No. 20-56174

In the United States Court of Appeals For The Ninth Circuit

MATTHEW JONES, *et al.*,

Plaintiffs-Appellants,

v.

XAVIER BECERRA, in his official capacity as Attorney General of the State of California, *et al.*,

Defendants-Appellees,

Appeal from the United States District Court for the Southern District of California
Civil Case No. 3:19-cv-01226-L-AHG (Honorable M. James Lorenz)

BRIEF OF AMICUS CURIAE EVERYTOWN FOR GUN SAFETY IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Everytown for Gun Safety (formally, Everytown for Gun Safety Action Fund) has no parent corporations. It has no stock and hence no publicly held company owns 10% or more of its stock.

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STATEMENT OF INTEREST

Amicus curiae Everytown for Gun Safety ("Everytown") is the nation's largest gun violence prevention organization, with nearly six million supporters across the country, including over 860,000 in California. Everytown was founded in 2014 as the combined effort of Mayors Against Illegal Guns, a national, bipartisan coalition of mayors combating illegal guns and gun trafficking, and Moms Demand Action for Gun Sense in America, an organization formed after a 20-year-old gunman murdered twenty children and six adults at an elementary school in Newtown, Connecticut. The mayors of 58 California cities are members of Mayors Against Illegal Guns. Everytown also includes a large network of gun-violence survivors who are empowered to share their stories and advocate for responsible gun laws.

Everytown's mission includes defending common-sense gun safety laws by filing *amicus* briefs that provide historical context and doctrinal analysis that might otherwise be overlooked. Everytown has filed such briefs in numerous Second Amendment cases, including in cases, like this one, involving challenges to minimum-age and other restrictions on the purchase and sale of firearms and ammunition. *See, e.g.*, *Hirschfeld v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, No. 19-2250 (4th Cir.); *Mitchell v. Atkins*, No. 3:19-cv-05106-RBL (W.D. Wash.); *Rhode v. Becerra*, No. 20-55437 (9th Cir.). Several courts have also

cited and expressly relied on Everytown's amicus briefs in deciding Second Amendment and other gun cases. *See, e.g.*, *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J.*, 910 F.3d 106, 112 n.8 (3d Cir. 2018); *Rupp v. Becerra*, 401 F. Supp. 3d 978, 991-92 & n.11 (C.D. Cal. 2019), *appeal docketed*, No. 19-56004 (9th Cir. Aug. 28, 2019); *see also Rehaif v. United States*. 139 S. Ct. 2191, 2210-11, nn.4 & 7 (2019) (Alito, J., dissenting).[1]

STATEMENT OF ADDENDUM

Pursuant to Fed. R. App. P. 28(f) and Ninth Circuit R. 28-2.7, an addendum containing pertinent statutes, constitutional provisions, treatises, and other authorities has been filed concurrently with this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs challenge California Penal Law section 27510 under the Second Amendment. Section 27510 prohibits persons licensed to sell firearms from selling or transferring firearms to persons under 21 years of age, subject to a number of exceptions. The district court correctly rejected Plaintiffs' request for a preliminary injunction, concluding that they had not met their burden to establish a likelihood of success on the merits, for two independent reasons. *First*, the court concluded that "age-based firearm restrictions such as California[']s] are longstanding, do not

[1] All parties consent to the filing of this brief. No party's counsel authored this brief in whole or part and, apart from Everytown, no person contributed money to fund its preparation or submission.

burden the Second Amendment, and are therefore presumptively Constitutional." 1-ER-11. *Second*, the court held that even if California's age restriction did implicate Second Amendment rights, it would survive the applicable (intermediate) standard of scrutiny. 1-ER-12-16.

This brief addresses the district court's first conclusion and demonstrates that it was correct: given our nation's long history of age-based firearms regulations, this Court should uphold California's law as outside the scope of the Second Amendment. For more than 150 years, states have restricted the ability of individuals under 21 (the age of majority under the common law) to purchase or acquire firearms. As the Supreme Court made clear in *Heller*, longstanding forms of firearms regulation such as these are "presumptively lawful." *District of Columbia v. Heller*, 554 U.S. 570, 626-27 & n.26 (2008). Accordingly, and in light of the long history of regulation, several federal courts, including the Fifth Circuit, have upheld age-based restrictions like California's against Second Amendment challenges. *See, e.g.*, *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185 (5th Cir. 2012) ("*BATFE*") (upholding federal criminal statutes making it unlawful for federal firearms licensees to sell handguns and handgun ammunition to those under 21, 18 U.S.C. § 922(b)(1) and (c)(1), and federal regulations implementing those statutes); *Hirschfeld v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 417 F. Supp. 3d 747 (W.D. Va. 2019) (same), *appeal docketed*, No.

19-2250 (4th Cir. Nov. 7, 2019); *Mitchell v. Atkins*, No. C:19-cv-05106-RBL, 2020 WL 5106723 (W.D. Wash. Aug. 31, 2020) (upholding Washington law prohibiting sales of semiautomatic rifles to individuals under 21), *appeal docketed*, No. 20-35827 (9th Cir. Sept. 22, 2020).

We respectfully submit that this Court should do the same, and should affirm the district court's denial of a preliminary injunction.

ARGUMENT

I. RESTRICTIONS ON THE TRANSFER OF FIREARMS TO PERSONS UNDER 21 COMPORT WITH HISTORICAL UNDERSTANDINGS OF THE SECOND AMENDMENT—AND THUS REGULATE CONDUCT OUTSIDE ITS SCOPE.

The Supreme Court held in *Heller* that the Second Amendment protects an individual right to bear arms. Its opinion emphasized, however, that this right "is not unlimited," and that "nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms." 554 U.S. at 626. Those longstanding prohibitions include "laws imposing conditions and qualifications on the commercial sale of arms," which are "presumptively lawful regulatory measures." *Id.* at 626-27 & n.26. Moreover, "exclusions need not mirror limits that were on the books in 1791." *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc); *see also Fyock v. City of Sunnyvale*, 779 F.3d 991, 997 (9th Cir. 2015).

The Ninth Circuit applies a two-step framework to assess whether a law violates the Second Amendment. The first step asks "whether the challenged law burdens conduct protected by the Second Amendment." *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013). This Court examines "whether there is persuasive historical evidence showing that the regulation does not impinge on the Second Amendment right as it was historically understood." *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016). The second step applies a "means-end" test, under which the court first determines the appropriate level of scrutiny and then asks whether the law satisfies that scrutiny. *See, e.g.*, *Chovan*, 735 F.3d at 1136-38; *see also* 1-ER12-16 (explaining that intermediate scrutiny applies and Section 27510 survives such scrutiny, because there is a "reasonable fit" between the law and the important government interest it serves).

The Court may uphold laws that restrict conduct historically understood to fall outside of the Second Amendment's scope without needing to proceed to the second step of the two-step framework. *Silvester*, 843 F.3d at 829-30. That is precisely the situation here. Restricting the sale or transfer of firearms to individuals under the age of 21 is a "longstanding" form of firearms regulation that "historically has fallen outside the scope of the Second Amendment." *United States v. Torres*, 911 F.3d 1253, 1258 (9th Cir. 2019). As the district court correctly concluded, Plaintiffs' motion for a preliminary injunction failed on the merits at step one of the

constitutional analysis. *See* 1-ER-12 ("Plaintiffs cannot demonstrate a likelihood of success on the merits because the challenged regulation does not burden the Second Amendment"). Thus, the Court need not reach the second step of its inquiry. *See* Appellees Br. 21-22; *see also, e.g.*, *Peruta v. Cty. of San Diego*, 824 F.3d 919, 942 (9th Cir. 2016) (en banc) (holding, based on historical analysis alone, that law prohibiting persons from carrying loaded or unloaded concealed weapons, subject to a license-based exception, did not violate the Second Amendment); *United States v. Rene E.*, 583 F.3d 8, 12, 16 (1st Cir. 2009) (holding, based on historical analysis alone, that law regulating possession of handguns by juveniles did not violate the Second Amendment); *People v. Aguilar*, 2 N.E.3d 321, 329 (Ill. 2013) (historical evidence set forth in other decisions supports "the obvious and undeniable conclusion that the possession of handguns by minors is conduct that falls outside the scope of the second amendment's protection"); *cf. BATFE*, 700 F.3d at 204 ("Although we are inclined to uphold the challenged federal laws at step one of our analytical framework, in an abundance of caution, we proceed to step two.").

A. The relevant time period for purposes of the historical analysis begins around 1868 with the Fourteenth Amendment's ratification.

As an initial matter, Plaintiffs wrongly suggest that the only relevant history is founding-era history. *See, e.g.*, Appellants' Br. 28, 30, 33-34. In fact, because Plaintiffs are challenging a state law, the most relevant time period for purposes of historical analysis begins around 1868, when the Fourteenth Amendment was

ratified and made the Second Amendment fully applicable to the States. *See Gould v. Morgan*, 907 F.3d 659, 669 (1st Cir. 2018) ("Because the challenge here is directed at a state law, the pertinent point in time would be 1868 (when the Fourteenth Amendment was ratified)."), *cert. denied*, No. 18-1272 (June 15, 2020); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012) (noting that the proper inquiry is whether the challenged statute "regulates activity falling outside the scope of the Second Amendment right as it was understood at the relevant historical moment—1791 [Bill of Rights ratification] or 1868 [Fourteenth Amendment ratification]" (internal quotation marks and citation omitted) (alterations in original)); *Ezell v. City of Chi.*, 651 F.3d 684, 702 (7th Cir. 2011) ("[I]f the claim concerns a state or local law, the 'scope' question asks how the right was publicly understood when the Fourteenth Amendment was proposed and ratified.") (citing *McDonald v. City of Chi.*, 561 U.S. 742, 770-85 (2010) and *Heller*, 554 U.S. at 625-28); *cf. Peruta*, 824 F.3d at 933 (evaluating historical materials bearing on the adoption of both the Second and Fourteenth Amendment in considering Second Amendment challenge to county's interpretation of the statutory good cause requirement under California law).[2]

[2] Plaintiffs' citation (Appellants' Br. 33-34) to *Gamble v. United States*, 139 S. Ct. 1960 (2019), is inapposite. *Gamble* involved a challenge to a *federal* prosecution, and thus it did not implicate the time of ratification of the Fourteenth Amendment. And even on those terms, *Gamble*'s import is far narrower than

The historical inquiry continues after 1868. *Heller* instructs that "examination of a variety of legal and other sources to determine the *public understanding* of a legal text in the period *after* its enactment or ratification" is also "a critical tool of constitutional interpretation."[3] *Heller*, 554 U.S. at 605 (second emphasis added); *see also, e.g.*, *Friedman v. City of Highland Park*, 784 F.3d 406, 408 (7th Cir. 2015) (noting that "*Heller* deemed a ban on private possession of machine guns to be obviously valid" despite the fact that "states didn't begin to regulate private use of machine guns until 1927," and that "regulating machine guns at the federal level" did not begin until 1934); *BATFE*, 700 F.3d at 196 ("*Heller* demonstrates that a regulation can be deemed 'longstanding' even if it cannot boast a precise founding-era analogue."). Indeed, the Ninth Circuit has found that regulations as recent as the "early twentieth century … might nevertheless demonstrate a history of longstanding

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Plaintiffs suggest: it did not reject any reliance on later sources, but instead said that treatises from a later time period were not sufficient to overturn "170 years of [the Court's] precedent" on the Fifth Amendment. *Id.* at 1964.

[3] Plaintiffs claim that 19th century laws "can prove nothing," citing *Heller*'s statement that later sources "'do not provide as much insight into [the Second Amendment's] original meaning as earlier sources.'" Appellants' Br. 33. But *Heller* involved *only* the Second Amendment, and not its late-19th-century incorporation through the Fourteenth, because it concerned a District of Columbia regulation, not a state law. *See Worman v. Healey*, 922 F.3d 26, 34 n.4 (1st Cir. 2018) (noting this distinction between *Heller* and a Second Amendment challenge to a state law), *cert. denied*, No. 19-404 (June 15, 2020).

regulation if their historical prevalence and significance is properly developed in the record." *Fyock*, 779 F.3d at 997.[4]

As explained in the following section, the historical record, beginning prior and continuing to 1868, and extending into the modern era, supports restrictions on the sale and transfer of firearms for 18-to-20-year-olds. While some individuals of the founding generation may have had personal opinions about the age at which someone could properly handle a firearm, these widespread laws and court decisions from the second half of the 19th century establish that the Constitution allows a state government to prevent those under 21 from possessing firearms.

B. For most of the history of the United States, including when the Second and Fourteenth Amendments were ratified, individuals under 21 were considered minors.

Plaintiffs allege that "[o]nce an individual turns 18 years old in this country, he or she is considered a legal adult free to exercise fundamental constitutional rights pursuant to the United States Constitution." 14-ER-18. For most of our history, however, including up to 1868, when the Fourteenth Amendment was ratified, and long after, persons under the age of 21 were considered minors.

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[4] *See also Duncan v. Becerra*, 970 F.3d 1133, 1150 (9th Cir. 2020) (in undertaking the step-one historical analysis, a court should "look[] for evidence showing whether the challenged law traces its lineage to founding-era *or Reconstruction-era* regulations." (emphasis added)), *pet'n for reh'g en banc filed*, No. 19-55376 (Aug. 28, 2020).

At common law, the age of majority was 21, and the term "minor" or "infant" applied to persons under 21. *See BATFE*, 700 F. 3d at 201; *Horsley v. Trame*, 808 F.3d 1126, 1130 (7th Cir. 2015) ("During the founding era, persons under 21 were considered minors or 'infants.'").[5]

Indeed, until 1969, the age of majority for unmarried men was 21 in every state. ADD152-157, Larry D. Barnett, *The Roots of Law*, 15 Am. U. J. Gender, Soc. Pol'y & L. 613, 681-86 (2007); *BATFE*, 700 F.3d at 201 ("[I]t was not until the 1970s that States enacted legislation to lower the age of majority to 18."); *Horsley*, 808 F.3d at 1130 ("The age of majority was 21 until the 1970s."). Thus, historically, laws restricting the rights of minors applied to persons under the age of 21.

[5] *See also* ADD0006, Blackstone, 1 *Commentaries On the Laws of England* 451 (1st ed. 1765) ("So that full age in male or female is twenty one years, … who till that time is an infant, and so styled in law."); ADD0010, Infant, *Black's Law Dictionary* (1st ed. 1891) (defining "infant" as "[a] person within age, not of age, or not of full age; a person under the age of twenty-one years; a minor"; ADD0021, Vivian E. Hamilton, *Adulthood in Law and Culture*, 91 Tul. L. Rev. 55, 64 (2016) ("The immediate historical origins of the U.S. age of majority lie in the English common law tradition. The American colonies, then the United States, adopted age twenty-one as the near universal age of majority. The U.S. age of majority remained unchanged from the country's founding well into the twentieth century."); ADD0064, T. E. James, *The Age of Majority*, 4 Am. J. Legal Hist. 22, 30 (1960) ("In the eyes of the common law, all persons were esteemed infants until they attained [21 years of age]"); *id.* at ADD0060 (noting that at the time of the Magna Carta, the age of majority was 21 years); ADD0073, James Kent, 2 *Commentaries on American Law* 191 (1827), Lecture XXXI Of Infants ("T[he] necessity of guardians results from the inability of infants to take care of themselves; and this inability continues, in contemplation of law, until the infant has attained the age of twenty-one years.").

C. Laws restricting the sale or transfer of firearms to minors have existed for more than 150 years.

Statutes restricting the purchase and transfer of firearms by those under the age of 21 are "longstanding," *Heller*, 554 U.S. at 626, and have existed for over 150 years. Indeed, numerous nineteenth century state laws restricted the purchase of firearms by, and transfer of firearms to, minors—including laws for the states of Alabama, Delaware, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nevada, North Carolina, Tennessee, Texas, West Virginia, Wisconsin, Wyoming, and the District of Columbia. *See, e.g.*, ADD0158-218, Chart compiling the earliest known nineteenth century state laws restricting the purchase of firearms by, and transfer of firearms to, minors; *see also BATFE* 700 F.3d at 202. Moreover, constitutional provisions analogous to the Second Amendment existed in twelve of these states at the time those laws restricting the ability of minors to purchase or use particular firearms were enacted. *See* ADD0219-75, Chart compiling nineteenth century state analogues to the Second Amendment.

Not only did the people's elected representatives demonstrate, by enacting these laws, that they considered them to be within the government's constitutional power, but judges and leading scholars of the era also considered them to be constitutional. For example, in 1878, the Supreme Court of Tennessee rejected a challenge to a law prohibiting the sale of pistols to minors, defined as those under age 21, holding that "we regard the acts to prevent the sale, gift, or loan of a pistol

or other like dangerous weapon to a minor, not only constitutional as tending to prevent crime but wise and salutary in all its provisions."[6] *State v. Callicutt*, 69 Tenn. 714, 716-17 (1878). The court rejected the defendant's argument that "every citizen who is subject to military duty has the right 'to keep and bear arms,' and that this right necessarily implies the right to buy or otherwise acquire, and the right in others to give, sell, or loan to him." *Id.* at 716. The court explained that the challenged laws were "passed with a view to 'prevent crime'" and do not "affect" or "abridge" the constitutional right of the "'citizens of the State to keep and bear arms for their common defense.'" *Id.*[7]

Thomas Cooley, the "most famous" nineteenth century constitutional law scholar who wrote "a massively popular" constitutional law treatise, *Heller*, 554 U.S. at 616, acknowledged that "the State may prohibit the sale of arms to minors." ADD0292, Thomas M. Cooley, *A Treatise on the Constitutional Limitations* 740 n.4 (5th ed. 1883). Cooley recognized the validity of age restrictions and concurrently

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[6] *See Whitt v. Whitt*, 490 S.W.2d 159, 160 (Tenn. 1973) (noting that Chapter 162 of the Public Acts of 1971 reduced the age of majority from 21 to 18 years of age).

[7] There are numerous examples of prosecutions under similar laws. *See, e.g.*, *Coleman v. State*, 32 Ala. 581, 582 (1858) (upholding conviction under law forbidding "sell[ing], or giv[ing], or lend[ing]" a pistol "to any male minor"); *State v. Allen*, 94 Ind. 441, 442 (1884) (defendant was charged with "'unlawfully barter[ing] and trad[ing] to … a minor under the age of twenty-one years, a certain deadly and dangerous weapon, to wit: a pistol'").

noted that the "federal and State constitutions therefore provide that the right of the people to bear arms shall not be infringed." *Id.* at 429. He did not see a conflict between these principles.

Early twentieth-century court decisions also recognize the constitutionality of age-based firearms regulations. *See Parman v. Lemmon*, 244 P. 227, 229 (Kan. 1925) (rejecting constitutional challenge to a law that prohibited the sale or possession of "dangerous weapons," including pistols and revolvers, to minors), *rev'd on other grounds on rehearing*, 244 P. 232 (Kan. 1926); *cf. Biffer v. City of Chi.*, 116 N.E. 182, 185 (Ill. 1917) (approving city ordinance that, among other things, denied minors permits to carry concealed weapons).[8]

In light of this extensive historical record, the district court was right to conclude that age restrictions like those in Section 27510 are part of a longstanding regulatory traditional and therefore constitutional. *See* 1-ER-10-11 (endorsing conclusions of other federal courts that age restrictions are longstanding, including because "[i]ndividuals under the age of 21 were considered minors or 'infants' for most of our country's history without the rights afforded adults," and, "'by 1923,

[8] *See* ADD0293-95, Op. of Kentucky Att'y Gen. OAG 94-14 (Mar. 3, 1994) (concluding that bill restricting possession of handguns by minors is constitutional under the federal and state constitutions and explaining, in relevant part, that "[g]iven the Commonwealth's history of restricting the access of minors to deadly weapons, it is not unreasonable to conclude that the Kentucky constitutional provision recognizing a right to bear arms has no application to minors").

over half the states … had set 21 as the minimum age for purchase or use of a particular firearm'" (quoting *Mitchell*, 2020 WL 5106723, at *4).

D. Plaintiffs' historical analysis based on militia laws is flawed and irrelevant to the constitutional analysis of California's age-based restriction.

Despite purporting to base their case on history, Plaintiffs barely engage with this robust historical record. Instead, they insist, incorrectly and in the face of contrary caselaw (*see supra* Section I.A), that the *only* relevant historical period is the time of the Second Amendment's ratification. *See* Appellants' Br. 33-34.[9] And Plaintiffs then hang effectively their entire argument on a series of unwarranted inferences from colonial and founding-era militia laws. They observe that most state laws and the Militia Act of 1792 required males in an age range encompassing 18-to-20-year-olds to enroll in the militia; and they maintain that this necessarily implies the right of anyone aged 18 to 20 to purchase, acquire, use, and possess firearms. *See* Appellants' Br. 20-25. Even on its own terms—and as the Fifth Circuit has already held, *see BAFTE*, 700 F.3d at 204 n.17—this argument fails on multiple

[9] In one particularly telling example, Plaintiffs dismiss the Fifth Circuit's reliance on nineteenth-century laws in *BATFE* on the ground that they were adopted "beginning more than five decades after the Founding." Appellants' Br. 33-34. Leaving aside the errors in that criticism on its own terms, *cf. Heller*, 554 U.S. at 605-619, it is certainly no response in a case, such as this, challenging a state-law restriction.

grounds.[10]

First, Plaintiffs' argument is undercut by the Supreme Court's decision in *Heller*, in which the Court decoupled the right to bear arms from the duty to serve in the militia. *See Heller*, 554 U.S. at 589-94. As the Fifth Circuit observed in *BATFE*, *Heller* held that "the right to arms is not co-extensive with the duty to serve in the militia." 700 F.3d at 204 n.17.

Second, Plaintiffs' argument cannot account for the fact that the lower age for militia service differed between states and frequently changed over time. For instance, in 1705, Virginia mandated militia duty at the age of 16. ADD0296-98, An act for settling the Militia, ch. XXIV, 3 William Waller Hening, *The Statutes At Large; Being A Collection Of All The Laws Of Virginia* ("Hening") 335, 335-36 (1823). In 1723, it raised the age to 21. ADD0299-300, An Act for the settling and better Regulation of the Militia, ch. II, § II, 4 Hening 118, 118 (1820). In 1755, it lowered the age to 18. ADD0301-03, An Act for the better regulating and training the Militia, ch. II, §§ II-III, 6 Hening 530, 530-31 (1819)). At the beginning of the Revolutionary War, Virginia lowered the minimum age to 16 (ADD0304-06, An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, ch. I, 9 Hening 9, 16-17 (1821)), only to raise it back to 18

[10] Plaintiffs in *Mitchell* also advanced this argument unsuccessfully. *See* Plaintiffs' Reply in Support of Summary Judgment and Opposition to Cross Motion, No. 3:19-cv-05106, Dkt. No. 103, at 9-12 (W.D. Wash.) (filed Apr. 28, 2020).

after the war (ADD0307-09, An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections, ch. XXVIII, § II, 11 Hening 476, 476-77 (1823)). In addition, during the nineteenth century, several states mandated militia enrollment at age 21, rather than 18. *See, e.g.*, ADD0340-42, N.C. Const. of 1868, art. XII, § 1 (1873); ADD0345-84, Chart compiling examples of state laws mandating militia enrollment at age 21. As the Fifth Circuit observed, these differing ages and fluctuations "undermine[] Appellants' militia-based claim that the right to purchase arms must fully vest precisely at age 18—not earlier or later." *BATFE*, 700 F.3d at 204 n.17. It is unclear whether even Plaintiffs would accept the irresponsible consequences of their argument—that those as young as 16 or even 15 should have the same Second Amendment rights as adults. *See* Appellants' Br. 23-25 (advocating for rights at age 18 while relying on militia and other laws that encompassed 15- or 16-year-olds); Appellees' Br. 28 n.4 ("Plaintiffs fail to carry their argument to its logical—and absurd—result."); *see also BATFE*, 700 F.3d at 204 n.17 (argument "proves too much" by implying rights for 16-year-olds).[11]

[11] Relatedly, the modern equivalents to early militia laws show an additional fatal flaw in Plaintiffs' effort to derive rights from the fact of serving with firearms. Seventeen-year-olds may serve active duty in the U.S. military. *See* 10 U.S.C. § 505(a) (enlistment permitted for "persons who are not less than seventeen years of age nor more than forty-two years of age"; parental consent required for 17-year-olds); *Join the Military*, USAGov, https://www.usa.gov/join-military ("You must be

Third, historical sources undermine the notion that 18-to-20-year-olds in the militia were required to supply their own firearms, and hence must have had a right to purchase them. In the debate regarding the Militia Act, Representative Jeremiah Wadsworth of Connecticut noted that "as to minors, their parents or guardians would prefer furnishing them with arms themselves." ADD-343-44, 2 *Annals of Cong., The Debates and Proceedings in the Cong. Of the U.S.* 1856 (1834). Several states even *required* the parents of militia members who were minors to provide firearms to their children. *See, e.g.*, ADD0345-84, Chart compiling examples of state laws requiring parents to furnish or provide arms to minors in the militia. And some militia laws required states to equip certain militia members with public arms (*i.e.*, arms that were the property of the state or town); ADD0385-411, Chart compiling examples of state laws providing for distribution of public arms to militia members. Thus, even laws that did mandate militia enrollment by minors frequently provided other means by which those minors would receive arms, negating the purported implication that minors had *a right* to arm themselves, much less to acquire firearms from a dealer.

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at least 17 to enlist in any branch of the active military.") (last visited Sept. 9, 2020); *see also* 10 U.S.C. § 246 ("The militia of the United States consists of all able-bodied males at least 17 years of age[.]"). But again, even Plaintiffs do not maintain that the Second Amendment extends to those under 18. Indeed, Plaintiffs reveal their awareness of this flaw in their argument when they state, incorrectly, that "[a]t *age 18*, they *became eligible* to serve … [i]n the military." Appellants' Br. 1 (emphasis added).

Fourth, Plaintiff's argument fails to recognize that a government mandate to engage in certain conduct does not create an individual right to do so. For example, even though citizens have a duty to serve on a jury, "[a]n individual juror does not have a right to sit on any particular petit jury," *Powers v. Ohio*, 499 U.S. 400, 409 (1991); and even though there is a duty to serve in the military if drafted,"[i]t is well established that there is no right to enlist in this country's armed services," *Lindenau v. Alexander*, 663 F.2d 68, 72 (10th Cir. 1981). The Supreme Court made that clear in the militia context almost 150 years ago. *See Presser v. Illinois*, 116 U.S. 252, 263 (1886) (holding that participation in a non-government-organized militia "cannot be claimed as a right independent of law"). And it reaffirmed that principle in *Heller*, explaining that "weapons … most useful in military service," not typically possessed by law-abiding citizens for lawful purposes, fall outside of the Second Amendment's scope, *see* 554 U.S. at 627-28—even though the government may mandate their use in the military or militia.

In short, this nation's longstanding history of firearm age restrictions establishes that Section 27510 is constitutional at the first step of the two-part Second Amendment analysis.

II. COURTS HAVE ACKNOWLEDGED THE LONGSTANDING HISTORY OF AGE-BASED RESTRICTIONS ON THE TRANSFER OF FIREARMS AND HAVE UPHELD SUCH RESTRICTIONS.

A significant body of caselaw confirms the constitutionality of age-based restrictions. More than eight years ago, in *BATFE*, the Fifth Circuit upheld 18 U.S.C. §§ 922(b)(1) and (c)(1) and attendant regulations, which prohibit federally licensed firearms dealers from selling handguns or handgun ammunition to persons under the age of 21. Following the two-step approach, the court first focused on the history of firearm age restrictions, starting with the era in which the Second Amendment was ratified. The Fifth Circuit observed that during that era, "an expectation of sensible gun safety regulation was woven into the tapestry of the guarantee," and that the gun regulations of the era "targeted particular groups for public safety reasons." 700 F.3d at 200. Noting that a person under the age of 21 was generally considered a "minor" or "infant" at the time, the Fifth Circuit concluded that "[i]f a representative citizen of the founding era conceived of a 'minor' as an individual who was unworthy of the Second Amendment guarantee, and conceived of 18-to-20-year-olds as 'minors,' then it stands to reason that the citizen would have supported restricting an 18-to-20-year-old's right to keep and bear arms." *Id.* at 202.

The Fifth Circuit also took into account the history of restricting the ability of minors to purchase firearms, starting in the nineteenth century. The Court observed that "by the end of the 19th century, nineteen states and the District of Columbia had

enacted laws expressly restricting the ability of persons under 21 to purchase or use particular firearms, or restricting the ability of 'minors' to purchase or use particular firearms while the state age of majority was set at age 21." *Id.* at 202. The court cited decisions by the Supreme Courts of Delaware, Indiana, and Kentucky, which recognized the validity of these laws more than a century ago. *Id.* The Fifth Circuit concluded that the restrictions found in 18 U.S.C. §§ 922(b)(1) and (c)(1) on "the ability of 18-to-20-year-olds to purchase handguns from [federally licensed firearms dealers]" were "consistent with a longstanding, historical tradition, which suggests that the conduct at issue falls outside the Second Amendment's protection." *Id.* at 203. Thus, the Fifth Circuit found it was "inclined to uphold the challenged federal laws at step one of our analytical framework." *Id.* at 204. The court, however, "in an abundance of caution," proceeded to step two and held that the challenged laws "pass constitutional muster even if they implicate the Second Amendment guarantee." *Id.*

The district court agreed with the Fifth Circuit's analysis and rejected Plaintiffs' suggestion that eighteenth-century militia service rules entail an absolute prohibition on firearms restrictions for those aged 18 to 20 today. *See* 1-ER-9-11. Plaintiffs criticize the court for doing so, *see* Appellants' Br. 26-34, but none of their arguments is persuasive. Their first assertion—that *BATFE* is distinguishable because the law challenged there was less "severe," *see id.* at 27—is simply

irrelevant; Plaintiffs have failed to connect that assertion to any aspect of the step-one historical inquiry. Their second assertion encompasses a series of attacks on *BATFE*'s reasoning, *see id.* at 27-34, which either inaccurately parody that reasoning or are otherwise mistaken.[12]

Plaintiffs' claims also fly in the face of several other decisions. Most recently, a district court in Washington rejected a Second Amendment challenge to a Washington law that prohibits those under 21 from purchasing or possessing (except in their home and certain other circumstances) a "semiautomatic assault rifle." *See Mitchell*, 2020 WL 5106723, at *3-7. The court held that the challenged law "does not burden Second Amendment rights," and thus is constitutional at the first step of the two-part inquiry, because "reasonable age restrictions on the sale, possession, or use of firearms have an established history in this country." *Id.* at *5. "U.S. law has long recognized that age can be decisive in determining rights and obligations," the

[12] Contrary to Plaintiffs' portrayal, the Fifth Circuit described early safety regulations not as laws *themselves* establishing a historical basis for age restrictions, but rather as part of the foundational principle that "the right to keep and bear arms has never been unlimited." 700 F.3d at 200. It relied on scholarly work "suggesting that the Founders would have supported limiting or banning 'the ownership of firearms by minors, felons, and the mentally impaired,'" and connected that to the age group challenging Section 27510 by observing that "minors" would be understood at the time of the founding to be those under 21, *see id.* at 200-01—points that Plaintiffs can only try to rebut by selectively describing and disassociating them, *see* Appellants' Br. 29-31. And, as already discussed (*see supra* Section I.A), Plaintiffs' claim that laws from around the time of the Fourteenth Amendment's ratification and thereafter "can prove nothing," *see* Appellants' Br. 33, is simply wrong.

court explained. *Id.* at *4. "For most of our country's history, 18- to 20-year-olds were considered minors or 'infants' without the full legal rights of adulthood. … Against this historical backdrop, it is unsurprising that laws prohibiting those under 21 from purchasing firearms are longstanding." *Id.* The court observed that such laws have existed from the nineteenth century up to the present, and that, "[b]ased on this historical evidence, several courts have concluded that firearms age restrictions, particularly those for people under 21, fall outside the Second Amendment's ambit." *Id*.[13]

A federal court in West Virginia reached a similar result in *Hirschfeld*, which considered a Second Amendment challenge to the same statute and regulations upheld in *BATFE*. *See Hirschfeld*, 417 F. Supp. 3d at 749. In addressing the history of age-based firearms regulations, the court noted that "[o]ver the course of the nineteenth and early twentieth century, many states enacted restrictions on gun ownership and use by certain categories of people for public safety reasons—including those under a certain age" and "[b]y the 1920s, roughly half of the states had set 21 as the minimum age for the use and possession certain firearms." *Id.* at 752. The court went on to note that courts upheld these types of laws and "legal

[13] Even though it conclusively held that plaintiffs' challenge failed at the first step of the two-part inquiry and was constitutional for that reason alone, the *Mitchell* court also held that Washington's age restriction would survive the applicable (intermediate) standard of scrutiny. *See id.* at *5-7.

scholars of the time accepted that the State may prohibit the sale of arms to minors." *Id.* (internal quotation marks and citations omitted). Relying on this "historical record of legislation, court decisions, and scholarship" as well as the reasoning in *BATFE*, the court held that challenged laws do not implicate Second Amendment rights.[14] *Id.* at 756.

Other federal courts have also upheld similar regulations affecting the ability of young people to obtain firearms. In *United States v. Rene E.*, 583 F.3d 8, 16 (1st Cir. 2009), the First Circuit upheld a federal ban on juvenile possession of firearms after "evaluat[ing] evidence that the founding generation would have regarded such laws as consistent with the right to keep and bear arms." In *Horsley v. Trame*, 808 F.3d 1126, 1134 (7th Cir. 2015), the Seventh Circuit upheld a state law restricting the ability of persons under the age of 21 from acquiring a firearm license without parental consent. And, in *Powell v. Tompkins*, 926 F. Supp. 2d 367, 387 (D. Mass. 2013), *aff'd on other grounds*, 783 F.3d 332 (1st Cir. 2015), the U.S. District Court for the District of Massachusetts held that Massachusetts's "proscription against grants of licenses to carry firearms to adults under the age of twenty-one comports with the Second Amendment and imposes no burden on the rights of eighteen- to twenty-year-olds to keep and bear arms." The court explained that "classification-

[14] As in *BATFE*, in an abundance of caution, the court went on to the second step of analysis and determined that the challenged law survived intermediate scrutiny. *Hirschfeld*, 417 F. Supp. 3d at 756.

based limitations on access to firearms for the purpose of ensuring public safety were commonplace in the early republic" and "[b]y the turn of the twentieth century, nearly twenty states had laws restricting the ability of persons under the age of twenty-one to access firearms, and over the course of the next twenty or so years, this number steadily grew." *Id.*[15]

State courts, including the Supreme Courts of Louisiana and Illinois, have also upheld various age-based restrictions on firearms possession, including for persons under the age of 21. *See State in Interest of J.M.*, 144 So. 3d 853, 862 (La. 2014) (holding that the "prohibition on the juvenile possession of a handgun is the type of long-standing limitation" that survives constitutional scrutiny, given that "[a]s early as in 1890, the Louisiana legislature made it a misdemeanor offense 'for any person to sell, or lease or give through himself or any other person, any pistol, dirk, bowie-knife or any other dangerous weapon, which may be carried concealed to any person under the age of twenty-one years'"); *Aguilar*, 2 N.E.3d at 329 ("[A]lthough many colonies permitted or even required minors to own and possess firearms for purposes of militia service, nothing like a right for minors to own and possess firearms has existed at any time in this nation's history."); *People v. Mosley*, 33 N.E.3d 137, 155

[15] *See also Nat'l Rifle Ass'n of Am., Inc. v. McCraw*, 719 F.3d 338, 347 (5th Cir. 2013) (upholding state law requirement that applicants for concealed-carry permits be at least 21; noting that "the conduct burdened by the Texas scheme likely 'falls outside the Second Amendment's protection'").

(Ill. 2015) (holding that possession of handguns by minors is conduct that falls outside the scope of the Second Amendment); *In re Jordan G.*, 33 N.E.3d 162, 168 (Ill. 2015) (holding that age-based restrictions on the right to keep and bear arms are historically rooted and apply "equally to those persons under 21 years of age").

In sum, federal and state courts across the country have reached a consensus that the historical record supports the longstanding nature of age-based firearms restrictions, making such restrictions permissible under the Second Amendment. We respectfully submit that this Court likewise should conclude that Plaintiffs' Second Amendment claim fails at the first step of the two-step inquiry.[16]

[16] In the alternative, for the reasons set out in the State's brief, this Court should affirm the district court's decision because (a) the applicable standard of scrutiny is intermediate scrutiny; (b) Section 27510 easily survives that scrutiny; and (c) Plaintiffs have not met their burden to satisfy the other requirements for a preliminary injunction. *See* Appellees' Br. 29-61. In addition, as the State notes, the claims of the individual Plaintiffs who have turned 21 are now moot. *See id.* at 61-64; *BATFE*, 700 F.3d at 191.

CONCLUSION

For the foregoing reasons, and those set forth by the State, the Court should affirm the denial of Plaintiffs' motion for a preliminary injunction.

Respectfully submitted,

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