatic AR-15-style rifles—the kind of firearm used to attack Sandy Hook Elementary School, the Pulse Nightclub, and Marjory Stoneman Douglas High School.[45] The legislature, furthermore, decided to regulate private sales because, unlike licensed sales, the state's background check and three-day waiting period requirements do not apply to private sales.[46]

B. The Supreme Court's Early Second Amendment Jurisprudence

In the two hundred years that followed the adoption of the Second Amendment, neither the Supreme Court nor legal academics agonized much over its

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[43] FLA. STAT. § 790.065 (2021). Under the Act, a "law enforcement officer" is any person authorized to carry a gun and arrest persons on behalf of the state or its political subdivisions, and whose primary duty is to combat crime. *Id.* § 943.10(1). A "correctional officer" includes employees of the state and its political subdivisions, as well as the private contractors that the state hires, who oversee persons in prison. *Id.* § 943.10(2). The Act defines a servicemember as a member of the U.S. military, Florida National Guard, or the reserves. *Id.* § 250.01(19). Persons who violate the Act's minimum purchase-age provision face a maximum of five years in prison and a fine of up to $5,000. Nat'l Rifle Ass'n v. Swearingen, 545 F. Supp. 3d 1247, 1251 (N.D. Fla. 2020) (citing FLA. STAT. §§ 775.082–.083), *appeal docketed*, No. 21-12314 (11th Cir. July 8, 2021).

[44] FLA. STAT. § 790.065(13); *see* Brief of Amici Curiae Giffords Law Center to Prevent Gun Violence, Brady, Team Enough, Orange Ribbons for Gun Safety, and March for Our Lives Action Fund at 25–26, *Swearingen*, 545 F. Supp. 3d 1247 (No. 4:18cv137) [hereinafter Giffords Amici Brief] (explaining how the Florida law has greater reach than federal law).

[45] Giffords Amici Brief, *supra* note 44, at 26. In December 2012, a twenty-year-old man armed himself with an AR-15 and attacked Sandy Hook Elementary School in Newtown, Connecticut, slaying twenty-six people, most of whom were first graders. Rick Rojas & Kristen Hussey, *Newly Released Documents Detail Sandy Hook Shooter's Troubled State of Mind*, N.Y. TIMES (Dec. 10, 2018), https://www.nytimes.com/2018/12/10/nyregion/documents-sandy-hook-shooter.html [https://perma.cc/43MK-PBBP]. In June 2016, a gunman attacked the Pulse Nightclub in Orlando, Florida using a semiautomatic pistol and a Sig Sauer MCX semiautomatic rifle that accepts the same ammunition as AR-15-style rifles. Bart Jansen, *Weapons Gunman Used in Orlando Shooting Are High-Capacity, Common*, USA TODAY, https://www.usatoday.com/story/news/2016/06/14/guns-used-kill-49-orlando-high-capacity-common-weapons/85887260/ [https://perma.cc/HU33-ALTQ] (June 15, 2016). Unlike the gunmen responsible for the shootings at Sandy Hook and Marjory Stoneman Douglas who were both under twenty-one, the perpetrator of the Orlando shooting was twenty-nine-years old. Burch & Mazzei, *supra* note 2; Rojas & Hussey, *supra*; *Who Is Orlando Gunman Omar Mateen?*, CBS NEWS, https://www.cbsnews.com/news/orlando-nightclub-shooting-suspected-gunman-omar-mateen/ [https://perma.cc/ZYJ7-9L7W] (June 12, 2016).

[46] Giffords Amici Brief, *supra* note 44, at 27.

meaning.[47] The Court's nineteenth-century cases involving the Amendment considered only the narrow issue of whether it was applicable against the states.[48] In deciding those cases, the Court applied its then-operative doctrine that held that the Bill of Rights only restricted Congress, not state legislatures.[49]

The lone twentieth-century Supreme Court case to contemplate the reach of the Second Amendment is *United States v. Miller*, decided in 1939.[50] *Miller* focused on the kind of weaponry permissible under the Amendment, rather than who could invoke its protections.[51] The government indicted the defendants under the National Firearms Act of 1934 for possessing an unregistered sawed-off shotgun.[52] The defendants claimed that the indictment violated their Second Amendment right to bear arms, and the district court agreed, dismissing the indictment.[53] On direct appeal, the Supreme Court considered whether the weapon at issue was within the scope of the Second Amendment.[54] Justice James Clark McReynolds, writing for a unanimous Court, determined that the Second Amendment's aim is to ensure the "continuation" and "effectiveness" of the militia and reasoned that the Court should construe it accordingly.[55] The Court, therefore, concluded that the Second Amendment did not protect the possession and use of a sawed-off shotgun because its use is unrelated to militia service.[56]

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[47] Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 461, 496 (1995) (explaining that academics rarely discussed the Second Amendment until the 1990s and that the Supreme Court rarely addressed it). The Second Amendment protects "the right of the people to keep and bear Arms." U.S. CONST. amend. II.

[48] Reynolds, *supra* note 47, at 496; *see* Miller v. Texas, 153 U.S. 535, 538 (1894) (stating that the Second Amendment only restricts the national government); Presser v. Illinois, 116 U.S. 252, 265 (1886) (same); United States v. Cruikshank, 92 U.S. 542, 553 (1875) (same).

[49] *See* Reynolds, *supra* note 47, at 496 (explaining that the Court did not apply the Second Amendment against the states because, in *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), and *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), it concluded that the Fourteenth Amendment did not incorporate the Bill of Rights against the states).

[50] *See* 307 U.S. 174, 178 (1939) (holding that possessing a sawed-off shotgun is beyond the scope of the Second Amendment); Reynolds, *supra* note 47, at 499 (surveying Supreme Court cases involving the Second Amendment and concluding that only the 1939 case *United States v. Miller* considered the nature of the right).

[51] 307 U.S. at 178. The Court's decision in *Miller*, however, did discuss who was included in the militia. *Id.* at 179. It surveyed the laws of several states and observed that the militias of Massachusetts and New York included sixteen-year-old men, whereas Virginia enlisted men beginning at eighteen. *Id.* at 180–81.

[52] *Id.* at 175. Specifically, the government alleged that the defendants transported a double barrel sawed-off shotgun from Oklahoma to Arkansas. *Id.* For an account of the defendants' background story in *Miller*, see Brian L. Frye, *The Peculiar Story of* United States v. Miller, 3 N.Y.U. J.L. & LIBERTY 48, 53 (2008).

[53] *Miller*, 307 U.S. at 177.

[54] *Id.* at 178.

[55] *Id.*

[56] *Id.*

C. The Contemporary Interpretation of the Second Amendment: Heller *and* McDonald

Nearly seven decades after *Miller*, in 2008, the Supreme Court in *Heller* considered the constitutionality of one of the nation's strictest firearm regulations: the District of Columbia's handgun prohibition.[57] The plaintiff served as a security guard in Washington, D.C. and legally carried a handgun while working.[58] After the District denied his application to register a handgun that he sought to store in his home, he filed suit in the U.S. District Court for the District of Columbia.[59] The district court dismissed the suit, but the U.S. Court of Appeals for the District of Columbia reversed, holding that the Second Amendment guarantees an individual right to bear arms.[60] The Supreme Court granted the District's petition for certiorari.[61]

Before analyzing the laws at issue, the Supreme Court engaged in a robust textual and historical analysis to discern the meaning of the Second Amendment.[62] The Court—relying on the notion that the Court must interpret

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[57] District of Columbia v. Heller, 554 U.S. 570, 574, 629 (2008). In 2008, the Supreme Court considered *District of Columbia v. Heller*, involving a challenge to several measures that limited D.C. residents' access to handguns. *Id.* at 574–75. Washington, D.C. prohibited carrying an unregistered firearm, and at the same time barred handgun registration. *Id.* Another provision made it unlawful to carry an unlicensed handgun and authorized the chief of police to issue one-year licenses. *Id.* at 576. D.C. also established certain gun storage requirements. *Id.* It required firearms stored at a resident's home to be "unloaded and disassembled or bound by a trigger lock or similar device." *Id.* at 575–76; *see* D.C. CODE § 7-2507.02 (2008), *invalidated by Heller*, 554 U.S. 570.

[58] *Heller*, 554 U.S. at 575. Dick Heller, an Army veteran, moved to Washington, D.C.'s Capitol Hill neighborhood in 1976. Justin Wm. Moyer, *'The Culture's Changed': Gun Rights Supporters Mark 10 Years Since Landmark Ruling Toppled D.C. Gun Ban*, WASH. POST (June 26, 2018), https://www.washingtonpost.com/local/crime/the-cultures-changed-gun-rights-supporters-mark-10-years-since-landmark-ruling-toppled-dc-gun-ban/2018/06/26/02fdf738-7890-11e8-bda2-f99f3863e603_story.html [https://perma.cc/676Y-UESJ]. He reportedly wanted to keep a gun in his house for self-defense because he lived across the street from a public housing complex. *Id.*; Mark Obbie, *He Won the Supreme Court Case That Transformed Gun Rights. But Dick Heller Is a Hard Man to Please*, THE TRACE (Mar. 20, 2016), https://www.thetrace.org/2016/03/dick-heller-second-amendment-hero-abolish-gun-regulation/ [https://perma.cc/58NJ-XWSS]. Heller's lawyers worried that he was an unsympathetic plaintiff because of his extreme libertarian views. Obbie, *supra*. For example, he often compared D.C.'s government to communist Russia. *Id.* Heller continues to serve as a gun rights activist. Tom Jackman, *D.C.'s Ghost-Gun Law Faces Legal Challenge from Dick Heller, Successful Gun Rights Activist*, WASH. POST (Oct. 9, 2021), https://www.washingtonpost.com/dc-md-va/2021/10/09/dc-ghost-gun-law/ [https://perma.cc/L5UJ-6JFD]. In 2021, he filed a challenge to a D.C. law that bars so-called "Ghost Guns," homemade firearms that do not have a serial number. *Id.*

[59] *Heller*, 554 U.S. at 575–76.

[60] *Id.* at 576; Parker v. District of Columbia, 311 F. Supp. 2d 103, 105, 109 (D.D.C. 2004), *rev'd*, 478 F.3d 370 (D.C. Cir. 2007), *aff'd sub nom. Heller*, 552 U.S. 570. Relying on *Miller*, the district court concluded that the Second Amendment only protects keeping and using arms for militia purposes. *Parker*, 311 F. Supp. 2d at 105. Because the plaintiff was not a militia member, it dismissed the complaint. *Id.* at 109.

[61] *Heller*, 554 U.S. at 576.

[62] *See id.* at 579–600 (dividing the Amendment into its prefatory and operative clauses and interpreting the meaning of each before turning to a broad historical inquiry to confirm its textual analysis).

the Constitution from the perspective of a typical American at the time of the framing—reasoned that the phrase "the people," which appears throughout the document and specifically in the Second Amendment, denotes the entire "political community."[63] It differentiated the inclusive nature of "the people" with the membership of early American militias that limited membership to certain "able-bodied" men.[64] It accordingly presumed at the outset that the Second Amendment codifies an individual right that protects every American.[65]

The Court ultimately recognized the English arms-bearing right, emphasizing the importance of self-defense, as the guarantee that the Framers codified in the Second Amendment.[66] To corroborate its conclusion, the Court considered how judges and scholars viewed and interpreted the Amendment in the one hundred years following its adoption.[67] Relying on, among other sources, court decisions and the writings of prominent legal scholars, the Court concluded that the Amendment protects an individual right to possess firearms for self-defense and that central to that guarantee is "the right of law-abiding, responsible citizens" to possess them to defend their homes.[68] Notably, the Court determined that the militia rationale for codifying the right neither curbs nor

[63] *Id.* at 576–77, 580 (first quoting U.S. CONST. amend II; and then quoting United States v. Sprauge, 282 U.S. 716, 731 (1931)); *see* U.S. CONST. amend. II (establishing "the right of *the people* to keep and bear Arms" (emphasis added)).

[64] *Heller*, 554 U.S. at 580–81, 596.

[65] *Id.* at 581.

[66] *See id.* at 593–94 (explaining that the English arms-bearing right that the British monarchs William and Mary originally guaranteed is the precursor to the American constitutional right). The Court looked to the influential legal scholar Sir William Blackstone's writings to discern the nature of the English right. *Id.* It explained that Blackstone viewed the English right as the right to own and use firearms for self-defense. *Id.* at 594 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *139–40). The Court found that Framers of the U.S. Constitution, like Samuel Adams, shared Blackstone's view of the arms-bearing right as an individual one centered on self-defense. *Id.* at 594–95.

[67] *See id.* at 605 (reasoning that Americans' understanding of the right over the course of the century following its adoption is essential to discerning its meaning). The Court surveyed legal scholars from both the framing generation and the nineteenth century, as well as nineteenth-century court decisions and legislation to confirm its interpretation of the Amendment as guaranteeing "an individual right unconnected with militia service." *Id.* at 605–19. But the Court discussed several nineteenth-century cases to demonstrate that the government could lawfully place limitations on the right to bear arms. *Id.* at 611. For example, it noted that, in 1843, a Maryland court held it permissible to disarm free Blacks because the legislature viewed them as a "dangerous population." *Id.* (quoting Waters v. State, 1 Gill 302, 309 (Md. 1843)).

[68] *Id.* at 592, 635.

enlarges the right itself.[69] Indeed, it held that the right has nothing to do with the militia.[70]

The Court, nevertheless, recognized that the right has limits, and it attempted to illustrate those boundaries.[71] Specifically, it cautioned that its historical analysis was not comprehensive and that its ruling did not undermine certain "longstanding" firearm restrictions.[72] It provided three examples of firearm regulations that it labeled "presumptively lawful": (1) those that bar felons and persons with mental illness from possessing firearms; (2) those that restrict possessing a firearm in "sensitive" public places, including schools; and (3) those that establish certain requirements for commercial transactions.[73]

Two years later, in 2010, the Court ruled in *McDonald v. City of Chicago* that the Second Amendment, like several others within the Bill of Rights, is enforceable against the states.[74] The Court again chose to emphasize that its holding did not call into question the validity of the "longstanding" firearm

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[69] *Id.* at 578, 599. The Court endorsed nineteenth-century legal scholar Thomas Cooley's view that the right was detached from militia service and that its aim was to ensure that men subject to militia service "have the right to keep and bear arms." *Id.* at 616–18 (quoting THOMAS COOLEY, TREATISE ON CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 271 (1868)).

[70] *See id.* at 582 (interpreting the text of the Second Amendment to guarantee a "right unconnected with militia service"). In support of its conclusion, the Court emphasized several nineteenth-century judicial opinions that seemed to endorse this view. *Id.* at 610–12. For example, it discussed a Michigan Supreme Court decision from 1829 in which the court concluded that the right does not guarantee the use of arms for illegal ends. *Id.* at 612; *see* United States v. Sheldon, 5 Blume Sup. Ct. Trans. 337, 346 (Mich. 1829). According to the U.S. Supreme Court, the decision demonstrates that Americans viewed the right as an individual right because, if it related to militia service, the limit would not be using arms for "unlawful" purposes, but rather using arms outside of a military context. *Heller*, 554 U.S. at 612. The Court further explained that its interpretation of the Second Amendment is consistent with precedent, including *Miller*. *Id.* at 625. It rejected Justice Stevens' reading of *Miller* that the Second Amendment only guarantees "the right to keep and bear arms for certain military purposes," and characterized the decision as holding that the Amendment only protects weapons "typically possessed by law-abiding citizens for lawful purposes." *Id.* at 621–22, 625 (quoting *id.* at 636 (Stevens, J., dissenting)).

[71] *See Heller*, 554 U.S. at 626 (majority opinion) (explaining that the Second Amendment does not permit persons "to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose").

[72] *Id.* at 626–27.

[73] *Id.* at 626–27 & n.26. The Court made clear that its list of restrictions was merely illustrative. *Id.* at 627 n.26. After discerning the scope of the right to keep and bear arms, the Court held that the challenged D.C. laws violated the Second Amendment. *Id.* at 628–29. It reasoned that D.C. could not completely prohibit handgun possession in the home because doing so "makes it impossible for citizens to use them for the core lawful purpose of self-defense." *Id.* at 630.

[74] 561 U.S. 742, 750 (2010). In 2010, in *McDonald v. City of Chicago*, the Supreme Court considered a challenge to a Chicago ordinance that practically barred possessing handguns. *Id.* The issue before the Court was whether the Second Amendment restricted the states. *Id.* at 767. Because Washington, D.C. is not a state, *Heller* did not consider whether the Fourteenth Amendment incorporated the Second Amendment against the states. 554 U.S. at 620 n.23.

regulations that it identified in *Heller*.[75] The Court's holding ultimately created the opportunity for litigants to mount Second Amendment challenges to state and municipal firearm regulations.[76]

D. The Contemporary Litigation Landscape

The Court's decision in *Heller* precipitated new questions about the scope and meaning of the Second Amendment and encouraged a profusion of litigation.[77] One federal Court of Appeals judge described the post-*Heller* situation as "prolonged and politicized trench warfare, with the courts as the generals of both lines."[78] In the initial eight years following the Court's decision, state and federal courts considered more than one thousand Second Amendment claims.[79] Of those, nearly half challenged class-based laws prohibiting certain groups, such as convicted felons, from possessing firearms.[80] This Section first provides a brief overview of the framework that federal appellate courts apply to Second Amendment challenges.[81] It then examines how those courts have applied that framework to evaluate age-based restrictions.[82]

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[75] *McDonald*, 561 U.S. at 786; *see Heller*, 554 U.S. at 627 & n.26 (identifying certain "longstanding" firearm restrictions as "presumptively lawful" and explaining that the listed limitations do not constitute a comprehensive list).

[76] Christopher M. Johnson, Note, *Second Class:* Heller*, Age, and the Prodigal Amendment*, 117 COLUM. L. REV. 1585, 1590 (2017). Indeed, in April 2021, the Court granted certiorari in *New York State Rifle & Pistol Ass'n v. Bruen*, a Second Amendment challenge to a New York law that requires gun owners to demonstrate "proper cause" to receive an unrestricted concealed-carry permit. N.Y. State Rifle & Pistol Ass'n v. Beach, 818 Fed. App'x 99 (2d Cir. 2020), *cert granted sub nom.* N.Y. State Rifle & Pistol Ass'n v. Corlett, 141 S. Ct. 2566 (2021); Amy Howe, *Court to Take Up Major Gun-Rights Case*, SCOTUSBLOG (Apr. 26, 2021), https://www.scotusblog.com/2021/04/court-to-take-up-major-gun-rights-case/ [https://perma.cc/US4D-3RQ5]. After the Court heard oral argument in November 2021, some observers predicted that the Court is likely to strike down the law, but that it will do so in a narrow decision focused on the regime at issue rather than on broader questions about the scope of the right beyond the home. Amy Howe, *Majority of Court Appears Dubious of New York Gun Law, but Justices Mull Narrow Ruling*, SCOTUSBLOG (Nov. 3, 2021), https://www.scotusblog.com/2021/11/majority-of-court-appears-dubious-of-new-york-gun-control-law-but-justices-mull-narrow-ruling/ [https://perma.cc/5D5B-BSRJ].

[77] *See* J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 280 (2009) (averring that *Heller*'s dearth of guidance to lower courts and its list of "presumptively lawful" restrictions led to a slew of challenges to existing gun restrictions).

[78] *Id.* at 279.

[79] Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After* Heller, 67 DUKE L.J. 1433, 1455 (2018) (examining 1,153 Second Amendment claims from June 26, 2008 to February 1, 2016). The authors found that parties appeal civil Second Amendment disputes in federal court at approximately 28% higher rates than in other fields of law. *Id.* at 1472–73.

[80] *Id.* at 1481 (explaining that 43% of the more than one thousand challenges in the survey involved laws prohibiting certain classes of people from owning firearms).

[81] *See infra* notes 83–90 and accompanying text.

[82] *See infra* notes 91–118 and accompanying text.

1. The Federal Circuit Courts' Two-Step Consensus

In *Heller*, the Supreme Court did not establish a precise test for lower courts to apply in considering Second Amendment challenges.[83] Every federal appellate court to consider a Second Amendment challenge has, nevertheless, adopted a two-step inquiry.[84] The first step of the analysis considers history and tradition to determine whether the law at issue burdens conduct that the Second Amendment protects.[85] If it does not infringe constitutionally-protected conduct, then the restriction is valid.[86] If, however, the law does impinge protected conduct, courts must determine the proper level of constitutional scrutiny and apply it.[87] The appropriate level of scrutiny turns on: (1) the law's proximity to the Second Amendment's core right; and (2) how seriously the law burdens that right.[88] Notably, federal appellate courts generally agree that class-based restrictions do not burden the core right that the *Heller* Court articulated—namely, that the Second Amendment entitles "law-abiding, responsible citizens" to use arms for self-defense in the home—and therefore, they hold that intermediate scrutiny is appropriate.[89] Courts further agree that strict

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[83] *See* District of Columbia v. Heller, 554 U.S. 570, 687 (2008) (Breyer, J., dissenting) (suggesting that the Court did not provide adequate guidance for lower courts to resolve Second Amendment challenges); Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives (*BATFE*), 700 F.3d 185, 194 (5th Cir. 2012) (same); Wilkinson, *supra* note 77, at 280 (observing that the Court in *Heller* did not identify a framework for Second Amendment challenges).

[84] *See BATFE*, 700 F.3d at 194 (describing the two-step framework as "the prevailing approach"); *see also* Jake Charles, *Where Are All the Second Amendment Circuit Splits?*, SECOND THOUGHTS (Aug. 16, 2019), https://sites.law.duke.edu/secondthoughts/2019/08/16/where-are-all-the-second-amendment-circuit-splits/ [https://perma.cc/N3N5-EPRV] (discussing the consensus among federal appellate courts on Second Amendment challenges, and observing that they have all embraced the two-step framework).

[85] *See BATFE*, 700 F.3d at 194 (explaining that at step one, the court must decide whether the law at issue is consistent with "the historical traditions associated with the Second Amendment").

[86] *Id.* at 195.

[87] *Id.*

[88] Mai v. United States, 952 F.3d 1106, 1115 (9th Cir. 2020) (quoting United States v. Chovan, 735 F.3d 1127, 1138 (9th Cir. 2013)), *cert denied*, 141 S. Ct. 2566 (2021).

[89] *See* District of Columbia v. Heller, 554 U.S. 570, 630, 634–35 (2008) (holding that, at its core, the Second Amendment protects "the right of law-abiding, responsible citizens to use arms in defense of hearth and home"); *see also Mai*, 952 F.3d at 1109 (holding that intermediate scrutiny applied to a federal law barring the previously committed from possessing firearms); Kanter v. Barr, 919 F.3d 437, 448 (7th Cir. 2019) (concluding that intermediate scrutiny applied to a federal law barring convicted felons from possessing firearms); United States v. Carter, 669 F.3d 411, 413 (4th Cir. 2012) (holding that intermediate scrutiny applied to a federal law that prohibits persons addicted to controlled substances from possessing firearms). For a law to withstand intermediate scrutiny, the government must show that it has a "significant, substantial, or important" objective and that there is a "reasonable fit" between the law at issue and the state's aim. *Mai*, 952 F.3d at 1115 (quoting Silvester v. Harris, 843 F.3d 816, 821–22 (9th Cir. 2016)). In contrast, rational basis review merely requires that the government demonstrate a "reasonable relationship" between the challenged law and a "legitimate government objective." *Rational-Basis Test*, BLACK'S LAW DICTIONARY, *supra* note 32. Justice Clarence Thomas has criticized federal appellate courts' application of intermediate scrutiny in Second Amendment cases, maintaining that it has no more teeth than rational basis review. *See* Silvester v. Becerra, 138 S. Ct.

scrutiny is only appropriate if the challenged law severely burdens the Second Amendment's core protections.[90]

2. Challenges to Age-Based Restrictions for 18–20 Year Olds

Both the U.S. Court of Appeals for the Fifth and Seventh Circuits have applied the two-step inquiry to laws restricting young adults' access to firearms.[91] Neither court determined whether the scope of the Second Amendment extends to eighteen- to twenty-year-old persons.[92] Although the Fifth Circuit found substantial historical evidence to support the view that persons under twenty-one are beyond the scope of the Second Amendment, it did not resolve the issue, reasoning that courts are ill-suited to conduct decisive historical surveys.[93] The Seventh Circuit, however, simply determined that it was unnecessary to resolve the question because the law at issue survived constitutional scrutiny.[94]

945, 945 (2018) (mem.) (Thomas, J., dissenting) (suggesting that federal courts are not interpreting and applying the Court's decisions in *Heller* and *McDonald* faithfully, and expressing concern that the right to bear arms is not receiving the same protection as other fundamental rights). Other judges have suggested that the two-step approach is inconsistent with *Heller* altogether and have called on courts to evaluate Second Amendment challenges considering only the "Amendment's text, history, and tradition." *See, e.g.*, Heller v. District of Columbia, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (maintaining that *Heller* and *McDonald* rule out the traditional tiers of scrutiny and require courts to evaluate firearms regulations solely based on "text, history, and tradition").

[90] *See Mai*, 952 F.3d at 1115 (explaining when strict scrutiny is appropriate).

[91] *See* Horsley v. Trame, 808 F.3d 1126, 1127 (7th Cir. 2015) (considering the constitutionality of an Illinois scheme that generally required parental consent for persons ages eighteen to twenty to obtain a firearm); *BATFE*, 700 F.3d at 188 (evaluating the constitutionality of federal laws that bar persons under twenty-one from purchasing firearms from federally licensed dealers). In 2021, in *Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco & Explosives*, the U.S. Court of Appeals for the Fourth Circuit considered whether the federal statutory regime that prohibits eighteen- to twenty-year-olds from purchasing handguns from federal firearm licensees violated the Second Amendment. 5 F.4th 407, 410 (4th Cir.), *vacated as moot*, 14 F.4th 322, 326 (4th Cir. 2021). The court determined that the Second Amendment protects persons ages eighteen to twenty and held that the laws are unconstitutional. *Id.*; *see* 18 U.S.C. § 922(b)(1), (c)(1) (prohibiting federal firearm licensees from selling handguns to persons under twenty-one). This Note does not discuss *Hirschfeld* because: (1) it was decided after the U.S. District Court for the Northern District of Florida issued its 2020 decision in *National Rifle Ass'n v. Swearingen* and thus was not available to the court as a source of persuasive authority; and (2) the Fourth Circuit subsequently dismissed the case as moot. *See Hirschfeld*, 14 F.4th at 326 (dismissing the case as moot because the plaintiff turned twenty-one and thereby could legally purchase a handgun); *Hirschfeld*, 5 F.4th at 407 (stating that the district court decided the case on July 13, 2021); Nat'l Rifle Ass'n v. Swearingen, 545 F. Supp. 3d 1247, 1247 (N.D. Fla. 2021) (stating that the district court decided the case on June 24, 2021), *appeal docketed*, No. 21-12314 (11th Cir. July 8, 2021).

[92] *See Horsley*, 808 F.3d at 1131 (explaining that it was unnecessary to resolve whether young adults can claim the Second Amendment's protections because the law at issue survived constitutional scrutiny); *BATFE*, 700 F.3d at 204 (deciding not to resolve the issue at step one because courts are ill-equipped to perform a conclusive historical analysis).

[93] *BATFE*, 700 F.3d at 204.

[94] *Horsley*, 808 F.3d at 1131, 1134.

a. The Fifth Circuit's Approach in NRA v. Bureau of Alcohol, Tobacco, Firearms, & Explosives

In 2012, in *National Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives* (*BATFE*), the U.S. Court of Appeals for the Fifth Circuit ruled that a federal law that bars federal firearms licensees from selling handguns to persons younger than twenty-one did not violate the Second Amendment.[95] After adopting the two-step inquiry, the court surveyed "founding-era attitudes" and noted that the framing generation implemented a range of gun control laws, including disarming citizens that posed a potential threat to public safety.[96] The court observed that the framing generation likely supported firearm restrictions and even total bans for persons under twenty-one that the common law classified as minors.[97] In fact, because the common law age of majority was twenty-one, the court reasoned that the framing generation would have viewed the federal provisions at issue as consistent with the Second Amendment.[98] The court then turned to a variety of nineteenth-century laws, court decisions, and the opinions of legal scholars and reached the conclusion that the current laws restricting young adults from possessing handguns are part of a well-established American tradition of enacting age-based restrictions.[99]

Although the court concluded that the challenged law did not burden constitutionally protected conduct, it moved on to step two "in an abundance of caution."[100] The court determined that intermediate scrutiny was appropriate because the law at issue was not a blanket ban; it still permitted eighteen- to

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[95] *BATFE*, 700 F.3d at 188; *see* 18 U.S.C. § 922(b)(1), (c)(1) (barring federal firearm licensees from selling handguns to persons younger than twenty-one). A year later, in 2013, in *National Rifle Ass'n v. McCraw*, the Fifth Circuit considered a challenge to Texas laws that prohibited eighteen- to twenty-year olds from publicly carrying firearms. 719 F.3d 338, 342 (5th Cir. 2013). The court applied intermediate scrutiny to the statutory scheme and concluded that it did not violate the plaintiff's Second Amendment rights. *Id.* at 349.

[96] *BATFE*, 700 F.3d at 194, 200.

[97] *Id.* at 201. The age of majority in the United States was twenty-one until state legislatures lowered it to eighteen in the 1970s. *Id.* The court explained that during the founding period, the right to bear arms was likely connected to the idea of "civic virtu" that recognized the state could disarm "unvirtuous citizens" including felons or persons incapable of virtue due to young age or mental illness. *Id.*

[98] *Id.* at 202 (concluding that, because the law characterized persons under twenty-one as minors at the time of the founding, the average eighteenth-century American may have endorsed limiting their access to firearms).

[99] *Id.* at 202–03. For example, the court noted that, by the beginning of the twentieth century, more than twenty states and Washington, D.C. prohibited persons younger than twenty-one from acquiring certain kinds of firearms. *Id.* at 202. Notably, the panel observed that Thomas Cooley, a scholar whose view of the Second Amendment the Supreme Court embraced in *Heller*, understood restrictions on selling firearms to minors as consistent with the Second Amendment. *Id.* at 203.

[100] *Id.* at 204.

twenty-year-olds to obtain and use both handguns and long guns.[101] It also emphasized the short-lived nature of the restriction.[102] The court held that the provision survived intermediate scrutiny, stressing that the law was the result of a years-long inquiry that targeted a specific issue: young persons' ability to acquire handguns from federally licensed dealers.[103] It reasoned that the limitation was targeted because it only applied to handguns and licensed sales.[104]

b. The Seventh Circuit's Approach in Horsley v. Trame

In 2015, in *Horsley v. Trame*, the U.S. Court of Appeals for the Seventh Circuit upheld an Illinois law that generally required persons between ages eighteen and twenty to secure parental consent prior to obtaining a firearm.[105] Specifically, Illinois required residents to acquire a Firearm Owners Identification (FOID) card to use or obtain a firearm.[106] Although eighteen- to twenty-year-old residents were eligible to obtain a FOID card, the state required that their applications include a parent or legal guardian's signature.[107] Shortly after turning eighteen, the plaintiff submitted an application for a FOID card, but the Illinois State Police declined to process her application because it did not include the required signature.[108] The plaintiff subsequently filed suit in the U.S. District Court for the Southern District of Illinois alleging that the signature requirement infringed her Second Amendment rights.[109]

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[101] *Id.* at 206–07.

[102] *Id.* at 207. The court observed that the consequences of the statutory scheme are temporary. *Id.* It stressed that young adults subject to the restrictions "will soon grow up and out of its reach." *Id.* The court compared the laws' temporary burden on eighteen- to twenty-year-olds to that imposed by the federal ban on firearm possession for users of illegal drugs because illegal drug users can regain their ability to possess firearms if they stop their illegal drug use. *Id.*; *see* 18 U.S.C. § 922(g)(3) (prohibiting users of controlled substances from possessing firearms). Accordingly, it determined that the same level of scrutiny—intermediate—is proper. *BATFE*, 700 F.3d at 207.

[103] *BATFE*, 700 F.3d at 207. The court pointed to criminological data indicating that persons ages eighteen to twenty are a significant public safety risk, accounting for 35% of "serious crimes of violence" and 21% of murder arrests. *Id.* at 208 (citing 114 CONG. REC. 12,279, 12,309 (1968) (statement of Sen. Thomas J. Dodd, Chairman, Sen. Subcomm. on Juv. Delinq.)).

[104] *Id.* at 209.

[105] 808 F.3d 1126, 1127 (7th Cir. 2015).

[106] *Id.* at 1128; *see* 430 ILL. COMP. STAT. 65/2(a)(1) (2021) (requiring a Firearm Owner's Identification (FOID) Card to lawfully obtain a firearm).

[107] *Horsley*, 808 F.3d at 1128; *see* 430 ILL. COMP. STAT. 65/4(a)(2)(i) (requiring persons younger than twenty-one, in order to receive a FOID Card, to obtain written consent from a parent or legal guardian who is eligible to own a firearm).

[108] *Horsley*, 808 F.3d at 1127. The plaintiff reportedly wanted to obtain a shotgun for self-defense, but her parents refused to endorse her application. *Id.* at 1127–28.

[109] *Id.* at 1128; Horsley v. Trame, 61 F. Supp. 3d 788, 788 (S.D. Ill. 2014), *aff'd*, 808 F.3d 1126. The plaintiff asked the court to order the Illinois State Police, the agency charged with reviewing FOID applications, to consider her application absent the required signature. *Horsley*, 808 F.3d at 1128. She also requested that the court enjoin the State Police from discarding FOID applications merely because they do not contain a parent or guardian's written consent. *Id.*

In analyzing whether the signature requirement restricts constitutionally-protected conduct, the Seventh Circuit observed that, from the founding up to the 1970s, twenty-one was the age of majority in the United States.[110] Accordingly, legislatures enacted most firearm restrictions during a period in which the law classified persons under twenty-one as minors.[111] The court noted, however, that the plaintiff's position has some historical support, including founding-era militia laws that conscripted eighteen-year-olds, thereby suggesting that young adults traditionally enjoyed the Second Amendment's protections.[112] It ultimately declined to resolve whether the Second Amendment protects the age group at issue and instead proceeded to determine the proper level of constitutional scrutiny.[113]

The court contrasted the outright prohibition at issue in *Heller* to the signature requirement, explaining that Illinois residents between ages eighteen and twenty who cannot secure a parent or guardian's consent can nonetheless obtain a FOID card with the approval of the Director of the Illinois State Police.[114] Accordingly, the court reasoned that, at most, the provision amounted to a "modest burden[]" on young adults' rights to bear arms because they can still obtain a firearm.[115] In addition, the court recognized the state's compelling interest in public safety.[116] Specifically, the court reasoned that criminological

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[110] *Horsley*, 808 F.3d at 1130. The court also noted that in 2012, in *National Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms & Explosives* (*BATFE*), the U.S. Court of Appeals for the Fifth Circuit determined that barring young adults from bearing a handgun outside the home probably fell beyond the scope of the Second Amendment. *Id.* at 1130–31; Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives (*BATFE*), 700 F.3d 185, 204 (5th Cir. 2012). It further observed that the Illinois Supreme Court twice reached the same decision. *Id.* at 1131; *see* People v. Mosley, 2015 IL 115872, ¶ 36 (holding that persons less than twenty-one-years old who are not using firearms for hunting purposes are beyond the core guarantee of the Second Amendment); People v. Jordan G. (*In re* Jordan G.), 2015 IL 116834, ¶ 25 (same).

[111] *Horsley*, 808 F.3d at 1130.

[112] *Id.* at 1131.

[113] *Id.* Several federal appellate courts have adopted this approach to resolve other Second Amendment challenges. *See, e.g.*, Mai v. United States, 952 F.3d 1106, 1114–15 (9th Cir. 2020) (electing to "assume, without deciding" that the Second Amendment protects persons no longer living with mental illness before proceeding to decide the proper standard of scrutiny), *cert denied*, 141 S. Ct. 2566 (2021); Woollard v. Gallagher, 712 F.3d 865, 876 (4th Cir. 2013) (assuming, without deciding, that Maryland's handgun permitting scheme regulates conduct within the scope of the Amendment, and then applying intermediate scrutiny).

[114] *Horsley*, 808 F.3d. at 1132. If an eighteen- to twenty-year-old applicant cannot obtain the required signature but can demonstrate that they have no prior forcible felony conviction, are not a public safety risk, and that the issuance of a license would not conflict with the public interest or violate federal law, then the Director of the State Police is free to issue one. 430 ILL. COMP. STAT. 65/10(c) (2021); *Horsley*, 808 F.3d at 1132. Moreover, an applicant is entitled to appeal the Director's decision in court. 430 ILL. COMP. STAT. 65/11(a); *Horsley*, 808 F.3d at 1132.

[115] *Horsley*, 808 F.3d. at 1132 (quoting Heller v. District of Columbia, 670 F.3d 1244, 1262 (D.C. Cir. 2011)).

[116] *Id.* The court further observed that the parent or guardian signatory is subject to civil liability for damages arising from the cardholder's use of a firearm, and hence, the law also promotes a com-

data and brain research demonstrate that young adults commit firearm-related homicides at higher rates than older adults and are generally more impulsive.[117] Notably, the court never articulated precisely which level of means-end scrutiny that it applied.[118]

E. Factual and Procedural History of Swearingen

The NRA's opposition to Florida's minimum purchase-age law once again raises the issue of whether the Second Amendment protects young adults' right to keep and bear arms.[119] On March 9, 2018—the same day that then-Governor Rick Scott signed the Marjory Stoneman Douglas High School Public Safety Act into law—the NRA filed a complaint in the U.S. District Court for the Northern District of Florida maintaining that the Act's minimum-purchase-age provision violates the Second Amendment.[120] The NRA estimated that it has thousands of members in Florida, including young adults who want to purchase firearms for "self-defense and other lawful purposes."[121] Although some legal academics have dismissed the case as merely an effort by the NRA to energize its members, others maintain that the issue deserves serious consideration.[122] On June 24, 2021, the court granted the government's motion for summary judgment and concluded that the Act's provision does not contravene the Second Amend-

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pensatory interest. *Id.*; *see* 430 ILL. COMP. STAT. 65/4(c) (establishing that the parent or guardian who provides the requisite signature is liable for damages).

[117] *Horsley*, 808 F.3d. at 1133. The court cited to a U.S. Department of Justice and Treasury study that found eighteen- to twenty-year-old adults were responsible for perpetrating the highest number of gun homicides within the United States. *Id.* It also pointed to a prominent neuropsychologist who explained that young adults' still-developing brains affect their ability to regulate impulsive behavior. *Id.*

[118] *See id.* at 1128–34 (evaluating the FOID Act's constitutionality while never characterizing the standard applied as intermediate scrutiny).

[119] *See* Nat'l Rifle Ass'n v. Swearingen, No. 4:18cv137, 2020 WL 5646480, at *3 (N.D. Fla. May 1, 2020) (stating that the plaintiffs alleged that Florida's minimum purchase-age provision violates young adults' right to bear arms).

[120] *See* Nat'l Rifle Ass'n v. Swearingen, 545 F. Supp. 3d 1247, 1251 (N.D. Fla. 2021), *appeal docketed*, No. 21-12314 (11th Cir. July 8, 2021) (noting that the NRA filed its challenge on the same day that the Act became law). The plaintiffs also claimed that the age-based provision violated the U.S. Constitution's Equal Protection Clause. Complaint for Declaratory and Injunctive Relief, *supra* note 13, at 17.

[121] Complaint for Declaratory and Injunctive Relief, *supra* note 13, at 7. The NRA maintained that the minimum-purchase-age provision is particularly egregious as applied to young women because they are extremely unlikely to commit violent crime. *Id.* at 9–10. According to the NRA, Federal Bureau of Investigation (FBI) data indicates that in 2015, women between eighteen and twenty-one represented less than 2% of violent crime arrests. *Id.* at 9. On November 19, 2019, the NRA filed an amended complaint, adding an allegedly "law-abiding, responsible" eighteen-year-old resident of Duval County, Florida as a plaintiff. Second Amended Complaint for Declaratory and Injunctive Relief at 4, *Swearingen*, No. 4:18cv137 (N.D. Fla. Nov. 19, 2019).

[122] Lee, *supra* note 12 (noting that one constitutional scholar described the case as "symbolic," whereas another law professor suggested that it will fundamentally change Second Amendment litigation).

ment.[123] The NRA has appealed the decision and whether the Eleventh Circuit affirms the district court's decision in *Swearingen* could have significant consequences for other states with existing age-based firearm restrictions and for any state legislature or future Congress considering similar measures.[124]

II. EVALUATING FLORIDA'S MINIMUM PURCHASE-AGE UNDER THE PREVAILING TWO-STEP TEST

In 2021, in *National Rifle Ass'n v. Swearingen*, the U.S. District Court for the Northern District of Florida considered whether Florida's law establishing twenty-one as the minimum purchase age for all firearms violated the Second Amendment.[125] The NRA maintained that the U.S. Court of Appeals for the Eleventh Circuit's two-step framework is inconsistent with the Supreme Court's 2008 decision, *District of Columbia v. Heller*, and accordingly, it asked the district court to apply a "text, history, and tradition" test.[126] It further claimed that the Act's minimum purchase-age provision is also invalid under the circuit's existing two-step test for Second Amendment challenges.[127]

This Part provides an overview of both the plaintiffs' and the government's arguments in *Swearingen*.[128] Section A summarizes the parties' historically-rooted arguments, from the period of the framing through the twentieth

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[123] Nat'l Rifle Ass'n v. Swearingen, 545 F. Supp. 3d 1247, 1250 (N.D. Fla. 2021), *appeal docketed*, No. 21-12314 (11th Cir. July 8, 2021).

[124] *See* Notice of Appeal to Court of Appeals at 1, *Swearingen*, No. 4:18cv137 (appealing the district court's decision to uphold Florida's law as consistent with the Second Amendment); *see also* VT. STAT. ANN. tit. 13, § 4020(a) (2021) (prohibiting firearm sales to anyone younger than twenty-one).

[125] 545 F. Supp. 3d 1247, 1250 (N.D. Fla. 2021), *appeal docketed*, No. 21-12314 (11th Cir. July 8, 2021).

[126] Plaintiffs' Motion for Summary Judgment and Incorporated Memorandum of Law at 20, *Swearingen*, 545 F. Supp. 3d 1247 (No. 4:18cv137) [hereinafter Plaintiffs' Motion for Summary Judgment]. *See generally* District of Columbia v. Heller, 554 U.S. 570 (2008) (relying on the Second Amendment's text and history to discern its scope). Some judges, most notably then-Circuit Judge Brett Kavanaugh, have interpreted the Supreme Court's 2008 decision *District of Columbia v. Heller* to limit the court's inquiry to the Amendment's text, history, and tradition, but not a single federal circuit court has embraced that approach. Charles, *supra* note 84 (noting that Justice Kavanaugh endorsed the text, history, and tradition test, but that federal appellate courts have not employed it); *see* Heller v. District of Columbia, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (averring that *Heller* instructed lower courts to consider the constitutionality of firearm regulations according to the Amendment's text, history, and tradition, and rejected the traditional tiers of scrutiny). In 2012, in *GeorgiaCarry.org, Inc. v. Georgia*, the U.S. Court of Appeals for the Eleventh Circuit adopted the two-step test for evaluating Second Amendment challenges. 687 F.3d 1244, 1260 n.34 (11th Cir. 2012). The issue in that case was whether a Georgia law that generally prohibited persons from bearing a firearm in certain places, including "place[s] of worship," violated the Second Amendment. *Id.* at 1248–49. The court ruled that the Second Amendment does not include the right to bear a firearm in a place of worship over the owner's objection. *Id.* at 1266.

[127] *See* Plaintiffs' Motion for Summary Judgment, *supra* note 126, at 3 (averring that the provision cannot sustain any standard of constitutional scrutiny).

[128] *See infra* notes 133–231 and accompanying text.

century.[129] Section B discusses the parties' arguments concerning the appropriate level of constitutional scrutiny for the court to apply.[130] In particular, it examines claims regarding the strength of the government interest and the gravity of the law's burden on young adults' rights.[131] Section C discusses the district court's decision that applied the two-step framework and held that the law is consistent with the Second Amendment.[132]

A. Step One: Considering Text, History, and Tradition to Discern the Scope of the Second Amendment

The plaintiffs in *Swearingen* rely on the Supreme Court's textual analysis in *Heller* to claim that young adults have a constitutional right to bear arms.[133] In *Heller*, the Court considered the meaning of "the people" as used in the Second Amendment.[134] It noted that the drafters used the phrase elsewhere in the Bill of Rights and the Constitution, and it concluded that in each case the phrase refers to the entire "political community."[135] The Court, therefore, determined that the right to bear arms is not limited to persons eligible for militia service, but is applicable to every American.[136] Elsewhere in its decision, however, the Court appeared to restrict the Amendment's protections to "law-abiding, responsible citizens."[137] The plaintiffs aver that eighteen- to twenty-year-olds are a generally law-abiding class of adults entitled to the Amendment's protections.[138] The government responds that the Court's decision in

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[129] *See infra* notes 133–194 and accompanying text.

[130] *See infra* notes 195–231 and accompanying text.

[131] *See infra* notes 195–231 and accompanying text.

[132] *See infra* notes 232–251 and accompanying text.

[133] *See* Plaintiffs' Motion for Summary Judgment, *supra* note 126, at 9 (claiming that persons age eighteen to twenty qualify as "the people" under *Heller*).

[134] 554 U.S. 570, 579–81 (2008); *see* U.S. CONST. amend. II (guaranteeing "the right of *the people* to keep and bear Arms") (emphasis added).

[135] *Heller*, 554 U.S. at 579–80. The Court endorsed its prior determination in *United States v. Verdugo-Urquidez* that the Framers used the phrase as a "term of art" to describe members of a "national community." *Id.* (quoting United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990)).

[136] *Id.* at 580–81.

[137] *See id.* at 635 (holding that the fundamental protections of the Second Amendment apply to "law-abiding, responsible citizens"). In his dissent, Justice John Paul Stevens suggested that the Court's definition of "the people" could not be reconciled with its conclusion that the right to bear arms only applies to responsible Americans. *Id.* at 644 (Stevens, J., dissenting).

[138] *See* Plaintiffs' Motion for Summary Judgment, *supra* note 126, at 8, 16 (suggesting that the founding generation considered eighteen-year-olds "law-abiding, responsible" persons, and emphasizing that today, society views eighteen-year-olds as adults for nearly everything (quoting *Heller*, 554 U.S. at 635 (majority opinion)). In 2012, in *National Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives* (*BATFE*), the U.S. Court of Appeals for the Fifth Circuit acknowledged that young adults' Second Amendment claim may be better than that of felons and domestic violence misdemeanants because, as a class, they have not been convicted of a crime. 700 F.3d 185, 206 (5th Cir. 2012). In her dissent from the Fifth Circuit's denial of an en banc rehearing, Circuit Judge Edith Jones emphasized that persons aged eighteen to twenty are overwhelmingly law-abiding. Nat'l Rifle Ass'n

Heller recognizes that Second Amendment rights exist on a spectrum.[139] In other words, some groups—in this case, young adults—receive less protection than others.[140]

Although the plaintiffs do make a textual argument, the core clash in legal challenges to firearm regulations generally centers more on history and tradition rather than on parsing the Court's interpretation of the Amendment's text.[141] There is a consensus among federal appellate courts that *Heller* requires a historical inquiry to determine the scope of the right, but disagreement persists on which historical sources are the most authoritative.[142] Some judges emphasize the primacy of the legal landscape during the founding era.[143] Others interpret *Heller* to require a more long-ranging inquiry that includes an examination of nineteenth- and even twentieth-century legal traditions.[144] Furthermore, even if judges agree on the relevant period, they still must determine the appropriate level of generality for the legal rules deduced from that history.[145] For example, in 2012, in *National Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives* (*BATFE*), the U.S. Court of Appeals for the Fifth Circuit found that the United States traditionally disarmed certain classes

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v. Bureau of Alcohol, Tobacco, Firearms, & Explosives (*BATFE II*), 714 F.3d 334, 347 (5th Cir. 2013) (Jones, J., dissenting) (stating that in 2010, less than 1% of the age cohort were arrested for "violent crimes"). In *Heller*, the Supreme Court may have implied that "the people" encompasses minors when it approvingly quoted the Georgia Supreme Court's description of the right as including "the whole people, old and young." 554 U.S. at 612 (quoting Nunn v. State, 1 Ga. 243, 251 (1846)). The plaintiffs highlight that the law treats eighteen-year-olds as adults in other legal contexts and aver that the right to bear arms similarly vests at eighteen. *See* Plaintiffs' Motion for Summary Judgment, *supra* note 126, at 8, 16 (noting that eighteen-year-olds enjoy other rights, such as marriage).

[139] *See* Defendants' Motion for Summary Judgment, *supra* note 16, at 7 (maintaining that the Second Amendment entitles some groups to less protection than others).

[140] *Id.*

[141] *See, e.g.*, Horsley v. Trame, 808 F.3d 1126, 1130 (7th Cir. 2015) (noting that the Constitution does not establish an age of majority before focusing on historical practices); United States v. Rene E., 583 F.3d 8, 13–16 (1st Cir. 2009) (conducting a broad historical survey to determine whether the Second Amendment protects persons under eighteen).

[142] *See* Saul Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities*, 39 FORDHAM URB. L.J. 1695, 1697 n.8 (2012) (explaining that courts disagree over what period is the most authoritative for resolving Second Amendment challenges); Charles, *supra* note 84 (observing that federal appellate courts have interpreted *Heller* to require a two-step inquiry).

[143] *See, e.g.*, *BATFE II*, 714 F.3d at 339–40 (Jones, J., dissenting) (arguing that *Heller* instructs courts to discern the Second Amendment's meaning at the time of the framing, and therefore founding-era laws are the most probative of the scope of the right).

[144] *See, e.g.*, Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives (*BATFE*), 700 F.3d 185, 194, 202–03 (5th Cir. 2012) (interpreting *Heller* to allow courts to consider a broad set of legal sources before surveying nineteenth-century statutes, court decisions, and legal scholars); *Rene E.*, 583 F.3d at 13–16 (considering a range of historical materials, including twentieth-century state court decisions).

[145] *See* Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852, 858 (2013) (explaining the challenges that historical inquires pose in interpreting constitutional provisions).

to protect the public.[146] At a more granular level, it also identified a legal tradition of "age- and safety-based" gun laws.[147] Accordingly, the parties' arguments in *Swearingen* differ not only in terms of the historical sources upon which they rely, but also on the level of generality for the rules deduced.[148] Subsection 1 of this Section discusses the parties' arguments rooted in founding-era history with a particular focus on federal and state militia statutes and class-based firearm restrictions.[149] Subsection 2 of this Section provides an overview of the parties' arguments grounded in nineteenth and twentieth-century state laws and court decisions.[150]

1. Founding-Era Legal Landscape

a. Federal and State Militia Laws

The plaintiffs in *Swearingen* maintain that early American militia laws demonstrate that persons between ages eighteen and twenty enjoy the full protection of the Second Amendment.[151] Their logic is straightforward: the Amendment protects militia members, and because some men between eighteen- and twenty-years old were in the militia during the founding period, those young adults had a right to bear arms.[152]

State militia laws were the most prevalent firearm regulations during the founding period.[153] They provided who was included in the militia and also established certain responsibilities, including that members supply their own arms.[154] Some states set the minimum age for militia service at eighteen, but most required sixteen-year-olds to enroll.[155] In addition to state laws, in 1792,

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[146] 700 F.3d at 203.

[147] *Id.* Circuit Judge Edith Jones claimed that the Fifth Circuit panel's historical conclusions were overly generalized. *BATFE II*, 714 F.3d at 344 (Jones, J., dissenting).

[148] *Compare* Plaintiffs' Motion for Summary Judgment, *supra* note 126, at 10–11 (averring that because eighteen- to twenty-year-old adults served in early American militias, they have Second Amendment rights), *with* Defendants' Motion for Summary Judgment, *supra* note 16, at 5 (maintaining that courts have recognized a robust legal tradition of "age- and safety-based" gun laws (quoting *BAFTE*, 700 F.3d at 203)).

[149] *See infra* notes 151–172 and accompanying text.

[150] *See infra* notes 173–194 and accompanying text.

[151] Plaintiffs' Motion for Summary Judgment, *supra* note 126, at 10–11.

[152] *Id.*; *see also* Kopel & Greenlee, *supra* note 11, at 499 (claiming that, because the militia includes young adults and the Supreme Court in *Heller* held that the Second Amendment applies to the militia, young adults have Second Amendment rights).

[153] *See* Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 508–09 (2004) (noting that laws governing the kind of firearms permissible for militia service were widespread in eighteenth-century America).

[154] *Id.* at 509. States regulated the militia intensely; for example, states fined men who failed to supply their own firearms and ammunition. *Id.*

[155] *See* Kopel & Greenlee, *supra* note 11, at 533 (surveying state militia laws, and concluding that "the most common age for militia duty was 16 to 50 years," but noting that service began at 18 in some states). For example, in 1778, both Massachusetts' and New York's militias included men be-

Congress enacted the federal Militia Act that obligated "every free able-bodied white male citizen" between ages eighteen and forty-five to join the militia and to provide their own weapons.[156] The plaintiffs in *Swearingen*, therefore, argue that the legal requirement for militia members to provide their own weapons and ammunition presumes the right to procure such equipment.[157]

The government responds that founding-era militia laws did not regulate firearm sales.[158] It highlights a 1790 congressional debate over the federal government's role in arming militia members, in which Representative Jeremiah Wadsworth of Connecticut suggested that parents should have the responsibility of arming minor militia members.[159] The government further argues that several state militia laws, including Maine's and North Carolina's, obligated parents to supply their minor children's weapons for militia service.[160] According to this view, founding-era militia laws merely demonstrate that young adults could carry firearms while serving in intensely regulated militias, and even then they were still subject to their parents' control.[161]

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tween ages sixteen and fifty. Cornell & DeDino, *supra* note 153, at 509. South Carolina established a slightly narrower age requirement, conscripting eighteen- to fifty-year old men. *Id.*

[156] Act of May 8, 1792, ch. 33, 1 Stat. 271; Kopel & Greenlee, *supra* note 11, at 501; *see* Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives (*BATFE II*), 714 F.3d 334, 339 (5th Cir. 2013) (Jones, J., dissenting) (citing the Militia Act requirement that members provide their own arms as evidence that eighteen-year-olds had the right to bear arms during the founding era). The federal Militia Act reportedly set the minimum age at eighteen because George Washington viewed men between eighteen and twenty-one as the finest soldiers. *BATFE II*, 714 F.3d at 341 n.9 (Jones, J., dissenting).

[157] Plaintiffs' Motion for Summary Judgment, *supra* note 126, at 10 (maintaining that eighteenth-century militia laws obligated members to obtain firearms, which presumed that they could buy them). At least one federal appellate court endorsed that view. *See* Ezell v. City of Chicago, 651 F.3d 684, 704 (7th Cir. 2011) (holding that the right to bear arms necessarily includes the right to obtain firearms).

[158] *See* Defendants' Motion for Summary Judgment, *supra* note 16, at 10 (arguing that the federal Militia Act of 1792 is silent on firearm sales).

[159] *Id.* at 11–12. During the founding era, persons under twenty-one were legally considered minors. *See* Horsley v. Trame, 808 F.3d 1126, 1130 (7th Cir. 2015) (explaining that the age of majority at the founding was twenty-one). In *BATFE*, the government emphasized that some states mandated militia members younger than twenty-one to obtain parental consent prior to enlisting. Brief for Appellees at 40, Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives (*BAFTE*), 700 F.3d 185 (5th Cir. 2012), 2012 WL 371762. For example, a 1755 Pennsylvania law prohibited men under twenty-one from joining the militia unless they obtained consent from a parent or guardian. *Id.* at 40–41.

[160] Defendants' Motion for Summary Judgment, *supra* note 16, at 12. Some states also obligated the parents of minors (that is, those under twenty-one) to resolve any fines arising from their son's militia service. *See BATFE II*, 714 F.3d at 342 (Jones, J., dissenting) (observing that multiple state militia laws obligated parents to pay their sons' militia-related penalties).

[161] Defendants' Motion for Summary Judgment, *supra* note 16, at 10. The government also casts doubt on the probative value of early American militia laws given that the Court in *Heller* held that the right was unconnected to the militia. *Id.*; *see* District of Columbia v. Heller, 554 U.S. 570, 593 (2008) (characterizing the English common-law right subsequently codified in the Second Amendment as unrelated to the militia). In addition, the government pointed to several state militia laws that

The government also emphasizes that the common law set the age of majority at twenty-one.[162] The fact that twentieth-century statutes later established eighteen as the age of majority in areas unrelated to firearms, the government argues, does not mean that eighteen-year-olds have the right to purchase firearms.[163] The government points out that Thomas Cooley, a legal scholar whom the Court cited approvingly in *Heller*, embraced this view when he acknowledged that it was within the state's police power to bar selling firearms to minors.[164]

b. Class-Based Disarmament Laws

The government asserts that the United States has a well-established practice, dating back even before the founding, of prohibiting certain high-risk groups from accessing firearms in order to protect the public.[165] The government notes that both the U.S. Court of Appeals for the First Circuit in 2009 in *United States v. Rene E.* and the Fifth Circuit in 2012 in *BATFE* recognized this tradition.[166] Specifically, in *BATFE*, the court pointed to loyalty oaths as evidence that the Framers believed that it was permissible for the state to disarm persons it viewed as security risks.[167] In response to the American Revolution, multiple

established twenty-one as the minimum age for membership. Defendants' Motion for Summary Judgment, *supra* note 16, at 11.

[162] Defendants' Motion for Summary Judgment, *supra* note 16, at 5, 7; *see also BATFE*, 700 F.3d at 201 (explaining that, during the founding period, persons did not obtain majority status until age twenty-one).

[163] Defendants' Motion for Summary Judgment, *supra* note 16, at 14, 17.

[164] *Id.* at 13. Cooley's conclusion is consistent with scholars who maintain that the founding generation understood the right to keep and bear arms as limited to "virtuous citizen[s]." Reynolds, *supra* note 47, at 480 (explaining that Standard Model Second Amendment scholars assert that the right to bear arms only applied to "the virtuous citizen," thus meaning that the right did not extend to criminals, children, and other persons supposedly unable to act virtuously (quoting Don B. Kates, *The Second Amendment: A Dialogue*, 49 LAW & CONTEMP. PROBS. 143, 146 (1986))). In *BATFE*, the Fifth Circuit relied on Thomas Cooley's treatise on constitutional law to conclude that he viewed minimum purchase-age requirements as a permissible limitation on the right to bear arms. 700 F.3d at 203 (citing THOMAS COOLEY, TREATISE ON CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 429, 740 n.4 (5th ed. 1883)). In *Heller*, the Supreme Court surveyed the writings of post-Civil War legal scholars to confirm its understanding of the Second Amendment. 554 U.S. at 616–19. The Court emphasized Thomas Cooley's authority as a constitutional scholar, noting his fame and the popularity of his work. *Id.* at 616 (describing Cooley as "[t]he most famous" legal scholar of the period, and explaining that his constitutional treatise was "massively popular").

[165] Defendants' Motion for Summary Judgment, *supra* note 16, at 9.

[166] *Id.* at 9–10; *see BATFE*, 700 F.3d at 203 (concluding based on its historical inquiry that there is a well-established American tradition of "age- and safety-based restrictions on the ability to access arms"); United States v. Rene E., 583 F.3d 8, 16 (1st Cir. 2009) (identifying a historical tradition in which the state regulates juveniles' firearm access).

[167] 700 F.3d at 200 (pointing to founding-era laws that disarmed Loyalists as evidence that the framing generation recognized that states could prohibit classes of individuals considered dangerous or untrustworthy from possessing firearms). In her dissent from the Fifth Circuit's denial of an en banc rehearing, Circuit Judge Edith Jones rejected any comparison of firearm regulations aimed at

states enacted measures that barred British Loyalists from using or possessing firearms.[168] For example, Pennsylvania disarmed citizens who declined to pledge their loyalty to the state.[169] Similarly, in *Rene E.*, the First Circuit recognized that a significant number of scholars insist that, during the founding period, only "virtuous citizens" enjoyed the right to bear arms.[170] These scholars emphasize that America, like every other government to guarantee an arms-bearing right, has always prohibited certain "suspect" classes from exercising the right.[171] According to this view, the framing generation understood the need to balance the right to keep and bear arms against the interest in public safety.[172]

2. Post-Enactment History: Nineteenth- and Twentieth-Century Sources

In *Heller*, the Supreme Court's historical analysis extended well beyond the founding era and included "Postratification Commentary," "Pre-Civil War

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young adults to founding-era loyalty laws. Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives (*BATFE II*), 714 F.3d 334, 343 (5th Cir. 2013) (Jones, J., dissenting). She reasoned that, because those laws disarmed persons older than eighteen, they presuppose that young adults had a right to keep and bear arms. *See id.* (emphasizing that eighteen-year old men were "*dis*armed" if they failed to pledge allegiance to the state and the nation). In addition, Judge Jones claimed that unlike modern age-based regulations, loyalty laws were premised on "conduct." *Id.* If anything, according to this view, loyalty oaths demonstrate that eighteen-year-olds' right to bear arms was the same as that of older Americans. *See id.* (contending that "eighteen-year-olds were considered to have rights even if they were being restricted equally with other suspect class members"). In 2013, in *Powell v. Tompkins*, the U.S. District Court for the District of Massachusetts considered the constitutionality of a Massachusetts law barring the issuance of firearm carry licenses to persons under twenty-one. 926 F. Supp. 2d 367, 370 (D. Mass. 2013), *aff'd*, 783 F.3d 332 (1st Cir. 2015). The court upheld the provision, reasoning that the framing generation viewed class-based firearm laws as a permissible means to protect communities. *Id.* at 387. It emphasized that the framing generation enacted laws restricting the ability of enslaved persons, free Blacks, and Native Americans to possess firearms. *See id.* at 386–87 (condemning those laws as "xenophobic and bigoted" before concluding that class-based firearm regulations enacted to promote public safety were typical in early America).

[168] Cornell & DeDino, *supra* note 153, at 506.

[169] *Id.* The state prohibited Loyalists from even borrowing weapons. *Id.* at 507. Loyalty oaths persisted even after the American Revolution. *Id.* A 1787 Massachusetts law, for example, required participants in the Shay's Rebellion to pledge an oath of allegiance and turn over their firearms to the state for three years to be eligible for a pardon. *Id.* at 507–08.

[170] *See Rene E.*, 583 F.3d at 16 (observing that even scholars who reject the idea that the right is limited to "virtuous citizens" acknowledge that the Second Amendment does not apply to persons under eighteen (quoting Robert E. Shalhope, *The Armed Citizen in the Early Republic*, 49 LAW & CONTEMP. PROBS. 125, 130 (1986))).

[171] *See* Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations and Criminological Considerations*, 60 HASTINGS L.J. 1339, 1360 (2009) (noting that governing bodies guaranteeing arms-bearing rights have always also barred certain classes from possessing arms). The Framers understood this tradition and Congress and state legislatures have subsequently limited the right to bear arms for felons, persons with mental illness, and children. *Id.* at 1360–61.

[172] Cornell & DeDino, *supra* note 153, at 507. In fact, during the founding period, only a small number of privileged Americans received the full breadth of the Second Amendment's protections. *See Powell*, 926 F. Supp. 2d at 386–87 (explaining that, because the state disarmed racial minorities and Loyalists, very few Americans enjoyed the Second Amendment's full protections).

Case Law," "Post-Civil War Legislation," and "Post-Civil War Commentators."[173] Some view the framework in *Heller* as endorsing a broad inquiry that considers nineteenth- and even some twentieth-century sources.[174] Others claim that *Heller* recognized a hierarchy of historical sources in which founding-era sources are the most probative.[175] Because state firearm restrictions increased over the course of the nineteenth century, advocates of age-based regulations often look to that period to demonstrate that the regulation at issue is consistent with an established tradition.[176] In *Swearingen*, the government avers that the court should consider "modern" gun-safety measures as part of its historical analysis.[177]

a. Nineteenth-Century State Laws and Court Decisions

The government in *Swearingen* relies on several nineteenth- and early twentieth-century state court decisions—and the underlying laws at issue—to suggest that there is an age-old American tradition of significantly curtailing young adults' access to firearms.[178] The earliest and the lone pre-Civil War case that it cites is *Coleman v. State*, an 1858 Alabama Supreme Court decision.[179] There, the court upheld an indictment under an 1856 law that prohibited persons from selling or providing a pistol to male minors, when twenty-one was the age of majority.[180] The government points to *Coleman* as proof that nineteenth-century courts viewed state efforts to restrict minors' access to fire-

[173] District of Columbia v. Heller, 554 U.S. 570, 605, 610, 614, 616 (2008).

[174] *See* Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives (*BATFE*), 700 F.3d 185, 194 (5th Cir. 2012) (explaining that *Heller* demonstrates that courts may consult a broad range of historical sources to determine the scope of the Second Amendment).

[175] *See* Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives (*BATFE II*), 714 F.3d 334, 339–40 (5th Cir. 2013) (Jones, J., dissenting) (maintaining that relying on nineteenth- and twentieth-century legal regimes to discern the scope of the Second Amendment is dubious, and suggesting that courts should examine laws from the founding period when conducting their historical inquiries).

[176] *See* Cornell & DeDino, *supra* note 153, at 512–13 (explaining that "the range and scope" of firearm restrictions expanded in the nineteenth century).

[177] *See* Defendants' Motion for Summary Judgment, *supra* note 16, at 14–15 (claiming that "modern" laws, such as federal age-based restrictions, are relevant because they are "longstanding," and contending that state minimum purchase-age requirements are sufficiently similar).

[178] *See id.* at 13 (citing to nineteenth-century state court decisions as evidence that America has long prevented minors from possessing certain firearms).

[179] *See id.* (citing *Coleman v. State*, 32 Ala. 581 (1858), to support the general proposition that nineteenth-century state court decisions upheld age-based firearm restrictions).

[180] *Coleman*, 32 Ala. at 582–83; *see* Defendants' Motion for Summary Judgment, *supra* note 16, at 13 (citing the Alabama Supreme Court's 1858 decision in *Coleman v. State* to support the proposition that the Second Amendment permits states to prohibit minors from buying firearms). The defendant was accused of allowing his nephew to remove a pistol from a drawer in his store. *Coleman*, 32 Ala. at 582.

arms as within the bounds of the Second Amendment.[181] The government also emphasizes the Tennessee Supreme Court's 1878 decision in *State v. Callicutt*, in which that court affirmed the defendant's conviction for supplying a person younger than twenty-one with a "dangerous weapon."[182] In *Callicutt*, Tennessee's high court rejected the defendant's argument that, because he qualified for militia service, he had a right to acquire a firearm.[183]

The government further notes that, by the late nineteenth century, nearly twenty states and the District of Columbia barred minors from purchasing or possessing certain firearms.[184] Courts have previously cited those restrictions as evidence of a well-established legal tradition of restricting young persons' access to firearms.[185] At least one judge, however, has criticized courts for relying on nineteenth- and twentieth-century laws and suggested that determining the scope of the right requires limiting the historical inquiry to the period of the founding.[186] The plaintiffs in *Swearingen* echo that critique, averring that laws enacted so long after the Amendment's adoption have little probative

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[181] *See* Defendants' Motion for Summary Judgment, *supra* note 16, at 13 (suggesting that courts agreed with legal scholar Thomas Cooley's view that states may ban minors from purchasing firearms).

[182] *Id.*; *see* State v. Callicutt, 69 Tenn. 714, 716–17 (1878) (upholding an indictment for providing a pistol to a minor). The law at issue in *State v. Callicutt* defined it as a misdemeanor to "sell, give, or loan a minor a pistol, or other dangerous weapon" with exceptions for hunting or while travelling. 69 Tenn. at 714. Some Second Amendment scholars consider Tennessee cases to be highly probative of the scope of the right because in 1939 in *United States v. Miller*, 307 U.S. 174 (1939), the Supreme Court implied that the state's arms-bearing right closely mirrors the right codified in the U.S. Constitution. *See* Reynolds, *supra* note 47, at 500–01 (explaining that academics view Tennessee cases as particularly probative because in *Miller*, the Supreme Court cited to *Aymette v. State*, 21 Tenn. 154 (1840), an 1840 Tennessee Supreme Court case where the state's constitutional provision was at issue, suggesting that the right is akin to the right codified in the Second Amendment). Although the Court in *Heller* criticized the Tennessee Supreme Court's decision in *Aymette*, it approvingly referenced two others. *See* District of Columbia v. Heller, 554 U.S. 570, 613–14 (2008) (criticizing the Tennessee Supreme Court's interpretation of the Second Amendment in *Aymette* before praising its decisions in the *Simpson v. State*, 13 Tenn. 356 (1833), and *Andrews v. State*, 50 Tenn. 165 (1871)).

[183] *See* 69 Tenn. at 716–17 (holding that the law did not violate the state's arms-bearing right because its purpose was to reduce crime).

[184] *See* Defendants' Motion for Summary Judgment, *supra* note 16, at 8–9 (noting that the Fifth Circuit in *BATFE* provided a list of nineteenth-century statutes that barred persons under twenty-one from buying or possessing particular firearms); *see also* Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives (*BATFE*), 700 F.3d 185, 202 n.14 (5th Cir. 2012) (identifying such laws in Alabama, Delaware, the District of Columbia, Georgia, North Carolina, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nevada, Tennessee, Texas, West Virginia, Wisconsin, and Wyoming, and noting that several of those states had arms-bearing rights in their state constitutions that mirrored the Second Amendment).

[185] *See BATFE*, 700 F.3d at 202–03 (observing that several states restricted minors from purchasing and/or possessing firearms, and concluding that those laws were presumably valid).

[186] *See* Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives (*BATFE II*), 714 F.3d 334, 339 (5th Cir. 2013) (Jones, J., dissenting) (arguing that the majority's reliance on nineteenth- and twentieth-century gun regulations was dubious). Circuit Judge Jones emphasized that the Framers codified the scope of the right in 1791 and that the government cannot invoke later statutes and decisions to narrow that scope. *Id.* at 339 n.5.

value.[187] They further allege that the Court's decision in *Heller* likely invalidates the laws that the government cites.[188]

b. Early Twentieth-Century State Laws and Court Decisions

In addition to nineteenth-century sources, the government in *Swearingen* avers that courts should consider twentieth-century laws as part of the historical inquiry because such laws demonstrate the sort of "longstanding" restrictions that the Court in *Heller* deemed "presumptively lawful."[189] The government highlighted *State v. Quail*, a Delaware case from 1914 that addressed a state statute that prohibited minors from purchasing lethal weapons, except for pocket knives.[190] Although the court's decision concerned a separate provision of the statute, the government argues that the law itself demonstrates that states have long regulated firearm sales to minors.[191] The government also points to the federal minimum purchase age for buying handguns from licensed dealers, which Congress passed in 1968, as evidence that restrictions on young adults are the kind of "longstanding" measure that *Heller* concluded were "presumptively lawful."[192]

The plaintiffs in *Swearingen* characterize twentieth-century laws, like the one challenged in *Quail*, as anomalies.[193] They also contend that the government focuses on the wrong historical period and aver that *Heller* prioritizes founding-era sources to discern the scope of the right.[194]

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[187] Plaintiffs' Reply in Support of their Motion for Summary Judgment at 3, Nat'l Rifle Ass'n v. Swearingen, 545 F. Supp. 3d 1247 (No. 4:18cv137) (N.D. Fla. 2021).

[188] *Id.*

[189] *See* Defendants' Brief for Summary Judgment, *supra* note 16, at 14 (claiming that twentieth-century legislation is material because the laws demonstrate that age-based restrictions on firearms are "longstanding") (citing District of Columbia v. Heller, 554 U.S. 570, 626–27 & n.26)); *see also Heller*, 554 U.S. at 626–27 (explaining that the Court's decision does not call into question certain well-established gun laws, such as "conditions and qualifications" on gun sales).

[190] Defendants' Brief for Summary Judgment, *supra* note 16, at 9; *see* State v. Quail, 92 A. 859, 859 (Del. 1914) (stating that Delaware prohibits the sale of firearms to minors).

[191] Defendants' Motion for Summary Judgment, *supra* note 16, at 8–9.

[192] *Id.* at 14–15 (citing *Heller*, 554 U.S. at 626–27 & n.26); *see* Omnibus Crime Control and Safe Streets Act, Pub. L. No. 90-351, 82 Stat. 197 (1968) (codified as amended in scattered sections of 18 & 34 U.S.C.) (establishing twenty-one as the minimum age for purchasing a handgun from a licensed dealer).

[193] *See* Plaintiffs' Reply in Support of their Motion for Summary Judgment, *supra* note 187, at 2–3 (suggesting that the nineteenth- and twentieth-century laws that the government cites are anomalies and that the Court's decision in *Heller* would, nevertheless, invalidate such laws).

[194] *See id.* at 1–2 (claiming that relying on nineteenth- and twentieth-century legal sources is at odds with *Heller*).

B. Step Two: Determining and Applying the Proper Level of Constitutional Scrutiny

Under the prevailing two-step test for Second Amendment challenges, courts need only proceed to apply heightened scrutiny if they determine that the conduct or class at issue is within the "scope" of the Amendment.[195] Sometimes courts, nevertheless, proceed to step two, despite deciding that the conduct or class is unprotected in order to confirm their conclusion at step one.[196] To determine the proper standard of scrutiny to apply at step two, courts consider whether the law at issue strikes at the core of the Amendment's protections and the seriousness of the "burden on the right."[197] If the law at issue regulates activity within the scope of the Amendment, intermediate scrutiny is proper.[198] If the law at issue strikes at the core of the Second Amendment and substantially burdens the right, then strict scrutiny is required.[199]

In *Swearingen*, the parties first disagree about whether the court should apply strict or intermediate scrutiny because they disagree about whether the issue strikes at the core of the Second Amendment or just falls within the scope of Amendment.[200] The plaintiffs contend that the minimum purchase-age law warrants strict scrutiny because it seriously infringes young adults' core constitutional right to bear arms for self-defense.[201] At the same time, they maintain that Florida's minimum purchase age is unconstitutional, regardless of whether the court applies intermediate or strict scrutiny.[202] The government urges the court to

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[195] *See* Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives (*BATFE*), 700 F.3d 185, 195 (5th Cir. 2012) (discussing the two-step framework for Second Amendment challenges).

[196] *See, e.g.*, *id*. at 204 (proceeding to step two, despite a historical survey that indicated that age-based firearm laws are permissible).

[197] *See* United States v. Chovan, 735 F.3d 1127, 1138 (9th Cir. 2013) (explaining the factors that circuit courts generally weigh to determine which standard of scrutiny is appropriate).

[198] *See* Silvester v. Harris, 843 F.3d 816, 823 (9th Cir. 2016) (surveying post-*Heller* Second Amendment challenges and concluding that federal appellate courts agree that laws that infringe on the Second Amendment right trigger intermediate scrutiny).

[199] *See* Mai v. United States, 952 F.3d 1106, 1115 (9th Cir. 2020) (explaining under what circumstances strict scrutiny is proper), *cert denied*, 141 S. Ct. 2566 (2021).

[200] *See* Plaintiffs' Motion for Summary Judgment, *supra* note 126, at 21 (arguing that the law seriously infringes the Second Amendment's core because it is an all-out ban); Defendants' Motion for Summary Judgment, *supra* note 16, at 29 (asserting that the law is merely an "age qualification" not a ban).

[201] Plaintiffs' Motion for Summary Judgment, *supra* note 126, at 21.

[202] *Id.* at 24. Although the plaintiffs acknowledged that the Eleventh Circuit uses a two-part inquiry to resolve Second Amendment challenges, they nonetheless requested that the court adopt the text, history, and tradition test. *Id.* at 7; *see supra* note 122 and accompanying text (explaining the text, history, and tradition test). Only after that argument do they claim that the provision cannot survive any form of heightened scrutiny. Plaintiffs' Motion for Summary Judgment, *supra* note 126, at 24.

adopt intermediate scrutiny, but it likewise claims that the level of scrutiny is not determinative because the measure would withstand either level of scrutiny.[203]

Second, the parties also disagree on what the government must prove to satisfy intermediate scrutiny.[204] The government asserts that it need only demonstrate that there is a "reasonable" relationship between the minimum purchase-age provision and an "important" state interest.[205] The plaintiffs respond that intermediate scrutiny requires the government to also prove that the law does "not burden substantially more [protected conduct] than is necessary" to achieve its ends.[206]

1. The Strength of the State's Interest

Courts applying means-end scrutiny to a challenged law must consider the government's policy objective.[207] The government in *Swearingen* notes that the Florida legislature raised the state's minimum purchase age to promote its well-recognized, "compelling" objective to ensure public safety.[208] The government contends that the Act's legislative history indicates that the legislature sought to reduce gun violence and school shootings, which in its view is sufficient to satisfy constitutional scrutiny.[209] In 1984, in *Schall v. Martin*, the Su-

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[203] Defendants' Motion for Summary Judgment, *supra* note 16, at 29.

[204] *Compare* Plaintiffs' Motion for Summary Judgment, *supra* note 126, at 24 (claiming that intermediate scrutiny demands that the challenged provision be narrowly tailored to avoid "burden[ing] substantially more [protected conduct] than is necessary" to advance the state's objective) (quoting McCullen v. Coakley, 573 U.S. 464, 486 (2014))), *with* Defendants' Motion for Summary Judgment, *supra* note 16, at 23 (averring that the relationship between the government's interest and the law need not be "perfect").

[205] Defendants' Motion for Summary Judgment, *supra* note 16, at 22 (quoting Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives (*BATFE*), 700 F.3d 185, 206 (5th Cir. 2012)). The government's position is consistent with how federal circuit courts have applied intermediate scrutiny to resolve Second Amendment disputes. *See* Silvester v. Harris, 843 F.3d 816, 821–22 (9th Cir. 2016) (intermediate scrutiny requires a "reasonable fit" between the law at issue and an "important" state interest); United States v. Booker, 644 F.3d 12, 25 (1st Cir. 2011) (same); United States v. Skoien, 614 F.3d 638, 641–42 (7th Cir. 2010) (same).

[206] Plaintiffs' Motion for Summary Judgment, *supra* note 126, at 24 (quoting *Coakley*, 573 U.S. at 486). The plaintiffs do not cite any Second Amendment decision in which a federal court applies their version of intermediate scrutiny. *See id.* (relying entirely on the Supreme Court's 2014 decision in *McMullen v. Coakley* to support their view of intermediate scrutiny). The plaintiffs base their argument on *McMullen*, a case that considered whether a Massachusetts law that created a "buffer zone" outside of abortion clinics in which demonstrators could not stand violated the First Amendment. 573 U.S. at 469. There, the parties agreed that content-neutral laws restricting speech pass constitutional muster only if they are "narrowly tailored to serve a significant governmental interest, and . . . they leave open ample alternative channels for communication of the information." *Id.* at 477 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)).

[207] *See Governmental Interest*, BLACK'S LAW DICTIONARY, *supra* note 32 (defining governmental interest as the "matter of public concern" that the state aims to address).

[208] Defendants' Motion for Summary Judgment, *supra* note 16, at 23 (quoting Schall v. Martin, 467 U.S. 253, 264 (1984)).

[209] *Id.*

preme Court held that crime prevention is a compelling state interest.[210] Federal circuit courts have since reiterated that conclusion in a variety of Second Amendment cases.[211] Notably, in *BATFE*, the Fifth Circuit recognized a more precise important state interest: combatting violent crime committed by persons younger than twenty-one.[212] The plaintiffs in *Swearingen* dispute neither the state's objective nor that it is important; rather, they suggest that the law is not appropriately tailored to the state's public safety interest because it prohibits young adults from purchasing any kind of firearm for any lawful purpose.[213]

2. Gravity of the Burden

In *Swearingen*, the plaintiffs allege that Florida's minimum purchase-age burdens young adults' core Second Amendment right because it prohibits them from purchasing any firearm regardless of source and thereby interferes with their right to use a firearm for self-defense or other lawful purposes.[214] They suggest that the provision is not a presumptively lawful sales "condition" under *Heller*, but is effectively a total firearm ban for persons under twenty-one.[215] The plaintiffs further claim that, unlike the statutory scheme that the Fifth Circuit upheld in *BATFE*, the Florida law is not sufficiently targeted because it includes every kind of firearm and every seller—not just federally licensed dealers.[216] Specifically, the plaintiffs contend that the Florida law is a blanket ban as opposed to a restriction because it makes it nearly impossible for individuals without parents living in the state to acquire a firearm.[217] They also contrast the provision to the federal laws that prohibits convicted felons

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[210] 467 U.S. at 264. The Supreme Court's 1984 case *Schall v. Martin* involved a challenge to a New York law that permitted the state to detain juveniles prior to trial based on a determination that they posed a significant risk of perpetrating another crime. *Id.* at 255. The Court upheld the measure, concluding that it promoted a legitimate state interest. *Id.*

[211] *See, e.g.*, Mai v. United States, 952 F.3d 1106, 1116 (9th Cir. 2020) (holding that crime prevention is a compelling state interest), *cert denied*, 141 S. Ct. 2566 (2021); Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 693 (6th Cir. 2016) (same); Horsley v. Trame, 808 F.3d 1126, 1132 (7th Cir. 2015) (concluding that public safety is a compelling state objective).

[212] Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives (*BATFE*), 700 F.3d 185, 209 (5th Cir. 2012).

[213] *See* Plaintiffs' Motion for Summary Judgment, *supra* note 126, at 25 (claiming that the provision fails intermediate scrutiny because the legislature could have accomplished its public safety objective through less restrictive means).

[214] *Id.* at 17–18.

[215] *Id.* at 17 (quoting District of Columbia v. Heller, 554 U.S. 570, 626–27 & n.26 (2008)); *see Heller*, 554 U.S. at 626–27 & n.26 (categorizing "conditions and qualifications on the commercial sale of arms" as "presumptively lawful").

[216] *See* Plaintiffs' Motion for Summary Judgment, *supra* note 126, at 26–27 (rejecting the comparison to the handgun restrictions at issue in *BATFE* because those provisions enabled eighteen- to twenty-year-olds to acquire handguns through private sales).

[217] *Id.* at 26–27, 29–30.

and previously committed persons from accessing firearms because those provisions require individual adjudications whereas the Florida law does not.[218]

The government, in response, characterizes the minimum purchase-age provision as a modest measure.[219] It insists that the law is a straightforward, age-based restriction premised on the age of majority established at common law.[220] The government suggests that the provision is far from an intrusion on the Second Amendment's core, and instead claims that it does not generally infringe young adults' "presumed right" whatsoever because the law permits young adults to possess firearms.[221] After all, the law does not bar an eighteen-year-old Florida resident from owning a firearm.[222] Moreover, the government notes that the restriction is transitory, further lessening its severity.[223] In short, it suggests that the legislature addressed a specific concern: young adults obtaining dangerous weapons without appropriate supervision.[224]

The plaintiffs, nonetheless, maintain that there is no proof that the ban will achieve Florida's public safety objective.[225] In their view, the state legislature relied only on the conjecture that, if young adults can buy guns, they will commit violent crimes.[226] The plaintiffs principally rely on three data points to demonstrate that the provision is overly broad and unlikely to be effective: (1) less than two percent of eighteen- to twenty-year-olds will ever perpetrate a violent crime; (2) gun crimes overwhelmingly involve the use of guns acquired

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[218] *See* Plaintiffs' Reply in Support of their Motion for Summary Judgement, *supra* note 187, at 9–10 (observing that 18 U.S.C. § 922(g)(1) and (4) require individualized, formal proceedings prior to the revocation of a person's firearm rights). The plaintiffs cite to Justice Amy Coney Barrett's dissent when she was a judge for the Seventh Circuit in the 2019 case *Kanter v. Barr*, in which she suggested that the government can only disarm "dangerous people." *Id.* at 10 (citing Kanter v. Barr, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting)). She warned that the Second Amendment's guarantee would be hollow if legislatures could "designate any group as dangerous." *Kanter*, 919 F.3d at 465.

[219] *See* Defendants' Motion for Summary Judgement, *supra* note 16, at 21 (claiming that Florida's minimum purchase-age provision warrants intermediate scrutiny because it only decides which persons are sufficiently "responsible" to purchase a gun).

[220] *Id.*

[221] *See id.* at 22 (noting that young adults in Florida may still receive a firearm as a gift from a parent or guardian).

[222] *See id.* (explaining that the law only applies to sales and that young adults may still acquire and use firearms).

[223] *Id.* at 21.

[224] *Id.* at 24. Defendants maintain that the legislature developed the so-called "sale-gift distinction" to remedy a narrow issue: the ability of persons between age eighteen and twenty to buy a firearm without the consent of a parent, guardian, or other responsible adult. *Id.* at 29.

[225] *See* Plaintiffs' Motion for Summary Judgment, *supra* note 126, at 27 (averring that there is no data indicating that the ability of young adults to purchase firearms leads to gun violence).

[226] *See id.* at 26 (contending that the connection between a minimum purchase age for firearms and the state's interest in public safety and school security is "speculative").

illegally, not through licensed dealers; and (3) long guns are seldomly utilized to commit crime.[227]

The government responds that those data points are misleading, and emphasize that what matters is the violent crime rate for young adults "*compared to other age groups*."[228] It points out that persons between ages eighteen and twenty are disproportionately responsible for "violent crime."[229] Although the government does rely on criminological data, it also maintains that findings in neuroscience support setting the minimum purchase age at twenty-one.[230] In particular, it observes that, because their brains are still maturing, eighteen-year-olds are more susceptible to act in ways that are "impulsive, emotional, and risky" than their slightly older twenty-one-year-old peers.[231]

C. The District Court's Application of the Two-Step Framework

On June 24, 2021, the U.S. District Court for the Northern District of Florida granted the government's motion for summary judgment.[232] At the outset of its decision, the court repudiated the claim that *Heller* provides lower courts with "clear" guidance for adjudicating Second Amendment challenges and described the current state of Second Amendment jurisprudence as a "morass of convoluted, competing, and confusing pronouncements."[233] After acknowledging the challenge of applying *Heller*, the court evaluated the Act's minimum purchase-age provision using the prevailing two-step framework.[234]

The court explained that the Eleventh Circuit's version of the two-step test requires answering two distinct, but related, questions at step one.[235] First,

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[227] *Id.* at 27–28. Rather than improve public safety, the plaintiffs contend that the minimum purchase age will put young adults at greater risk. *Id.* at 28. They emphasize that young adults are often involved in violent crime as victims and that the law effectively renders them defenseless. *Id.* at 29.

[228] Defendants' Motion for Summary Judgement, *supra* note 16, at 26.

[229] *Id.* at 26–27. For example, in 2018, eighteen- to twenty-year-olds made up less than 4% of the American population, but they accounted for nearly 10% of "violent crime" arrests. *Id.* at 26.

[230] *Id.* at 24.

[231] *Id.* at 25. The government describes a so-called "developmental mismatch" in the brains of young adults. *Id.* at 24–25. They emphasize that young adults' frontal cortex, that regulates "cognitive control," are underdeveloped while at the same time their nucleus accumbens and amygdala—parts of the brain linked to rash behavior—are hyperactive. *Id.* at 24–25. As such, according to the government, young adults struggle to keep their reckless conduct in check. *Id.* at 25.

[232] Nat'l Rifle Ass'n v. Swearingen, 545 F. Supp. 3d 1247, 1250 (N.D. Fla. 2021), *appeal docketed*, No. 21-12314 (11th Cir. July 8, 2021). It simultaneously denied the plaintiff's motion for summary judgment. *Id.*

[233] *Id.* at 1252. The court colorfully compared the clarity of the Court's decision in *Heller* to that of the Suwannee River, a blackwater river in Northern Florida. *Id.* at 1252 & n.6 (explaining that the river's water is "darkly stained, resembling black tea" (quoting *Tannins and Blackwater Rivers*, OGEECHEE RIVERKEEPER (May 29, 2020), https://www.ogeecheeriverkeeper.org/tannins-and-blackwater-rivers/ [https://perma.cc/UA8R-S9XR])).

[234] *Id.* at 1252–53.

[235] *Id.* at 1255.

considering the history surrounding the Amendment's adoption, do eighteen- to twenty-year-olds have a right to buy firearms?[236] Second, if the government fails to demonstrate that young adults had no such right at the founding, is the regulation nonetheless "longstanding" under *Heller*?[237] In other words, in the Eleventh Circuit, founding-era history is relevant for determining the scope of the right and more modern history is relevant for determining whether a regulation is "longstanding" and thus "presumptively lawful."[238]

The court reviewed the parties' founding-era evidence and determined that it shed little light on whether the right to bear arms protects young adults' ability to purchase firearms.[239] The parties' focus on militia laws made sense given that no founding-era law barred the sale of firearms to eighteen- to twenty-year-olds, but the court emphasized that militia laws provide only modest insights.[240] To start, the history surrounding the founding demonstrates that age requirements for militia service varied among the states.[241] Some states included eighteen-year-olds in the militia, others did not.[242] Moreover, because *Heller* provides that the right is an individual right unconnected to militia service, the court reasoned that militia laws have "limited value" in discerning the scope of the right.[243] More broadly, the court cast doubt on the idea that a consensus on the Second Amendment's meaning ever existed.[244]

Despite concluding that the Act's minimum purchase-age requirement is not grounded in founding-era history, the court did not proceed to apply any form of means-end scrutiny.[245] Instead, it asked an additional question at step one: whether the measure is "longstanding" and thus "presumptively lawful" under *Heller*.[246] The district court determined that a law is "longstanding" if:

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[236] *Id.*

[237] *Id.* at 1261–62.

[238] *Id.* at 1253–55; District of Columbia v. Heller, 554 U.S. 570, 626–27 & n.6 (2008) (identifying certain "longstanding" gun-safety measures as "presumptively lawful").

[239] *See Swearingen*, 545 F. Supp. 3d at 1258 (characterizing the relevant history as "muddled" and "unhelpful"). The court also recognized that judges are not historians and accordingly are not trained to resolve conflicting historical evidence. *Id.* at 1254 n.8, 1258–59.

[240] *Id.* at 1256–59.

[241] *Id.* at 1257–58. The minimum age for the militia varied among the states, and states adjusted this minimum age depending on whether they were at war. *Id.*

[242] *See id.* (noting that some states established eighteen as the minimum age for militia service, whereas others selected twenty-one).

[243] *Id.* at 1258.

[244] *Id.* at 1259. The court emphasized that in contemporary America the public rarely agrees on the answer to such granular political questions and then asked, "Why should we assume that our forbearers were any different?" *Id.*

[245] *See id.* at 1261 (deciding that it must ask whether the restriction is "longstanding" under *Heller* before advancing to step two).

[246] *Id.*; District of Columbia v. Heller, 554 U.S. 570, 626–27 & n.6 (2008) (emphasizing that its decision does not call into question certain "longstanding" firearm restrictions and providing a non-exhaustive list of "presumptively lawful" regulations).

(1) *Heller* explicitly identified it as such; (2) it is analogous to the examples provided in *Heller*; or (3) it is "longstanding in time."[247] It then concluded that Florida's minimum purchase age is "longstanding" because laws restricting the sale of certain firearms to eighteen- to twenty-year-olds originated in the 1960s, prior to laws explicitly identified as longstanding in *Heller*.[248] The court also found that the law at issue is analogous to the presumptively lawful measures identified in *Heller* because, like the restrictions on felons and persons with mental illness, it targets a high-risk population.[249] After concluding that Florida's minimum purchase age qualifies as longstanding and therefore does not infringe constitutionally-protected conduct, the court explained that under Eleventh Circuit precedent, the plaintiff cannot rebut that presumption.[250] Accordingly, the court upheld the measure at step one as consistent with the Second Amendment.[251]

III. FLORIDA'S MINIMUM PURCHASE AGE PROVISION IS CONSTITUTIONAL

This Part contends that in 2021, in *National Rifle Ass'n v. Swearingen*, the U.S. District Court for the Northern District of Florida correctly concluded that Florida's minimum-purchase-age law is constitutional.[252] Section A maintains that the court wisely avoided a robust historical analysis at step one and rightly concluded that the parties' founding-era evidence is ambiguous.[253] Section B avers that federal courts should adopt the U.S. Court of Appeals for the Eleventh Circuit's approach to step one that considers whether a firearm regulation is longstanding under the Supreme Court's 2008 decision, *District of Columbia v. Heller*.[254] Section C, however, argues that a determination that a law is longstanding and thus presumptively lawful should be rebuttable by demonstrating that it fails intermediate scrutiny.[255] It further argues that Florida's minimum-purchase-age law withstands intermediate scrutiny because the state's interest is unquestionably compelling and criminological and scientific data substantially support the law.[256] Finally, Section D contends that whether

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[247] *Swearingen*, 545 F. Supp. 3d at 1262; *see also Heller*, 554 U.S. at 626–27 (explaining that the Court's decision does not call into question certain "longstanding" firearm laws, including those that establish requirements for commercial sales).

[248] *Swearingen*, 545 F. Supp. 3d, at 1267–68.

[249] *Id.* at 1267.

[250] *See id.* at 1268 (explaining that circuit precedent holds that longstanding firearm regulations are *per se* constitutional).

[251] *Id.*

[252] *See infra* notes 252–311 and accompanying text.

[253] *See infra* notes 258–271 and accompanying text.

[254] *See infra* notes 272–279 and accompanying text.

[255] *See infra* notes 280–299 and accompanying text.

[256] *See infra* notes 280–299 and accompanying text.

the Florida law is constitutional is important because it promises to save lives.[257]

A. Step One: Identifying the Right Historical Lesson

Courts are institutionally ill-equipped to conduct historical surveys.[258] When courts conduct historical inquiries, they encounter a slew of problems, including determining what period(s) to examine and the appropriate degree of specificity for the legal rules deduced from that history.[259] It is also an especially knotty task for judges to differentiate between genuine historical research and sharp legal advocacy cloaked in history.[260] Above all else, though, courts invite criticism that they merely reverse-engineer a historical justification to arrive at an ideologically-motivated result.[261] Because Second Amendment issues are so divisive, the concern is especially acute in decisions interpreting the scope of the right.[262]

At step one, the district court in *Swearingen* correctly determined that founding-era militia laws provide little insight about the scope of the Second Amendment.[263] First, in *Heller*, the Supreme Court held that the Amendment codified a right "unconnected with militia service" and that self-defense is the

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[257] *See infra* notes 300–311 and accompanying text.

[258] *See* Saul Cornell, Heller, *New Originalism, and Law Office History: "Meet the New Boss, Same as the Old Boss*," 56 UCLA L. REV. 1095, 1111 (2009) (suggesting that the Supreme Court's historical inquiries have generally been "amateurish" and subject to "ideological manipulation").

[259] *See* Miller, *supra* note 145, at 858 (discussing the difficulties in relying on historical inquires to develop a "durable and principled" jurisprudence, including "[w]hose history" to consider and what to glean from alleged "historical analogue[s]").

[260] *See* Cornell, *supra* note 142, at 1697 (suggesting that it is extremely difficult for judges to analyze "the complex and contradictory historical evidence" that litigants invoke to support their position). Judges are ill-equipped to perform this analysis partly because the legal literature they consult is itself flawed. *See* Cornell, *supra* note 258, at 1099 (averring that the absence of formal peer-review processes in the legal academy combines with law professors' lack of "specialized" training to generate flawed interdisciplinary legal scholarship).

[261] *See* Cornell, *supra* note 258, at 1098 (arguing that the Supreme Court's 2008 case *District of Columbia v. Heller* exemplifies an outcome-driven approach whereby judges cherry-pick historical materials to craft holdings consistent with their personal political projects); Wilkinson, *supra* note 77, at 269 (observing that the justices in both the majority and minority in *Heller* predictably concluded that the historical evidence proved that their interpretation of the Second Amendment was correct).

[262] *See* Harry Enton, *The U.S. Has Never Been So Polarized on Guns*, FIVETHIRTYEIGHT (Oct. 4, 2017), https://fivethirtyeight.com/features/the-u-s-has-never-been-so-polarized-on-guns/ [https://perma.cc/X4XE-EF7B] (explaining that gun regulation is an extremely "polarized" political issue in the United States). Gun ownership is a more reliable indicator of party affiliation than gender or sexual orientation. *Id.* Even compared to other "culture war issues," such as abortion and same-sex marriage, Democratic and Republican voters are more divided on how they view guns. *Id.*

[263] *See* Nat'l Rifle Ass'n v. Swearingen, 545 F. Supp. 3d 1247, 1258 (N.D. Fla. 2021) (noting that "whether a select group was considered part of the militia has limited value in determining the scope of the Second Amendment" because *Heller* held that it protects a right to self-defense unconnected to militia service), *appeal docketed*, No. 21-12314 (11th Cir. July 8, 2021).

Amendment's core concern.[264] Some federal judges suggest that militia laws clearly demonstrate that the Second Amendment protects the rights of young adults.[265] They reason that the framing generation understood how teenagers behave and yet decided to include them in the militia, thus establishing a group that the Second Amendment protects.[266] But those judges ignore *Heller*'s plain teaching that the right of self-defense that the plaintiffs in *Swearingen* invoke is unrelated to militia service.[267] If militia laws provide any clues about the scope of the right to keep and bear arms at the founding, their different minimum-age provisions demonstrate that Americans disagreed about at what age the right vests.[268] In light of the ambiguous historical evidence, the district court wisely observed that the framing generation, like the American public today, probably agreed on some vague gun-safety principles while disagreeing on how those principles should be applied.[269] Recognizing that entire nations rarely share a single view on such a granular political issue and that the framing generation was not a monolith with respect to the firearm rights of young adults, the district court took a pragmatic view of history.[270] The district court's approach is far better than insisting that the historical evidence provides an authoritative and clear answer about the scope of the right.[271]

B. The Court Correctly Considered Whether the Law Is "Longstanding"

Federal courts should adopt the district court's two-pronged approach to step one and consider whether a particular gun regulation is "longstanding" because it: (1) faithfully applies *Heller*; and (2) recognizes that Americans'

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[264] 554 U.S. 570, 582, 599 (2008).

[265] *See, e.g.*, Nat'l Rifle Ass'n v. Bureau of Firearms, Alcohol, Tobacco, & Explosives (*BATFE II*), 714 F.3d 334, 342 (5th Cir. 2013) (Jones, J., dissenting) (suggesting that determining whether young adults enjoy the Second Amendment's core guarantee is "easy" because at the time of the framing, they were militia members, and therefore, were obligated to own firearms). Five judges joined Circuit Judge Jones in her dissent: Circuit Judges E. Grady Jolly, Jerry E. Smith, Edith Brown Clement, Priscilla R. Owen, and Jennifer Walker Elrod. *Id.* at 335.

[266] *See id*. at 342 (contending that the First Congress was unaware of modern technology but understood teenage boys).

[267] *See Heller*, 554 U.S. at 605 (finding that "important founding-era legal scholars" endorse the Court's conclusion that the Second Amendment guarantees "an individual right unconnected with militia service"); *BATFE II*, 714 F.3d at 342 (Jones, J., dissenting) (relying on founding-era militia laws to conclude that the Second Amendment's guarantees apply to eighteen- to twenty-year-olds).

[268] *See Swearingen*, 545 F. Supp. 3d at 1258 (explaining that there was "no uniform age for militia service" during the founding era).

[269] *Id*.

[270] *See id*. (asking why the court should believe that the founding generation agreed on the specific scope of the Second Amendment).

[271] *See id*. (reasoning that the nation's current politics demonstrate that the public typically disagrees about something as granular as the age at which the Second Amendment vests); Cornell, *supra* note 142, at 1697 (arguing that it is extremely difficult for judges to analyze muddled historical evidence).

enduring acceptance of a particular firearm restriction is powerful evidence of its constitutionality.[272] In *Swearingen*, the district court acknowledged that *Heller* failed to establish the precise limits of the Second Amendment's reach, but it nonetheless upheld its duty to apply it.[273] For better or for worse, *Heller* included a non-exhaustive list of "presumptively lawful" gun laws, and two years later in 2010, the Supreme Court reiterated those limits in *McDonald v. City of Chicago*.[274] In *Swearingen*, the district court correctly reasoned that minimum-purchase-age laws are analogous to the presumptively lawful firearm restrictions governing felons and the mentally ill because each aims to prevent high-risk groups from obtaining dangerous weapons.[275] Other courts evaluating age-based restrictions should further emphasize that *Heller*'s list of presumptively constitutional laws also includes "qualifications on the commercial sale of arms," and that age qualifications fit squarely into that category, too.[276] In *Swearingen*, Eleventh Circuit precedent compelled the district court to conclude that longstanding laws are *per se* constitutional.[277] As the district court observed, however, *Heller* merely stated that such laws are "*presumptively* lawful" and, of course, litigants may overcome presumptions.[278] Accordingly, even if a court concludes that a regulation is longstanding, the plaintiffs should have an opportunity to rebut that presumption by demonstrating at step two that the government cannot satisfy the appropriate level of means-end scrutiny.[279]

C. The Role of Intermediate Scrutiny

On appeal, the Eleventh Circuit should overturn its precedent that longstanding laws are *per se* constitutional and instead evaluate longstanding firearm restrictions under intermediate scrutiny.[280] In proceeding to step two, the court should recognize that since *Heller*, federal appellate courts have concluded that strict scrutiny is only appropriate for laws that seriously burden the

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[272] *See Heller*, 554 U.S. at 626–27 & n.6 (identifying certain longstanding restrictions on firearms as "presumptively lawful"); *Swearingen*, 545 F. Supp. 3d at 1261 (explaining that many courts reason that persistent public acceptance is good evidence of a restriction's constitutionality).

[273] *See Swearingen*, 545 F. Supp. 3d at 1250, 1252–53 (noting that the parties' dispute "falls squarely in the middle of a constitutional no man's land," but nonetheless attempting to apply the governing case law).

[274] McDonald v. City of Chicago, 561 U.S. 742, 786 (2010); *Heller*, 554 U.S. at 626–27 & n.6.

[275] *Swearingen*, 545 F. Supp. 3d at 1266–67.

[276] *See Heller*, 554 U.S. at 626–27 & n.26 (identifying "laws imposing conditions and qualifications on the commercial sale" of firearms as "presumptively lawful").

[277] *Swearingen*, 545 F. Supp. 3d at 1268 (explaining that Eleventh Circuit precedent holds that the presumption cannot be rebutted).

[278] *Id.*; *Heller*, 554 U.S. at 627 n.26 (identifying certain "*presumptively* lawful regulatory measures") (emphasis added).

[279] *See Swearingen*, 545 F. Supp. 3d at 1268 (explaining that a presumption merely shifts the burden of proof to the other party (citing *Presumption*, BLACK'S LAW DICTIONARY, *supra* note 32)).

[280] *See id.* (noting that the presumption cannot be overcome in the Eleventh Circuit).

core protections of the Second Amendment.[281] In *Heller*, the Supreme Court identified the core of the Amendment as the right to keep and bear arms for defense of the home, but explained that it only extends to "law-abiding, responsible citizens."[282] In *Swearengin*, the plaintiffs presume that eighteen- to twenty-year-old adults fit that description.[283] They provide certain criminological data that suggests that the minimum purchase-age provision would be ineffective because only a tiny percentage of young adults ever perpetrate a "violent crime."[284] Those statistics may suggest that young adults as a class are law-abiding, but they do not shed light on whether the group is responsible.[285]

In contrast, laws that do not burden the core protections of the Second Amendment receive only intermediate scrutiny.[286] Given that the Florida legislature's decision to raise the minimum purchase age for all firearms to twenty-one does not burden the Second Amendment's core, the court should apply intermediate scrutiny.[287] The Florida legislature reasonably determined that scientific evidence demonstrates that, as a class, persons age eighteen to twenty are irresponsible.[288] As both the Fifth and Seventh Circuits observed when considering challenges to other age-based firearm restrictions, research on brain development demonstrates that young adults are less capable of self-control and more likely to act impulsively than older adults.[289] This is because

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[281] *See* Mai v. United States, 952 F.3d 1106, 1115 (9th Cir. 2020) (explaining that strict scrutiny is limited to restrictions that "substantial[ly] burden" the Second Amendment's core), *cert denied*, 141 S. Ct. 2566 (2021); Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives (*BATFE*), 700 F.3d 185, 195 (5th Cir. 2012) (explaining that laws that do not infringe the Second Amendment's core only require intermediate scrutiny); United States v. Chester, 628 F.3d 673, 682–83 (4th Cir. 2010) (holding that intermediate scrutiny applies because the plaintiff's "claim is not within the core right identified in *Heller*").

[282] *Heller*, 554 U.S. at 635.

[283] *See* Plaintiffs' Motion for Summary Judgment, *supra* note 126, at 1–2 (averring that Florida's minimum purchase-age requirement prohibits "an entire class of law-abiding, responsible adults" from accessing firearms).

[284] *See id.* at 27–28 (noting that less than 2% of persons ages eighteen to twenty are ever responsible for a "violent crime").

[285] *See Responsible*, DICTIONARY.COM, https://www.dictionary.com/browse/responsible [https://perma.cc/6FDL-FB3V] (defining "responsible" as "answerable . . . for something within one's power, *control*, or management") (emphasis added).

[286] *See supra* note 281 and accompanying text (explaining how courts determine the proper level of scrutiny).

[287] *See* United States v. Chester, 628 F.3d 673, 683 (4th Cir. 2010) (holding that intermediate scrutiny applied because domestic violence misdemeanants are not "law-abiding, responsible" persons entitled to the Second Amendment's core protection (quoting *Heller*, 554 U.S. at 635)).

[288] *See* Defendants' Motion for Summary Judgment, *supra* note 16, at 24–25 (summarizing neuroscience research that demonstrates that eighteen-year olds are more likely than their slightly older peers to act in ways that are "impulsive" and "risky" because their brains are still maturing).

[289] *See* Horsley v. Trame, 808 F.3d 1126, 1133 (7th Cir. 2015) (pointing out that the areas of the brain that regulate "impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable" are still developing "until the early 20s" (quoting Ruben C. Gur, Ph.D.)); Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms, & Explo-

a person's brain does not fully mature until they are well into their twenties.[290] Specifically, the prefrontal cortex, that regulates "impulse control, judgment, and planning" is the final area of the brain to develop.[291] Some scientists suggest that the reason young adults generally perpetrate crime at higher rates compared to other age groups is because their brains make them more prone to engage in reckless behavior.[292]

More importantly, however, the Florida statute does not burden the core of the Second Amendment because it does not prohibit any eighteen-year-old from storing and using a firearm in their home for purposes of self-defense.[293] Although Florida's minimum purchase age extends to any sale, it nonetheless does not bar possession.[294] Young adults are free to acquire a firearm from a parent or other adult over twenty-one and use it for any lawful purpose, including to defend their home.[295] Moreover, the restriction is temporary.[296]

The Eleventh Circuit—the federal circuit in which the U.S. District Court for the Northern District of Florida sits—has not yet weighed in on the proper level of scrutiny to apply at step two of its Second Amendment inquiry.[297] On appeal, it should adopt the form of intermediate scrutiny that other circuits use for Second Amendment disputes that requires only that the law have a "reasonable fit" with an important state interest.[298] Accordingly, the Eleventh Circuit should hold that Florida's minimum purchase age is constitutional because both criminological data and scientific research demonstrate that such laws are

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sives (*BATFE*), 700 F.3d 185, 211 n.21 (5th Cir. 2012) (observing that research demonstrates that young adults are "more impulsive" than persons twenty-one and older because key portions of the brain are still developing (quoting Brief for the Am. Med. Ass'n et al. as *Amici Curiae* in Support of Neither Party at 19–20, Miller v. Alabama, 567 U.S. 460 (2012) (Nos. 10–9646, 10–9647))).

[290] Brief of *Amicus Curiae* Giffords Law Center to Prevent Gun Violence in Support of Appellees and Affirmance at 16–17, Hirschfeld v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 14 F.4th 322 (4th Cir. 2021) (No. 19-2250).

[291] *Id.*

[292] *See id.* at 19 n.22 (observing that teens' penchant for risky behavior explains the age groups' relatively high crime rates).

[293] *See* FLA. STAT. § 790.065(13) (2021) (prohibiting persons under twenty-one from *buying* a firearm); *see also* District of Columbia v. Heller, 554 U.S. 570, 635 (2008) (holding that the core of the Second Amendment protects the right of "law-abiding, responsible citizens" to use firearms to defend their homes).

[294] *See* § 790.065(13) (addressing gun sales only, not use or possession).

[295] *Id.*; Defendants' Motion for Summary Judgment, *supra* note 16, at 22 (acknowledging that the law may make it more difficult for persons under twenty-one to acquire a firearm, but noting that it is still lawful for Florida residents under twenty-one to receive a firearm as a gift).

[296] *See* Defendants' Motion for Summary Judgment, *supra* note 16, at 21 (claiming that the law's burden is lessened because young adults will ultimately outgrow the restriction).

[297] *Id.* at 19.

[298] *See, e.g.*, Mai v. United States, 952 F.3d 1106, 1115 (9th Cir. 2020) (quoting Silvester v. Harris, 843 F.3d 816, 821–22 (9th Cir. 2016)) (holding that intermediate scrutiny requires a "reasonable" relationship between an important state interest and the law at issue), *cert denied*, 141 S. Ct. 2566 (2021); Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives (*BATFE*), 700 F.3d 185, 207 (5th Cir. 2012) (same).

a reasonable solution to promoting the state's compelling interest in reducing gun violence.[299]

D. A Simple, Popular Solution That Could Save Lives

Raising the minimum purchase age to twenty-one for all firearms is a simple, popular, and promising strategy for reducing the forty-one thousand lives lost to gun violence annually in America.[300] Despite the fact that gun rights is an especially divisive issue, public polling indicates that raising the minimum purchase age enjoys broad support.[301] Even most Republicans, who generally oppose stricter gun laws, reportedly support the measure.[302] In 2018, Dick's Sporting Goods and Walmart—two major firearm retailers—raised the minimum purchase age in their stores to twenty-one on their own after the deadly shooting at Marjory Stoneman Douglas High School.[303] The chief executive of Dick's is a gun owner, but after listening to victims of the Parkland shooting tell their stories, he became convinced that it was time to act.[304]

Congress and state legislatures, however, should not rely on the goodwill of licensed dealers to save lives.[305] Gun homicides account for more than thirteen thousand deaths each year.[306] Notably, persons younger than twenty-five are responsible for nearly half of those deaths.[307] Furthermore, raising the minimum purchase age for all firearm sales may provide benefits beyond reducing

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[299] *See* Horsley v. Trame, 808 F.3d 1126, 1133 (7th Cir. 2015) (holding that both scientific research and criminological data undergird the challenged law); *BATFE*, 700 F.3d at 210, 211 & n.21 (same); Defendants' Motion for Summary Judgment, *supra* note 16, at 24–26 (summarizing the research indicating that young adults' brains are less developed and that they commit crime at higher rates than other age groups).

[300] *See Statistics*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, https://giffords.org/gun-violence-statistics/ [https://perma.cc/ZRQ6-H6XL] (noting that guns kill forty-one thousand Americans annually); Winkler & Natterson, *supra* note 9 (arguing that Congress should adopt a minimum purchase-age that governs every source of firearm sales and that if the law barred persons under twenty-five from purchasing a gun or possessing one without supervision, deaths would decline).

[301] *See* Enton, *supra* note 262 (noting that guns are an extremely partisan issue); Alex Leary, *Poll: 'Vast Majority' of Florida Voters Support Stricter Gun Laws*, TAMPA BAY TIMES (Feb. 28, 2018), https://www.tampabay.com/florida-politics/buzz/2018/02/28/poll-vast-majority-of-florida-voters-support-stricter-gun-laws/ [https://perma.cc/6AXT-3PNT] (finding that almost 80% of Florida voters favor raising the gun purchase-age to twenty-one).

[302] *See* Tim Marcin, *Majority of Republicans Support Raising Minimum Gun Age to 21, Poll Finds*, NEWSWEEK (Aug. 3, 2018), https://www.newsweek.com/raise-minimum-gun-age-republicans-majority-support-poll-law-1056249 [https://perma.cc/7V5Z-TY8K] (reporting that 54% of Republicans support changing the minimum purchase-age for all firearms to twenty-one and that 32% "strongly" endorse the idea).

[303] Creswell & Corkery, *supra* note 40.

[304] *See id*. (explaining that Dick's CEO Edward Stack was "disturbed" after the shooting in Parkland and that the students' activism persuaded him to raise the minimum purchase age in his stores).

[305] *See id*. (discussing Dick's and Walmart's decision to limit gun sales to those over twenty-one).

[306] *Statistics*, *supra* note 300.

[307] Winkler & Natterson, *supra* note 9.

gun homicides because guns also contribute to two other major causes of death for young Americans: unintentional injury and suicide.[308] Although gun violence remained an issue in 2020, the public response to the COVID-19 pandemic led to a significant decline in the number of mass shootings, including those in schools.[309] Tragically, with students returning to in-person learning, that could change.[310] The court's decision in *Swearingen* is especially important because it preserves a data-driven strategy and ensures that students can focus on learning, rather than fighting for their lives.[311]

CONCLUSION

In *National Rifle Ass'n v. Swearingen*, the plaintiffs claimed that a Florida law prohibiting the sale of firearms to persons under twenty-one violated the Second Amendment. Although the provision applies to every firearm and source of sale, the U.S. District Court for the Northern District of Florida correctly concluded that the law is constitutional. The provision has only temporary effect, and it permits persons over eighteen to possess firearms for lawful purposes, including to defend their home. Federal courts should, therefore, recognize that the minimum-purchase-age laws are a data-driven response to gun violence that kills tens of thousands of Americans annually. The court's

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[308] *Id.*

[309] *See* Lisa Marie Pane, *In a Year of Pain, One Silver Lining: Fewer Mass Shootings*, ASSOCIATED PRESS (Dec. 29, 2020), https://apnews.com/article/us-news-pandemics-shootings-coronavirus-pandemic-052396ae1f5322397c04fd191f596190 [https://perma.cc/XUG2-PUCG] (noting that there were only "two public mass shootings" in 2020, but observing that the number of firearm deaths by suicide was similar to prior years).

[310] *See id.* (suggesting that a risk remains that the "cycle" of mass shootings could begin anew). In March 2021, as the United States was ramping up its COVID-19 vaccination efforts and many Americans were preparing for a return to "normal," two gunmen murdered eighteen people within a single week. Corky Siemaszko, *After Two Mass Shootings, Americans Ask: Is This What a Return to Normal Looks Like?*, NBC NEWS (Mar. 23, 2021), https://www.nbcnews.com/news/us-news/after-two-mass-shootings-americans-ask-what-return-normal-looks-n1261841 [https://perma.cc/5T5Z-WH3X]. On March 16, 2021, a twenty-one-year-old man attacked three massage parlors in Atlanta, killing eight people, most of whom were Asian women. Jaclyn Diaz & Vanessa Romo, *8 People, Many of Them Asian, Shot Dead at Atlanta-Area Spas; Man Arrested*, NPR (Mar. 17, 2021), https://www.npr.org/2021/03/16/978024380/8-women-shot-to-death-at-atlanta-massage-parlors-man-arrested [https://perma.cc/3JCV-RNXP]. The following Monday, another twenty-one-year-old gunman killed ten people at a Boulder, Colorado grocery store. Amir Vera, Jason Hanna, & Madeline Holcombe, *Suspect in Colorado Grocery Store Shooting Faces 10 Counts of Murder, Police Say*, CNN (Mar. 24, 2021), https://www.cnn.com/2021/03/23/us/boulder-colorado-shooting-tuesday/index.html [https://perma.cc/QJZ3-8KWY].

[311] *See* Defendants' Motion for Summary Judgment, *supra* note 16, at 24–28 (providing an overview of criminological data and brain science research that support the measure); Lucero *supra* note 1 (summarizing Emma González's speech at the March for Our Lives rally in Washington, D.C.).

decision in *Swearingen* is important because minimum age restrictions enjoy bipartisan support and could prove effective in reducing gun violence.

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