No. 13-137

In the Supreme Court of the United States

NATIONAL RIFLE ASSOCIATION, ET AL., PETITIONERS

v.

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

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
STUART F. DELERY
Assistant Attorney General
MICHAEL S. RAAB
ANISHA S. DASGUPTA
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Federal law allows persons aged 18 to 20 to possess and use handguns, and to acquire handguns by gift, but provides that a federally licensed firearms dealer may sell or deliver only "a shotgun or rifle, or ammunition for a shotgun or rifle, to any individual who the licensee knows or has reasonable cause to believe is less than twenty-one years of age" but above eighteen. 18 U.S.C. 922(b)(1) and (c)(1); 27 C.F.R. 478.99(b), 478.124. The question presented is as follows:

Whether this federal regulatory scheme is consistent with the Second Amendment and the equal protection component of the Fifth Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

In the Supreme Court of the United States

No. 13-137

NATIONAL RIFLE ASSOCIATION, ET AL., PETITIONERS

v.

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

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-56) is reported at 700 F.3d 185. The order of the district court (Pet. App. 86-106) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on October 25, 2012. A petition for rehearing was denied on April 30, 2013 (Pet. App. 57-58). The petition for a writ of certiorari was filed on July 29, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1968, after a multi-year inquiry into the use of firearms in violent crime, Congress enacted a federal restriction on certain handgun sales to 18-to-20-

year-olds. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 901, 82 Stat. 225-226. Section 922(b)(1) of Title 18 of the United States Code provides that commercial sellers of firearms—who are also known as federal firearms licensees (FFLs)—may deliver only "a shotgun or rifle, or ammunition for a shotgun or rifle, to any individual who the licensee knows or has reasonable cause to believe is less than twenty-one years of age" but above eighteen. 18 U.S.C. 922(b)(1). Section 922(c)(1) buttresses that restriction by providing that FFLs may not "sell a firearm to [an unlicensed] person who does not appear in person at the licensee's business premises" unless the purchaser submits a "sworn statement" attesting that, if the firearm to be purchased is something "other than a shotgun or a rifle," the purchaser is "twenty-one years or more of age."[1] 18 U.S.C. 922(c)(1); see also 27 C.F.R. 478.99(b), 478.124.

Congress recognized that under these provisions, "a minor or juvenile would not be restricted from owning, or learning the proper usage of [a] firearm, since any firearm which his parent or guardian desired him to have could be obtained for the minor or juvenile by the parent or guardian." S. Rep. No. 1097, 90th Cong., 2d Sess. 79 (1968) (*1968 Senate Report*). Parents and guardians may provide their 18-to-20-year-old children with handguns because a person who is permitted under federal law to purchase a handgun

---

[1] Congress subsequently limited the circumstances under which individuals under 18 years of age may possess handguns, but it has not placed any similar age-related limits on the possession of handguns by individuals between 18 and 20 years old. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, Tit. XI, § 110201, 108 Stat. 2010 (adding 18 U.S.C. 922(x)).

from an FFL may purchase it as a gift for someone else. See ATF Form 4473, at 4, http://www.atf.gov/files/forms/download/atf-f-4473-1.pdf.

2. a. Petitioners are the National Rifle Association of America, Inc. (NRA), on behalf of its FFL members and its youth members aged between 18 and 20, and certain individual NRA youth members aged between 18 and 20 who wish to purchase handguns.[2] Pet ii. Petitioners filed this suit against respondents, the Bureau of Alcohol, Tobacco, Firearms and Explosives and certain federal officials (collectively, the government), in the United States District Court for the Northern District of Texas. Petitioners contend that federal laws providing that FFLs may sell handguns and handgun ammunition only to persons 21 years of age and older, 18 U.S.C. 922(b)(1) and (c)(1), 27 C.F.R. 478.99(b), 478.124, violate the Second Amendment and the equal protection component of the Fifth Amendment. Pet i.

b. The district court granted summary judgment for the government. Pet. App. 86-106. The court held that petitioners had Article III standing to bring this suit, but rejected petitioners' Second Amendment and equal protection claims on the merits.

3. a. The court of appeals affirmed.[3] Pet. App. 1-56.

---

[2] Three of the individual petitioners have turned 21. A fourth is currently 19. Pet. 8.

[3] Before addressing the merits of petitioners' claims, the court held that petitioners had standing to bring this suit because the challenged regulatory framework causes them the "concrete, particularized injury" of "not being able to purchase handguns from FFLs." Pet. App. 12.

As relevant here, the court of appeals first adopted the two-step approach to adjudicating Second Amendment challenges that "has emerged as the prevailing approach" among the courts of appeals. Pet. App. 17. The court of appeals explained that in *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment protects the historical right to bear arms enjoyed by "law-abiding, responsible citizens * * * in defense of hearth and home." *Id.* at 635. *Heller*, however, "did not set forth an analytical framework with which to evaluate firearms regulations in future cases." Pet. App. 16. Examining the *Heller* opinion, the court of appeals observed that the Supreme Court had first analyzed the historical scope of the right to bear arms and concluded that the right did not "cast doubt on longstanding prohibitions" such as those on possession by felons and those setting conditions on the commercial sale of arms. 554 U.S. at 626-627. The *Heller* Court then held that the restrictive District of Columbia statutes at issue would fall "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights." *Id.* at 628.

The court of appeals concluded that *Heller*'s analysis "suggests that the threshold issue is whether the party is entitled to the Second Amendment's protection." Pet. App. 23. If the answer were yes, the next question would be whether intermediate or strict scrutiny was appropriate. *Ibid.* (citing 554 U.S. at 628 n.27, 634).

Accordingly, the court of appeals first examined the "interpretive materials" that *Heller* used "to conduct a historical analysis." Pet. App. 18 (citing 554 U.S. at 600-626). The court explained that at common

law, the age of majority was 21, and that restrictions on the ability of people under 21 to purchase guns were longstanding. *Id.* at 33-37. That evidence, the court concluded, suggested that "the conduct at issue falls outside the Second Amendment's protection." *Id.* at 37. "[I]n an abundance of caution," however, the court of appeals "[a]ssum[ed] that the challenged federal laws burden conduct within the scope of the Second Amendment." *Id.* at 39, 41.

Turning then to the appropriate level of scrutiny, the court of appeals determined that intermediate scrutiny was appropriate because the challenged regulatory framework imposed a limited restriction on purchasing handguns, rather than a complete ban on the exercise of Second Amendment rights. Pet. App. 41-45. The court also observed that its conclusion that the rights of those under 21 were not the "central concern" of the Second Amendment militated in favor of intermediate scrutiny. *Id.* at 43.

The court of appeals concluded that the challenged regulatory framework satisfied intermediate scrutiny. Pet. App. 45-55. The court explained that the government had an important interest in preventing violent gun crimes, and that Congress had before it evidence showing that "the ease with which young persons under 21 could access handguns—as opposed to other guns—was contributing to violent crime. *Id.* at 49. The court of appeals also noted that Congress found that FFLs—as opposed to other sources—constituted the central conduit of handgun traffic to young persons under 21." *Ibid.* The court determined that "Congress, in turn, reasonably tailored a solution to the particular problem" and "deliberately adopted a calibrated, compromise approach" under which it

"restricted the ability of persons under 21 to purchase handguns from FFLs, while allowing [18-to-20-year-old persons] to purchase long-guns, * * * to acquire handguns from parents or guardians, and * * * to possess handguns and long-guns." *Id.* at 49-50.

Finally, the court of appeals rejected petitioners' equal protection challenge, explaining that Congress's decision to restrict handgun purchases based on the age of the purchaser satisfied rational basis scrutiny. Pet. App. 55-56.

b. The court of appeals denied rehearing en banc. Pet. App. 57-58. Judge Jones, joined by five other judges, dissented. *Id.* at 59-85. The dissenting judges would have concluded that "18- to 20-year olds can claim 'core' Second Amendment protection," *id.* at 74, and that the challenged laws do not satisfy "'intermediate scrutiny' as it has conventionally been applied in the First Amendment context," *id.* at 81.

ARGUMENT

Petitioners renew (Pet. 14-35) their contentions that the federal restrictions prohibiting FFLs from selling handguns and handgun ammunition to 18-to-20-year-olds violates the Second Amendment and the equal protection component of the Fifth Amendment. The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other circuit. Further review is not warranted.

1. Petitioners contend (Pet. 17-19, 26-33) that this Court's review is warranted because lower courts have adjudicated Second Amendment challenges to firearms restrictions under standards that, in petitioners' view, are insufficiently rigorous to comply with *District of Columbia* v. *Heller*, 554 U.S. 570 (2008). This

Court has recently denied certiorari in petitions raising similar arguments. See, *e.g.*, *Schrader* v. *Holder*, 2013 WL 2903493 (Nov. 4, 2013) (No. 12-1443); *Skoien* v. *United States*, 131 S. Ct. 1674 (2011) (No. 10-7005). The same result is warranted here.

a. As an initial matter, petitioners do not contend—nor could they—that the Fifth Circuit's decision upholding the federal regulatory scheme governing 18-to-20-year-olds' access to handguns conflicts with the decision of any other court of appeals. No other court of appeals has considered a Second Amendment challenge to the regulatory framework at issue here. Pet. App. 13 ("No other circuit court has considered the constitutionality of the challenged federal laws in light of *Heller*.").

The Fifth Circuit's analytical approach in this case, moreover, is consistent with that adopted by other courts of appeals to have considered Second Amendment challenges. Like those courts, the Fifth Circuit employed a two-step inquiry in evaluating petitioners' claim. The court first asked whether the conduct fell within the Second Amendment's protection and, if so, then considered whether to apply intermediate or strict scrutiny.[4] Pet. App. 17; see, *e.g.*, *United States* v. *Greeno*, 679 F.3d 510, 518 (6th Cir.), cert. denied, 133 S. Ct. 375 (2012); *Heller* v. *District of Columbia*,

---

[4] Petitioners cite (Pet. 32-33) the opinions of dissenting judges who have disagreed with the way in which the court applied the two-step approach or intermediate scrutiny to specific statutes. See, *e.g.*, *United States* v. *Skoien*, 614 F.3d 638, 653-654 (7th Cir. 2010) (Sykes, J., dissenting) (arguing that court should have remanded rather than engaging in intermediate-scrutiny analysis itself), cert. denied, 131 S. Ct. 1674 (2011). Such opinions cannot create a circuit conflict warranting this Court's review.

670 F.3d 1244, 1252 (D.C. Cir. 2011) (*Heller II*); *Ezell* v. *City of Chi.*, 651 F.3d 684, 701-704 (7th Cir. 2011); *United States* v. *Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *United States* v. *Reese*, 627 F.3d 792, 800-801 (10th Cir. 2010), cert. denied, 131 S. Ct. 2476 (2011); *United States* v. *Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010), cert. denied, 131 S. Ct. 958 (2011).

The courts of appeals have correctly concluded that the two-step approach is consistent with the Court's analysis in *Heller*. There, the Court held that the scope of the Second Amendment is informed by the "pre-existing" right to bear arms, and that the Second Amendment right is therefore "not unlimited." 554 U.S. at 603, 626. Specifically, the "core" right protected by the Second Amendment is the right of "law-abiding, responsible" individuals to possess firearms "in defense of hearth and home." *Id.* at 634-635. At the same time, "longstanding prohibitions on the possession of firearms" by certain classes of people, including "felons and the mentally ill," are "presumptively lawful." *Id.* at 626, 627 n.26. The Court then concluded that the District of Columbia statutes at issue prohibited exercise of the core right to possess guns in the home, and that they would be unconstitutional "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights." *Id.* at 628-629. Thus, the two-step inquiry—examining whether the conduct falls within the historical scope of the Second Amendment, and if so, applying some form of heightened scrutiny—tracks the steps in the *Heller* Court's analysis.

b. In the absence of a conflict among the courts of appeals, petitioners contend that this Court's review is necessary to remedy what petitioners perceive as the

lower courts' "massive resistance" to *Heller*. Pet. 18. Petitioners' disagreement with lower-court decisions in other cases involving distinct Second Amendment challenges to various state and federal statutes, however, is not a reason to grant review in this case. And in any event, the few decisions petitioners cite simply reflect lower courts' application of the principles delineated in *Heller* to regulations that were not presented in *Heller*.

Petitioners contend, for example, (Pet. 18) that courts have adopted an "exceedingly minimalist view of *Heller*" by holding that the Second Amendment does not protect gun possession outside the home. But the Second Amendment's application to possession outside the home is not at issue here, as the challenged federal laws permit 18-to-20-year-olds to possess and use handguns both within and outside the home. Moreover, the decisions on which petitioners rely merely observe—correctly—that *Heller* did not decide whether the Second Amendment applies to conduct outside the home. See *Little* v. *United States*, 989 A.2d 1096, 1100-1101 (D.C. 2010); *Williams* v. *State*, 10 A.3d 1167, 1175-1179 (Md.), cert. denied, 132 S. Ct. 93 (2011); *United States* v. *Masciandaro*, 638 F.3d 458 (4th Cir.), cert. denied, 132 S. Ct. 756 (2011); cf. *Osterweil* v. *Bartlett*, 706 F.3d 139 (2d Cir. 2013) (where existence of a Second Amendment issue turned on the proper interpretation of state law, certifying state-law question to state court); *Commonwealth* v. *Perez*, 952 N.E.2d 441, 451 (Mass. App. Ct. 2011) (upholding licensing requirement because it exempted possession within one's residence or place of business).

Petitioners also rely (Pet. 28) on two court of appeals decisions in which this Court recently denied certiorari, contending that these decisions held that the government has a "substantial" interest in preventing citizens from exercising Second Amendment rights. See *Woollard* v. *Gallagher*, 712 F.3d 865, 875 (4th Cir.), cert. denied, No. 13-42, 2013 WL 3479421 (Oct. 15, 2013); *Kachalsky* v. *County of Westchester*, 701 F.3d 81 (2d Cir. 2012), cert. denied, 133 S. Ct. 1806 (2013). In both cases, the courts assumed that the Second Amendment right extends outside the home, but nevertheless upheld state concealed-carry laws that required gun owners to show good cause in order to obtain a blanket permit to carry a concealed weapon outside the home. The courts did not suggest, as petitioners contend, that the government has an interest in suppressing the exercise of Second Amendment rights as such. Instead, the courts concluded, on the basis of historical and empirical evidence presented by the States, that the restrictions were substantially related to an important interest in crime prevention. See *Woollard*, 712 F.3d at 876-882; *Kachalsky*, 701 F.3d at 96-101. And, again, the decision challenged here has nothing at all to do with the concealed-carry laws at issue in *Kachalsky* and *Woollard*.

Finally, petitioners seek (Pet. 18) to bolster their claims of "massive resistance" by pointing to an ordinance enacted by the City of Chicago in the wake of *McDonald* v. *City of Chicago*, 130 S. Ct. 3020, 3036-3044 (2010) (plurality opinion), which held that the Second Amendment is incorporated against the States. But the actions of the City of Chicago—as distinct from the decisions of lower courts—provide no basis for review here. And petitioners' reliance on

that ordinance is in any event hard to understand, as the Seventh Circuit *enjoined* Chicago's ordinance after finding that plaintiffs' Second Amendment claims there were likely to succeed. See *Ezell*, 651 F.3d at 711. The history of the Chicago ordinance thus undermines (rather than supports) petitioners' claim of lower-court resistance.

2. The court of appeals correctly held that the challenged federal restrictions on 18-to-20-year-olds' purchase of handguns are consistent with the Second Amendment.

a. Petitioners first contend (Pet. 21-25) that this Court's review is warranted because the court of appeals held that 18-to-20-year-olds "do not possess Second Amendment rights *at all* unless the legislature deems them sufficiently 'responsible' to keep and bear arms." Pet. 19. The court of appeals, however, did not hold or suggest that 18-to-20-year-olds lack Second Amendment rights. Pet. App. 41. Rather than addressing that broader question, the court considered only whether restrictions on 18-to-20-year-olds' *purchase* of particular guns were consistent with the historical scope of the Second Amendment. Even with respect to that question, the court assumed that such restrictions implicated 18-to-20-year-olds' Second Amendment rights. This case therefore does not present the question whether 18-to-20-year-olds may be "den[ied] fundamental constitutional rights." Pet. 22.

Pursuant to the two-step inquiry for evaluating Second Amendment challenges, the court of appeals first considered whether the federal scheme's restriction on purchases by individuals under 21 "burden[s] conduct that is protected by the Second Amendment."

Pet. App. 29. After canvassing the historical sources, the court stated that those sources, including century-old state laws prohibiting those under 21 from purchasing and/or using guns, "suggest[] that the conduct at issue"—*i.e.*, 18-to-20-year-olds' purchase of handguns—"falls outside the Second Amendment's protection." *Id.* at 37. The court ultimately chose to assume, however, that the Second Amendment protects the right of individuals under 21 to purchase guns.[5] *Id.* at 39. Although petitioners assert (Pet. 21) that the court of appeals should have held, rather than assumed, that the challenged statute impinges on a right protected by the Second Amendment, that disagreement provides no basis for review.

Nor did the court of appeals suggest that people under 21 "do not possess Second Amendment rights *at all*" unless they are deemed "sufficiently 'responsible' to keep and bear arms." Pet. 19. In determining the appropriate level of scrutiny, the court of appeals observed that the fact that "the rights of 18-to-20-year-olds" were at stake supported applying intermediate scrutiny because the core Second Amendment right extends to "law-abiding, *responsible* citizens." Pet. App. 43 (internal quotation marks and citation omitted). The court acknowledged, however, that "18-

---

[5] As the government asserted below, see Gov't C.A. Br. 29-41, the court of appeals would have been justified in rejecting petitioners' Second Amendment challenge based on historical evidence indicating that restrictions on the purchase of firearms by those under 21 have long been viewed as consistent with the Second Amendment and state analogues. See *Heller*, 554 U.S. at 591-592, 603 (scope of Second Amendment is informed by scope of historical right to bear arms). In any event, that evidence also supports the court of appeals' decision to apply intermediate, rather than strict, scrutiny. See pp. 15-18, *infra*.

to-20-year-olds may have a stronger claim to the Second Amendment guarantee" than those who have historically been subject to bans on possession, such as felons or the mentally ill. *Ibid.* The court therefore based its decision to apply intermediate scrutiny primarily on the fact that the restriction on purchasing handguns at issue in this case is limited and temporary, and is thus "sufficiently bounded to avoid strict scrutiny." *Id.* at 45; see *id.* at 41-45.

b. Petitioners next challenge the court of appeals' conclusion that intermediate scrutiny was appropriate. Petitioners' argument lacks merit.

The court of appeals correctly concluded that intermediate scrutiny was appropriate because the regulatory scheme is limited and does not prohibit activities within the "core" of the Second Amendment right. Although Section 922(b)(1) prohibits individuals under 21 from purchasing handguns from FFLs, it permits them to exercise the core right identified in *Heller*: possessing and using handguns for self-defense in the home. Pet. App. 44; see 554 U.S. at 628-629. Federal law also permits 18-to-20-year-olds to use handguns outside the home for lawful purposes. Moreover, individuals between 18 and 20 may legally obtain handguns through avenues not prohibited by federal law, including by receiving gifts from their parents, who may purchase from FFLs, and by purchasing from sellers who are not FFLs. See 18 U.S.C. 921(a)(21)(C), 922(b)(1); ATF Form 4473, at 4, http://www.atf.gov/files/forms/download/atf-f-44731.pdf. And the restrictions imposed by the scheme are temporary, in that they cease to apply once a person turns 21. For these reasons, the court of appeals correctly concluded that Section 922(b)(1) does not prohibit

exercise of the core right described in *Heller*, but instead "resemble[s]" a regulation that "impos[es] conditions and qualifications on the commercial sale of arms." Pet. App. 44; *Heller*, 554 U.S. at 626-627. Such conditions on commercial sales, the *Heller* Court stated, are longstanding and "presumptively lawful."[6] *Id.* at 627 & n.26. The court of appeals therefore correctly applied intermediate scrutiny.[7]

That conclusion is consistent with the decisions of other courts of appeals, which have uniformly declined to apply strict scrutiny to restrictions that regulate purchases or specific uses but do not restrict possession in the home. See, *e.g.*, *Drake* v. *Filko*, 724 F.3d 426, 434-437 (3d Cir. 2013) (public carry permitting requirement); *Woollard*, 712 F.3d at 876 (concealed carry restriction); *Kachalsky*, 701 F.3d at 96 (same); *Heller II*, 670 F.3d at 1255-1256 (registration and training requirements); *Ezell*, 651 F.3d at 708 (permitting regime; requiring "more rigorous showing" that

---

[6] Contrary to petitioners' assertion (Pet. 31), the court of appeals did not presume that the challenged restrictions are constitutional. The court applied intermediate scrutiny in part because it viewed the restrictions as similar to "presumptively lawful" commercial-sale conditions. *Heller*, 554 U.S. at 627 n.26. But the court correctly required the government to bear the burden of demonstrating that the provision satisfies intermediate scrutiny. Pet. App. 45.

[7] Petitioners suggest (Pet. 29) that intermediate scrutiny is not appropriate because the Second Amendment protects a "fundamental" right. See *McDonald*, 130 S. Ct. at 3037. Although strict scrutiny is sometimes applied to constitutional claims that involve enumerated and fundamental rights, less demanding scrutiny is frequently applied as well. Even in contexts where strict scrutiny sometimes applies, such as the First Amendment right to free speech, this Court often uses a more deferential standard of scrutiny. See, *e.g.*, *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 189 (1997).

was "not quite strict scrutiny"); *Masciandaro*, 638 F.3d at 470-471 (restrictions on possession in a national park); *Marzzarella*, 614 F.3d at 97 (prohibition on possession of firearms with altered serial numbers).

The court of appeals' use of intermediate scrutiny is also supported by the longstanding historical practice of regulating 18-to-20-year-olds' access to guns. *Heller* held that the Second Amendment's scope is informed by the historical understanding of the right to bear arms.[8] 554 U.S. at 591-592, 603. In ascertaining that scope, *Heller* looked to both pre- and post-ratification historical sources, including "[p]ost-Civil War [l]egislation," *id.* at 614, and the interpretation of state right-to-bear-arms provisions by "19th-century courts and commentators," *id.* at 603. Those sources, the Court explained, are "instructive," *id.* at 614, because they reflect "*the public understanding* of [the Second Amendment] in the period after its enactment or ratification," *id.* at 605. Here, 19th-century legal sources demonstrate that restrictions on the ability of individuals under 21 to purchase guns have long been viewed as consistent with the right to bear arms. "[B]y the end of the 19th century, nineteen States and the District of Columbia had enacted laws expressly

---

[8] For this reason, petitioners' suggestion (Pet. 22) that 18-to-20-years-olds' Second Amendment rights must be co-extensive with their rights under the First and Fourth Amendments is incorrect. The scope of Second Amendment rights generally is informed by the unique history of the "pre-existing" right to bear arms. *Heller*, 554 U.S. at 591-592, 603. Thus, petitioners' observation (Pet. 21) that Congress could not restrict books with violent content for 19-year-olds is beside the point. Congress likewise could not restrict violent books for all felons or the mentally ill, yet this Court in *Heller* indicated that Congress *could* restrict access to *firearms* for those groups.

restricting the ability of persons under 21 to purchase or use particular firearms, or restricting the ability of 'minors' to purchase or use particular firearms while the state age of majority was set at age 21." Pet. App. 34 (listing statutes). At the same time, 19th-century courts and commentators "maintained that age-based restrictions on the purchase of firearms—including restrictions on the ability of persons under 21 to purchase firearms—comported with the Second Amendment guarantee." *Id.* at 36 (citing *Heller*, 554 U.S. at 603); see, *e.g.*, Thomas M. Cooley, *Treatise on the Constitutional Limitations* 740 n.4 (5th ed. 1883); *State* v. *Callicutt*, 69 Tenn. 714, 714 (1878) (upholding state law prohibiting sale of pistol to minor as consistent with the State's Second Amendment analogue; age of majority was 21). The existence and prevalence of these longstanding prohibitions indicate that the Second Amendment was not viewed as prohibiting limitations on the rights of individuals under 21 to purchase guns.

Petitioners' argument to the contrary (Pet. 23) is based on founding-era laws permitting or requiring individuals who were under 21 to serve in the militia. But the fact that people under 21 served in some founding-era militias does not indicate that such individuals' *purchase* of guns could not be restricted consistent with the Second Amendment.[9] For one thing,

---

[9] People under 21 did not invariably serve in militias or have the right to do so absent parental consent. See Gov't C.A. Br. 39 (citing examples of state statutes setting age of service at 21). In particular, around the time of the Revolutionary War, persons under 21 often could not join the military without their parents' consent. See *Brown* v. *Entertainment Merchs. Ass'n*, 131 S. Ct. 2729, 2758 (2011) (Thomas, J., dissenting). After the war, the 1792 Militia Act

19th-century restrictions on purchases by individuals under 21 became prevalent despite young men's historical service in militias. The legislatures that enacted such laws, and the courts that upheld them, evidently did not believe that militia service—or the more recent Civil War military service by those under 21—rendered unconstitutional laws limiting 18-to-20-year-olds' ability to purchase guns in civilian life.

Moreover, the fact that individuals under 21 served in some militias did not reflect any uniform expectation that those individuals would have the ability to procure firearms on their own. Rather, militia laws often assumed that enrollees under 21 lacked independent access to firearms, and they accordingly either required parents to provide their under-21 sons with guns or exempted those under 21 from having to furnish their own guns. See, *e.g.*, An Act for the Regulation of the Militia of the Commonwealth of Pennsylvania, ch. MDCXCVI, §§ I-II (1793), *reprinted in* 14 *The Statutes at Large of Pennsylvania from 1682 to 1801*, at 456 (James T. Mitchell & Henry Flanders eds. 1909); Gov't C.A. Br. 37 n.14 (collecting statutes). And in debating the 1792 Militia Act, which provided that men between 18 and 45 should be enrolled in the militia (unless States chose different age ranges), 1 Stat. 271-272, Members of Congress acknowledged that those under 21 would have trouble

---

"gave States discretion to impose age qualifications on service, and several States chose to enroll only persons age 21 or over, or required parental consent for persons under 21." Pet. App. 40 n.17; see Act of May 8, 1792, ch. 33, §§ 1-2, 1 Stat. 271-272; *United States* v. *Anderson*, 24 F. Cas. 813 (C.C.D. Tenn. 1812) (No. 14,449) (granting parent's habeas petition seeking return of an 18-year-old who had joined the military without parental consent even though he was under 21).

providing their own firearms unless their parents or guardians supplied them. See 2 Annals of Cong. 1855-1856 (1791).

c. Petitioners contend that the court of appeals erred in holding that the challenged regulatory scheme satisfies intermediate scrutiny. The court of appeals correctly held that the purchase restrictions are reasonably related to an important government objective.

i. Congress's purpose in enacting Section 922(b)(1) and associated provisions was to curb violent crime by addressing the "clandestine acquisition of firearms by juveniles and minors," which it concluded "is a most serious problem facing law enforcement and the citizens of this country." *1968 Senate Report* 79. The "Government's general interest in preventing crime is compelling." *United States* v. *Salerno*, 481 U.S. 739, 750 (1987); see also *Schall* v. *Martin*, 467 U.S. 253, 264 (1984).

Congress enacted the regulatory framework at issue here after its investigation of violent crime revealed a "causal relationship between the easy availability of firearms other than a rifle or shotgun and juvenile and youthful criminal behavior." § 901(a)(6), 82 Stat. 225-226. Congress's investigation showed that "minors"—a term Congress used to denote those under 21—"account for 64 percent of the total arrests in this category." *1968 Senate Report* 77. In addition, law enforcement officers from several major cities provided Congress with statistics documenting the prevalence of "misuse of firearms by juveniles and minors." S. Rep. No. 1866, 89th Cong., 2d Sess. 59 (1966) (*1966 Senate Report*). Congress therefore concluded that uniform federal regulation was neces-

sary to prevent 18-to-20-year-olds from obtaining handguns for criminal purposes, and to prevent them from "going across State lines to procure firearms which they could not lawfully obtain or possess in their own State." *Id.* at 19.

Petitioners contend (Pet. 27-28) that the court of appeals held that Congress had an "important interest in eliminating" the Second Amendment rights of 18-to-20-year-olds. That is a mischaracterization of the court's holding and Congress's reasoning. As the court of appeals explained, Congress focused on the "causal relationship" between young adults' unsupervised access to handguns and their participation in violent crime. Pet. App. 28. The government interest at issue is thus preventing violent gun crimes, including those committed by people under 21—not broadly prohibiting people under 21 from having access to firearms. That is why Congress did not prohibit 18-to-20-year-olds from possessing or using handguns (or from buying rifles and shotguns). That is also why Congress emphasized that Section 922(b)(1) does not prevent a person under 21 from "owning, or learning the proper usage of the firearm, since any firearm which his parent or guardian desired him to have could be obtained * * * by the parent or guardian." *1968 Senate Report* 79.

ii. The court of appeals correctly held that the challenged laws are reasonably related to Congress's objective of preventing gun violence. Pet. App. 49-55. Contrary to petitioners' argument (Pet. 30), the court of appeals correctly recognized that Congress's "predictive judgments" about the risk of firearms misuse by 18-to-20-years-olds who purchase handguns from FFLs are entitled to deference, because Congress is

best positioned to formulate appropriate firearms policy in order to further the goal of public safety. Pet. App. 54 n.21; cf. *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 665-666 (1994) (opinion of Kennedy, J.) (in applying intermediate scrutiny under the First Amendment, courts should accord substantial deference to Congress's predictive judgments). As the court of appeals held, the purchase restriction is sufficiently tailored to the government's interest for several reasons.

First, Congress's decision to limit 18-to-20-year-olds' ability to purchase handguns as a way of preventing crime is both consistent with historical gun regulation and supported by empirical evidence. See *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618, 628 (1995) (the fit between an important government interest and the regulation at issue may be established by multiple sources of evidence, including empirical evidence, "history, consensus, and simple common sense") (internal quotation marks omitted). The long existence of state regulations prohibiting the purchase of firearms by 18-to-20-year-olds reflects a general recognition that restricting access in this manner helps prevent crime. See *Callicutt*, 69 Tenn. at 714 (restricting purchase by those under 21 "tend[s] to prevent crime"); pp. 15-16, *supra*.

Congress had before it ample evidence demonstrating that people under 21 committed a disproportionate share of violent crimes, and that they often used handguns to do so. Pet. App. 47 (citing legislative hearing testimony to the effect that people under 21 represented 35% of arrests for "serious crimes of violence" and 21% of arrests for murder). Those conclusions continue to hold true today: crime statistics

reflect that handgun violence by those under 21 remains a significant problem. See *id.* at 50-53 (canvassing recent data). Having identified the severe problem of youth gun violence, Congress was entitled to focus its legislative effort on 18-to-20-year-olds—particularly because Congress tailored the prohibition to prevent unrestricted access to handguns while allowing 18-to-20-year-olds to possess and use handguns for legitimate activities. See pp. 23-24, *infra*.

Congress also recognized that 18-to-20-year-olds' "emotional[] immatur[ity]" and "thrill-bent" behavior may generally render them less capable of handling unrestricted access to the handgun market than older individuals. § 901(a)(6), 82 Stat. 226. Congress's focus on those under 21 is thus consistent with the general societal and judicial recognition that "youth is more than a chronological fact" because people who are in their late teens and early twenties may lack the maturity and impulse control to fully moderate their behavior.[10] *Johnson* v. *Texas*, 509 U.S. 350, 367 (1993)

---

[10] As petitioners point out (Pet. 5), the age of majority is generally now set at 18, which reflects a judgment that 18-year-olds are ordinarily mature enough to handle most adult rights and responsibilities. See Pet. App. 39 n.17. But even though 18-years-olds are considered adults for most purposes, their rights still may be limited with respect to particularly weighty responsibilities or potentially dangerous activities. For instance, several States require adoptive parents to be 21 or even 25 years old. See Child Welfare Information Gateway, Dep't of Health & Human Servs., *Who May Adopt, Be Adopted, or Place a Child for Adoption?* at 2, Jan. 2012, https://www.childwelfare.gov/systemwide/laws_policies/statutes/parties.pdf. Mississippi requires parental consent before a person under 21 may get married, Miss. Code Ann. § 93-1-5(a) (West 2007), and Nebraska requires parental consent for those under 19, Neb. Rev. Stat. Ann. §§ 42-105, 43-245 (LexisNexis 2011). And the legal drinking age is generally 21, which reflects a

(holding that sentencer in a capital case "must be allowed to consider the mitigating qualities of [a nineteen-year-old criminal defendant's] youth in the course of its deliberations over the appropriate sentence" because immaturity "often result[s] in impetuous and ill-considered actions and decisions"); see also *Gall* v. *United States*, 552 U.S. 38, 57-58 (2007) (sentencing court reasonably took into account the fact that defendant was 21 at the time of his drug offense and relied on studies showing that people under 25 may not have reached full maturity); Pet. App. 54 n.21.

Petitioners contend (Pet. 30-31) that *Craig* v. *Boren*, 429 U.S. 190 (1976), indicates that the court of appeals should have required a greater correlation between age and arrests for violent crimes—*i.e.*, that Congress was required to find that a significant portion of all people aged 18 to 20 commit violent crimes. Petitioners are incorrect. In *Craig*, the Court held that a statistic "broadly establish[ing] that .18% of females and 2% of males" aged 18 to 20 were arrested for alcohol-related driving offenses was insufficient to demonstrate a reasonable fit between the objective of preventing drunk driving and the statute's prohibition on the purchase of 3.2% beer by males—but not females—under 21. *Id.* at 201-202. *Craig* thus held that a closer correlation was required before the State could employ a classification based on sex. That rea-

---

judgment that persons under 21 are "incompetent to handle the [e]ffects of alcohol" without endangering themselves or others. See *Congini* v. *Portersville Valve Co.*, 470 A.2d 515, 517 (Pa. 1983). For similar reasons, States also frequently limit the ability of people under 21 to gamble. See, *e.g.*, Nev. Rev. Stat. Ann. § 463.350 (LexisNexis 2012).

soning is not apposite here. Age, unlike sex, is a permissible means of classifying individuals because it is generally recognized as a "proxy for other qualities, abilities, or characteristics"—such as maturity and impulse control—that are "relevant to the State's legitimate interests." *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 84 (2000). Congress relied on those characteristics of age in addition to evidence demonstrating that a disproportionate number of violent offenses are committed by people under 21. The fit between limiting handgun purchases by people under 21 and preventing gun crime is therefore far tighter than the fit between the sex classification at issue in *Craig* and preventing drunk driving. Particularly in light of the history of limiting 18-to-20-year-olds' purchase of firearms, as well as the strength of the government's interest in preventing crime, Congress was justified in legislating based on evidence that those who commit violent crimes are relatively likely to be young adults.

Second, Congress prohibited 18-to-20-year-olds from purchasing handguns, but not shotguns and rifles, because it found that concealable firearms had been "widely sold by federally licensed importers and dealers to emotionally immature, or thrill-bent juveniles and minors prone to criminal behavior." § 901(a)(6), 82 Stat. 226. Specifically, "[t]he evidence * * * has overwhelmingly demonstrated that the handgun is the type of firearm that is principally used in the commission of serious crime." *1966 Senate Report* 7.

Third, Congress chose to focus on sales by FFLs because it found that FFLs "constituted the central conduit of handgun traffic to young persons." Pet.

App. 49; § 901(a)(6), 82 Stat. 226. While 18-to-20-year-olds may purchase handguns from non-FFLs, *i.e.*, those who "make[] occasional sales * * * for the enhancement of a personal collection or for a hobby, or who sell[] all or part of his personal collection of firearms," 18 U.S.C. 921(a)(21), Congress had evidence before it that the "vast majority" of firearms supplied to people under 21 are supplied by FFLs. Pet. App. 47 (citing hearing testimony). Congress thus purposefully adopted a "calibrated" approach that does not entirely foreclose 18-to-20-year-olds' access to handguns. *Id.* at 50. That decision is of a piece with Congress's emphasis that parents or guardians may provide handguns to their 18-to-20-year-old children: Congress wished to limit unrestricted access to the primary handguns market while permitting 18-to-20-year-olds to possess and learn to use handguns in contexts unlikely to result in the guns' being used for criminal purposes.

Petitioners are thus incorrect in arguing (Pet. 32) that the federal regulatory scheme is invalid because it prevents 18-to-20-year-olds from purchasing handguns from federally licensed firearms dealers but "leaves them free to obtain handguns at garage sales." Pet. 32. Under intermediate scrutiny, the fit between the governmental objective and the regulation need not be "perfect," so long as it is reasonable. See *Florida Bar*, 515 U.S. at 632; *United States* v. *Staten*, 666 F.3d 154, 167 (4th Cir. 2011) ("Intermediate scrutiny does not require a perfect fit; rather only a reasonable one."), cert. denied, 132 S. Ct. 1937 (2012). Congress was entitled to tailor its regulation to the type of handgun sale that it had found was primarily responsible for the misuse of handguns by young adults.

The court of appeals therefore correctly held that the challenged laws satisfy intermediate scrutiny. Petitioners repeatedly accuse the court of appeals of applying a "watered-down form" of intermediate scrutiny (Pet. 27) and of "manipulating the constitutional analysis to chip away at the scope of the Second Amendment" (Pet. 26). But the court of appeals evaluated whether the provisions at issue were sufficiently tailored to an "important government objective," Pet. App. 45, and examined whether its approach was consistent with *Heller*. *E.g.*, *id.* at 45-55. This Court should not lightly assume that the court of appeals implicitly watered down the standard of review—when the court repeatedly and explicitly stated that the relevant standard was "intermediate scrutiny," *id.* at 45—or that the court attempted to undermine *Heller*.[11] Cf. *Sprint/United Mgmt. Co.* v. *Mendelsohn*, 552

[11] Amicus Second Amendment Foundation, Inc., argues (Br. 2-3) that the Fifth Circuit's holding that petitioners had standing to bring this suit conflicts with the Fourth Circuit's holding that different plaintiffs lacked standing to challenge the distinct regulatory framework set forth in Section 922(b)(3), which prohibits FFLs from selling firearms to purchasers who do not reside in the State in which the FFL is located. See *Lane* v. *Holder*, 703 F.3d 668 (4th Cir. 2012), petition for cert. pending, No. 12-1401 (filed May 28, 2013). That is incorrect. As the government explained in its brief in opposition in *Lane*, the Fourth Circuit correctly held that the petitioners in that case lacked an injury-in-fact fairly traceable to the challenged statutes because Section 922(b)(3) did not operate directly on the petitioners; the costs about which petitioners complained were independently imposed by FFLs, not by any regulatory requirement; and the petitioners had alternative, equally cost-effective, means of obtaining firearms from out-of-state sources. See Br. in. Opp. at 5-6, *Lane* v. *Holder*, No. 12-1401 (Sept. 6, 2013). The government further explained that there is no conflict between *Lane* and the decision at issue here because

U.S. 379, 386 (2008) ("An appellate court should not presume that a district court intended an incorrect legal result when the order is equally susceptible of a correct reading.").

3. Petitioners' question presented encompasses the court of appeals' rejection of their contention that the federal regulatory scheme violates the equal protection component of the Fifth Amendment. See Pet. i. Petitioners have not, however, separately discussed that contention in the body of their petition. In any event, the court of appeals correctly rejected the claim. Petitioners do not suggest that the court's equal-protection holding conflicts with any decision of this Court or another court of appeals.

As the court of appeals explained, "[u]nlike race- or gender-based classifications, * * * the government may 'discriminate on the basis of age without offending' the constitutional guarantee of equal protection 'if the age classification in question is rationally related to a legitimate state interest.'" Pet. App. 56 (quoting *Kimel*, 528 U.S. at 83-84). "[T]he individual challenging [an age classification's] constitutionality bears the burden of proving that the facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Kimel*, 528 U.S. at 84 (internal quotation marks omitted). In light of the legislative record,

---

the Fifth Circuit's conclusion that petitioners had standing was based on the fact that the challenged restrictions, unlike those at issue in *Lane*, directly restrict petitioners from obtaining firearms from FFLs. *Id.* at 9; Pet. App. 9-13; see *Lane*, 703 F.3d at 673 (distinguishing regulations that prevent individuals from obtaining firearms). The decision below and *Lane* thus considered and decided distinct standing issues.

see pp. 20-22, *supra*, petitioners cannot meet their burden of showing that the age qualifications that Congress decided to impose on commercial handgun purchases were based on facts that "could not reasonably be conceived to be true by the governmental decisionmaker." *Kimel*, 528 U.S. at 84.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
STUART F. DELERY
Assistant Attorney General
MICHAEL S. RAAB
ANISHA S. DASGUPTA
Attorneys

NOVEMBER 2013