No. 19-2250

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

TANNER HIRSCHFELD; NATALIA MARSHALL,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Virginia
No. 3:18-cv-103

BRIEF FOR APPELLEES

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STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331. On October 4, 2019, the district court entered an order granting the government's motion to dismiss and denying plaintiffs' motion for summary judgment. *See* ECF No. 49. Plaintiffs timely appealed on November 7, 2019, *see* ECF No. 52; Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Federal law restricts the commercial sale of certain firearms and ammunition by federal firearms licensees to persons between the ages of 18 and 21. *See* 18 U.S.C. § 922(b)(1), (c)(1); *see also* 27 C.F.R. §§ 478.99(b)(1), 478.124(a), 478.96(b). The issues presented are whether the federal restrictions violate the Second Amendment and the equal protection component of the Fifth Amendment.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Statutory & Regulatory Background

1. Federal law restricts the type of firearms that federal firearms licensees ("FFLs") may sell or deliver to persons between the ages of 18 and 21 to "a shotgun or rifle, or ammunition for a shotgun or rifle." 18 U.S.C. § 922(b)(1).[1]

[1] A federal firearms license is required to "engage in the business of importing, manufacturing, or dealing in firearms [or ammunition]." 18 U.S.C. § 922(a)(1). A

Congress enacted the prohibition as part of the Omnibus Crime Control Act and the Gun Control Act of 1968, Pub. L. No. 90-618, tit. I, § 101, 82 Stat. 1213, following a multi-year inquiry into violent crime that included "field investigation and public hearings." S. Rep. No. 88-1340, at 1 (1964). Congress found "that the ease with which" handguns could be acquired by "juveniles without the knowledge or consent of their parents or guardians . . . is a significant factor in the prevalence of lawlessness and violent crime in the United States." Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, tit. IV, § 901(a)(2), 82 Stat. 197, 225. The legislative record established that "juveniles account for some 49 percent of the arrests for serious crimes in the United States and minors account for 64 percent of the total arrests in this category." S. Rep. No. 90-1097, at 77 (1968). "[M]inors under the age of 21 years accounted for 35 percent of the arrests for the serious crimes of violence including murder, rape, robbery, and aggravated assault," and 21 percent of the arrests for murder. 114 Cong. Rec. 12279, 12309 (1968) (Sen. Dodd).

Based on its investigations, Congress found "a causal relationship between the easy availability of firearms other than a rifle or shotgun and juvenile and youthful criminal behavior[.]" Pub. L. No. 90-351, tit. IV, § 901(a)(6), 82 Stat. at 225-26. Federal law enforcement officials testified before Congress that "[t]he greatest growth

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person is "engaged in the business" of dealing firearms, *id.* § 921(a)(21), if that person "devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit," *id.* § 921(a)(21)(C).

of crime today is in the area of young people, juveniles and young adults" and that "[t]he easy availability of weapons makes their tendency toward wild, and sometimes irrational behavior that much more violent, that much more deadly." *Federal Firearms Act: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Sen. Comm. on the Judiciary*, 90th Cong. 57 (1967) (testimony of Sheldon S. Cohen). Law enforcement officers from New York City, Los Angeles, St. Louis, Chicago, Philadelphia, and Atlanta provided Congress with "statistics documenting the misuse of firearms by juveniles and minors," which "take on added significance when one considers the fact that in each of the jurisdictions referred to the lawful acquisition of concealable firearms by these persons was prohibited by statute." S. Rep. No. 89-1866, at 59 (1966); *see also id.* at 58, 60.

Congress's investigations further revealed that "almost all of these firearms[] are put into the hands of juveniles by importers, manufacturers, and dealers who operate under licenses issued by the Federal Government." *Federal Firearms Act: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Sen. Comm. on the Judiciary*, 89th Cong. 67 (1965) ("Firearms Act: 1965 Hearings") (testimony of Sheldon S. Cohen). Congress thus concluded that concealable firearms, such as handguns, "have been widely sold by federally licensed importers and dealers to emotionally immature, or thrill-bent juveniles and minors prone to criminal behavior." Pub. L. No. 90-351, tit. IV, § 901(a)(6), 82 Stat. at 226. It determined "that only through adequate Federal control over interstate and foreign commerce in these weapons, and

over all persons engaging in the businesses of importing, manufacturing, or dealing in them, can this grave problem be properly dealt with." *Id.* § 901(a)(3), 82 Stat. at 225.

To that end, Congress enacted provisions designed to address "[t]he clandestine acquisition of firearms by juveniles and minors," S. Rep. No. 90-1097, at 79, including 18 U.S.C. § 922(b)(1) and (c)(1). Section 922(b)(1) prohibits FFLs from selling "any firearm or ammunition to any individual" under the age of 18, and limits FFL sales of firearms to individuals between the ages of 18 and 20 to "a shotgun or rifle, or ammunition for a shotgun or rifle." *Id.* § 922(b)(1).[2] Under Section 922(c)(1), an FFL 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, in the case of any firearm other than a shotgun or a rifle, [the transferee is] twenty-one years or more of age, or that, in the case of a shotgun or a rifle, [the transferee is] eighteen years or more of age." *Id.* § 922(c)(1).

Sections 922(b)(1) and (c)(1) do not regulate private sales by individuals, and do not prohibit the possession of handguns or other firearms by 18-to-20 year olds. 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

[2] Section 922(g)(1)'s prohibition on the sale or delivery by FFLs of "any firearm or ammunition to any individual" under the age of 18 is not at issue here. *See* JA 15-16 (Compl.) (challenging restrictions on FFLs "selling handguns and handgun ammunition to law-abiding adults aged eighteen to twenty").

juvenile by the parent or guardian." S. Rep. No. 90-1097, at 79. "At the most," therefore, these provisions "could cause minor inconveniences to certain youngsters who are mature, law abiding, and responsible, by requiring that a parent or guardian over 21 years of age make a handgun purchase for any person under 21." 114 Cong. Rec. at 12309 (Sen. Dodd).

Congress subsequently limited the circumstances under which juveniles under 18 years old may possess handguns, but 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. 1796, 2010 (adding 18 U.S.C. § 922(x)); *see also United States v. Rene E.*, 583 F.3d 8 (1st Cir. 2009) (upholding Section 922(x) against Second Amendment challenge).

The Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), which is authorized to issue "such rules and regulations as are necessary to carry out" Title 18's provisions relating to firearms, 18 U.S.C. § 926, has issued implementing regulations that closely track the statute. *See* 27 C.F.R. § 478.99(b).[3] ATF applies these

[3] The regulation at 27 C.F.R. § 478.99(b) provides that a federal firearm licensee "shall not sell or deliver (1) any firearm or ammunition to any individual who the [licensee] knows or has reasonable cause to believe is less than 18 years of age" or (2) any firearms "other than a shotgun or rifle, or ammunition for a shotgun or rifle, to any individual who the [licensee] knows or has reasonable cause to believe is less than 21 years of age."

implementing regulations consistent with Congress's understanding that "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. 90-1097, at 79. Accordingly, ATF has explained that a dealer may lawfully sell a firearm to a parent or guardian who is purchasing it for a minor child as long as the minor is not otherwise prohibited from receiving or possessing a firearm. JA 45-49 (Opinion of the Chief Counsel of ATF, No 23362 (Dec. 5, 1983)) ("ATF Opinion Letter").

B. Factual Background & Prior Proceedings

Plaintiffs Tanner Hirschfeld and Natalia Marshall sought to purchase handguns and handgun ammunition from FFLs. JA 13, 15. Sections 922(b)(1) and (c)(1) and related implementing regulations ("the challenged laws"), *see supra* n.3, prevented their sale because, at the time, plaintiffs were 20-years old and 18-years old, respectively. JA 11, 13, 15. Plaintiffs challenged the federal restrictions in district court as "unduly

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ATF has also provided that FFLs "shall not sell or otherwise dispose, temporarily or permanently, of any firearm to any [transferee who is not federally licensed] unless the licensee records the transaction on a firearms transaction record, Form 4473." 27 C.F.R. § 478.124(a); *see also* 27 C.F.R. § 478.96(b) (imposing same restrictions with respect to out-of-state and mail order sales). The Form 4473 establishes the transferee's eligibility to possess a firearm by recording, among other things, the transferee's "date and place of birth," 27 C.F.R. § 478.124(c)(1), and the transferee's certification that if "the firearm to be transferred is a shotgun or rifle, the transferee is 18 years or more of age," and if "the firearm to be transferred is a firearm other than a shotgun or rifle, the transferee is 21 years or more of age," *id.* § 478.124(f).

burden[ing], discourag[ing], and eliminat[ing] the[ir] private acquisition and ownership of firearms." JA 10. Plaintiffs further alleged a violation of their Fifth Amendment right to equal protection under the law. JA 16.

Rejecting plaintiffs' claims, the district court explained that the challenged laws "are among the 'longstanding prohibitions' and 'conditions and qualifications on the commercial sale of arms,' which the Court in *District of Columbia v. Heller* did not 'cast doubt' on." JA 507 (citing 554 U.S. 570, 626-27 & n.26 (2008)). The court concluded that the regulations do not implicate the right to bear arms as historically understood and thus do not implicate the Second Amendment. JA 508. The court noted its agreement with the Fifth Circuit's decision in *National Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 203 (5th Cir. 2012) ("*NRA*"), which held that that the challenged age restrictions are "consistent with a longstanding tradition of targeting select groups' ability to access and to use arms for the sake of public safety." JA 508-09; *see also* JA 509 (analyzing and upholding the challenged laws under means-end scrutiny "in an abundance of caution"). The court further rejected plaintiffs' equal protection challenge. "[A]ge is not a suspect classification under the Equal Protection Clause," explained the court, JA 513 (quoting *Kimel v. Florida Bd. of Regents*, 528 U.S. at 83 (2000)), and Congress "had a rational basis for regulating adults over 21 differently from adults under 21." JA 513.

SUMMARY OF ARGUMENT

Federal law precludes federal firearms licensees from selling certain types of firearms, including handguns, to purchasers between the ages of 18 and 21. *See* 18 U.S.C. § 922(b)(1), (c)(1). The district court correctly held that plaintiffs had not stated a viable Second Amendment claim. The challenged restrictions do not bar plaintiffs from owning handguns, and, indeed, they have not alleged that the restrictions have prevented them from obtaining handguns. Plaintiffs challenge precisely the type of restriction on commercial sales that the Court in *District of Columbia v. Heller* was at pains not to call into question. 554 U.S. 570, 626 (2008). The age of majority during the Founding was 21 years of age, and State laws restricting the purchase or use of firearms by individuals younger than 21 have been in existence substantially longer than even the restrictions the Supreme Court recognized as "longstanding" in *Heller*. *Id.* Historical interpretations of the Second Amendment by courts and commentators confirm that age qualifications like those at issue here were consistent with the right to bear arms as it was historically understood. Even where 18-to-20 year olds were permitted to handle firearms before reaching the age of majority in the highly regulated context of military service, State and federal militia laws retained a role for parents to act as gatekeepers, providing permission to serve and furnishing handguns to their minor children—a traditional role reflected in the regulatory framework challenged here.

Plaintiffs are on no firmer ground in attempting to recast their claim as a violation of their Fifth Amendment rights. As the district court properly concluded, Congress reasonably regulated the sale of firearms by FFLs to persons under 21 years old via statutory provisions designed to address "[t]he clandestine acquisition of firearms by juveniles and minors," S. Rep. 90-1097, at 79, and only after discovering a "causal relationship between the easy availability of firearms other than a rifle or shotgun and juvenile and youthful criminal behavior." Pub. L. No. 90-351, tit. IV, § 901(a)(6), 82 Stat. at 225-26.

Finally, we note that plaintiff Hirschfeld is currently 21 years old, *see* Br. 3 n.1, and that his case no longer presents a live controversy. It appears, however, that plaintiff Marshall is 19 years old as of the filing of this brief. *See* JA 14.

STANDARD OF REVIEW

The district court's decision is reviewed *de novo*. *United States v. Pruess*, 703 F.3d 242, 245 (4th Cir. 2012) ("We consider such constitutional challenges *de novo*.").

ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT THE CHALLENGED AGE RESTRICTIONS ON THE SALE OF HANDGUNS ARE CONSISTENT WITH THE SECOND AND FIFTH AMENDMENTS

A.1. The district court properly rejected plaintiffs' Second Amendment challenge. As an initial matter, although plaintiffs allege that the challenged laws "unduly burden, discourage, and eliminate the[ir] private acquisition and ownership of

firearms," JA 10 (Compl.), these provisions do not bar them from owning handguns and, indeed, they have not alleged that they have been unable to acquire handguns.

The challenged laws regulate only commercial sales of select firearms and ammunition by FFLs to persons between the ages of 18 and 21. They do not bar such persons from possessing handguns, nor purchasing handguns in private sales by individuals. As the Senate Report noted, "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. 90-1097, at 79. "At the most," therefore, these provisions "could cause minor inconveniences to certain youngsters who are mature, law abiding, and responsible, by requiring that a parent or guardian over 21 years of age make a handgun purchase for any person under 21." 114 Cong. Rec. at 12309 (Sen. Dodd). ATF has similarly noted that the age restrictions "prevent juveniles from acquiring firearms without their parents' or guardian's knowledge," and do not prohibit them "from possessing, owning, or learning the proper usage of firearms." JA 47-48 (ATF Opinion Letter).

2. The Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation," but "[l]ike most rights, the right secured by the Second Amendment is not unlimited." *District of Columbia v. Heller*, 554 U.S. 570, 592, 626 (2008). The Supreme Court in *Heller* identified the right as belonging to "law-abiding, responsible citizens," *id.* at 635, and consistent with that understanding,

stated that "nothing in [its] opinion should be taken to cast doubt" on a number of "presumptively lawful regulatory measures," including "longstanding prohibitions on the possession of firearms by felons and the mentally ill," and "conditions and qualifications on the commercial sale of arms." *Id.* at 626-27 & n.26. The Court described these "permissible" measures as falling within "exceptions" to the protected right to bear arms. *Id.* at 635. Two years later, a plurality of the Court "repeat[ed]" its "assurances" that *Heller*'s holding "did not cast doubt on such longstanding regulatory measures" such as "laws imposing conditions and qualifications on the commercial sale of arms." *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (quoting *Heller*, 554 U.S. at 626).

Legislatures have long established categorical minimum age limits for the use and acquisition of firearms. Indeed, State laws restricting the purchase or use of firearms by individuals below 21 years of age have been in existence substantially longer than even the restrictions the Supreme Court characterized as "longstanding" in *Heller*. 554 U.S. at 626. Before the end of the nineteenth century, 19 States and the District of Columbia had enacted laws restricting the ability of persons under 21 to purchase or use particular firearms. *See* JA 50-71 (chart reproducing State laws).[4] By

[4] Some states stated the age limit expressly as 21: Alabama (1856), Tennessee (1856), Kentucky (1873), Indiana (1875), Georgia (1876), Mississippi (1878), Missouri (1879), Delaware and Illinois (1881), Maryland and West Virginia (1882), Kansas and Wisconsin (1883), Iowa (1884), Nevada (1885), Louisiana (1890), Wyoming (1890),

the early twentieth century, three more States restricted the purchase or use of particular firearms by individuals below 21 years of age. *See id.*[5]

Thus, by 1923, a total of 22 States and the District of Columbia had made 21 the minimum age for purchase or use of particular firearms. *See* JA 50-71; *supra* notes 4-5. Within the same timeframe (mid-nineteenth century through early twentieth century), 21 other States imposed age qualifications on the purchase or use of some, but not all, firearms, setting the minimum age between 12 and 20. *See* JA 50-71.[6]

District of Columbia (1892), North Carolina (1893), and Texas (1897). *See* JA 50-71 (chart reproducing State laws).

Others achieved the same result by prohibiting purchase or possession of firearms by "minors," and setting the age of majority at 21: *Walker v. Walker*, 17 Ala. 396 (Ala. 1850); *Jones v. Wells*, 2 Houst. 209 (Del. Super. Ct. 1860); *Womack v. Greenwood*, 6 Ga. 299 (Ga. 1849); *Peters v. Jones*, 35 Iowa 512 (Iowa 1872); *Burgett v. Barrick*, 25 Kan. 526 (Kan. 1881); *Blackard v. Blackard*, 426 S.W.2d 471, 472 (Ky. 1968); *Fitz-Gerald v. Bailey*, 58 Miss. 658 (Miss. 1881); *Crouch v. Crouch*, 187 S.E.2d 348, 349 (N.C. Ct. App. 1972); *Whitt v. Whitt*, 490 S.W.2d 159, 160 (Tenn. 1973); *Memphis Trust Co. v. Blessing*, 58 S.W. 115, 117 (Tenn. 1899); *Bullock v. Sprowls*, 54 S.W. 657, 659-60 (Tex. Civ. App. 1899); *Doe v. Archdiocese of Milwaukee*, 700 N.W.2d 180, 188 (Wis. 2005). Until the 1970s, Illinois, Missouri, and Oklahoma set the age of majority at twenty-one for men, and eighteen for women. *See Castner v. Walrod*, 83 Ill. 171 (Ill. 1876); *Anderson v. Williams*, 104 N.E. 659, 661 (Ill. 1914); *Reisse v. Clarenbach*, 61 Mo. 310 (Mo. 1875); *Bassett v. Bassett*, 521 P.2d 434, 435 n.2 (Okla. Civ. App. 1974).

[5] Oklahoma (law enacted in 1890, Oklahoma admitted as a State in 1907), New Hampshire (1923), and South Carolina (1923). *See* JA 50-71.

[6] Oregon (1868), Ohio (1880), Florida and Pennsylvania (1881), New Jersey (1882), Michigan, New York, and Rhode Island (1883), Washington (enacted 1883, admitted as a State in 1889), Massachusetts (1884), Minnesota and Virginia (1889),

At present, all 50 States and the District of Columbia have minimum-age qualifications for the use or purchase of some firearms. *See* JA 50-71; *see also supra*, notes 4-6.[7] Twenty-nine of the 50 States, and the District of Columbia, place a minimum-age qualification only on the purchase or use of handguns—usually defined as pistols, revolvers, or other concealable firearms. *Id.*[8]

3. Age qualifications restricting the purchase of firearms by individuals below 21 years of age thus plainly comport with the "historical background of the Second Amendment." *Heller*, 554 U.S. at 592. "In the view of at least some members of the founding generation, disarming select groups" altogether "for the sake of public safety

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Vermont (1896), South Dakota (1903), Utah (1905), Montana (1907), Idaho and Maine (1909), Arizona (enacted 1883, admitted as a State in 1912), California and Connecticut (1923). Subsequently, age restrictions were also enacted by New Mexico (1971), Arkansas (1975), Nebraska (1977), Alaska (1978), North Dakota (1985), Hawaii (1988), and Colorado (1993). *See* JA 50-71.

[7] At the time that these minimum-age qualifications were enacted, 35 of the 50 States, and the District of Columbia, had State constitutional analogues to the Second Amendment. Those states were Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Missouri, Montana, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Wyoming. Because the District of Columbia is a federal enclave, it is directly constrained by the Second Amendment. *See* JA 50-71.

[8] Alabama, California, Colorado, Connecticut, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, South Carolina, Tennessee, Texas, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *See* JA 50-71.

was compatible with the right to arms specifically and with the idea of liberty generally." *National Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 200 (5th Cir. 2012) ("NRA"). "Scholars have proposed that at the time of the founding, 'the right to arms was inextricably and multifariously linked to that of civic virtu (i.e., the virtuous citizenry),'" such that the Second Amendment did not preclude laws restricting the rights of "unvirtuous citizens"—a category extending to "*minors*, felons, and the mentally impaired." *Id.* at 201 (quoting Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations & Criminological Considerations*, 60 Hastings L.J. 1339, 1359-60 (June 2009), and Don B. Kates, *Second Amendment*, in 4 *Encyclopedia of the American Constitution* 1640 (Leonard W. Levy et al. eds., 1986)). As historically understood, the terms "minor" and "infant" referred to persons under the age of 21. *See* William Blackstone, 1 *Commentaries On The Laws Of England* 463 (1st ed. 1765)) ("So that full age in male or female, is twenty one years, which age is completed on the day preceding the anniversary of a person's birth; who till that time is an infant, and so styled in law.").[9]

Nineteenth century courts and commentators noted with approval restrictions on the ability of minors to purchase firearms. "[T]he judge and professor Thomas

[9] Indeed, the tradition of designating 21 years of age as the "age of majority" can be traced in England as far back as the time of Magna Carta, where the "choice of this age evolved" with regard to men in knight service, "owing to the weight of the arms and the greater skill required in warfare." *See* T.E. James, *The Age of Majority*, 4 Am. J. Legal Hist. 22, 26, 30 (1960).

Cooley, who wrote a massively popular 1868 Treatise on Constitutional Limitations," *Heller*, 554 U.S. at 616, included among the permissible exercises of State police power "[t]hat the State may prohibit the sale of arms to minors." Thomas M. Cooley, *Treatise on Constitutional Limitations* 740 n.4 (5th ed. 1883). Professor Cooley perceived no inconsistency between these age qualifications on sales and the fact that "State constitutions," like the federal constitution, "provide that the right of the people to bear arms shall not be infringed." *Id.* at 429; *see also Heller*, 554 U.S. at 616-17 (treating Cooley's interpretations of the Second Amendment as persuasive authority); *United States v. Emerson*, 270 F.3d 203, 235-36, 258-59 (5th Cir. 2001) (same).

Nineteenth and early twentieth century cases underscore the longstanding recognition of limitations on firearms purchases by persons under the age of 21. Tennessee outlawed the sale of pistols to minors under the age of 21, *see supra* note 4, and the Tennessee Supreme Court upheld a conviction under the prohibition against a challenge brought under the State's Second Amendment analogue. *See State v. Callicutt*, 69 Tenn. 714, 716-17 (1878). The court explained that the challenged restrictions "do not in fact abridge[] the constitutional right of the 'citizens of the State to keep and bear arms for their common defense,'" and that "acts to prevent the sale" of "a pistol or other like dangerous weapon to a minor" were "not only constitutional as tending to prevent crime[,] but wise and salutary in all [their] provisions." *Id.* The Supreme Court of Kansas moreover rejected a constitutional challenge to a State law provision that, unlike the challenged restriction here, prohibited both the sale and possession of

"dangerous weapons to minors," including "any pistol, revolver, or toy pistol." *See Parman v. Lemmon*, 244 P. 227, 228, 231 (Kan. 1925); *see also Biffer v. City of Chicago*, 116 N.E. 182, 184-85 (1917) (holding that a city ordinance denying concealable weapons permits to "all minors" did not violate the federal or state constitutional right to bear arms); Op. of Kentucky Att'y Gen. 94-14 (March 3, 1994) ("Given 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," and that "[i]f the right to bear arms does extend to minors, it likely is a more limited right than that possessed by adults").

B. Plaintiffs do not dispute the tradition of age restrictions, and their attempts to discover constitutional infirmities are unavailing.

1. Plaintiffs argue (Br. 11) that the challenged restrictions are unconstitutional on the ground that the "generally-recognized age of majority . . . is now eighteen." *See also* Br. 13 (arguing that "[t]he age of majority at the time of a court's inquiry" is the relevant inquiry).

That the age of majority for some types of restrictions may now generally be 18 casts no doubt on the constitutionality of longstanding restrictions on the sale of particular firearms to 18 to 21 year olds. As plaintiffs recognize (Br. 32-33), "the scope of the Second Amendment is subject to historical limitations," and a court should rely principally on text and history to discern the limits of the right to keep and bear arms. *United States v. Chester*, 628 F.3d 673, 679 (4th Cir. 2010). And, as the

Supreme Court instructed in *Heller*, that history includes an "examination of a variety of legal and other sources" as "a critical tool of constitutional interpretation." 554 U.S. at 605. As discussed, this post-ratification commentary, case law, and legislation all support the government's authority to restrict the sale of firearms to individuals under the age of 21.

2. Plaintiffs note that 18-year olds served in 18th century state militias, where they "were in regular use, possession, and trade of pistols and ammunition." *See* Br. 15-17. But "the right to arms is not co-extensive with the duty to serve in the militia." *NRA*, 700 F.3d at 204 n.17l; *see also Callicutt*, 69 Tenn. at 716-17 (expressly rejecting 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.").

In any event, the practice of enrolling persons under 21 was far from universal. Some legislatures, like Virginia, established a minimum age of 21, which it lowered during times of exceptional need, for example, in 1755 prior to the Seven Years War. *See* JA 292-96 (chart reproducing early Virginia militia laws). The militia laws of a number of others States—Delaware, Georgia, Kansas, New Jersey, North Carolina, Ohio, Pennsylvania—enrolled only individuals over 21 in their respective militias beginning in the late eighteenth century throughout the mid-nineteenth century. *See* JA 286-89 (chart reproducing statutory provisions setting 21 as the minimum age for militia service).

Many of the State militia laws on which plaintiffs seek to rely also presumed active oversight of minors by parents or legal guardians. For example, Colonial Pennsylvania's 1755 militia act, drafted by Benjamin Franklin, permitted persons under 21 to enroll in the militia but provided "that no youth under the age of twenty-one years, . . . shall be admitted to enroll himself, or be capable of being enrolled, in the said companies or regiments without the consent of his or their parents or guardians, masters or mistresses, in writing under their hands first had and obtained." *An Act For The Better Ordering And Regulating Such As Are Willing And Desirous To Be United For Military Purposes Within This Province*, Nov. 25, 1755, in 3 Jared Sparks, ed., *The Works of Benjamin Franklin* 78, 82-83 (1836); *see also* JA 291 (chart summarizing state laws that required parental consent for those under 21 to serve in the militia). Other States required parents to furnish the firearms for their minor child's militia duty: Delaware (1785), Massachusetts (1789), New Hampshire (1786), Vermont (1797), North Carolina (1806), Maine (1821), and Missouri (1825). *See* JA 298-301. *Contra* Br. 18 ("[M]inors were in the militia and expected, if not required, to own their own weapons."). Thus, to the extent it is relevant, the highly regulated context of military service at the Founding is entirely consistent with the existence of age qualifications on the personal purchase of firearms.

Plaintiffs fare no better (Br. 17) in seeking to rely on the Militia Act of 1792. As noted, the right to bear arms is not coextensive with the duty to serve in the militia. Nor did the statute rest on the premise that minors would be able to purchase

firearms. In the course of Congressional debate over the 1792 Militia Act, while Congress was considering whether the United States should furnish firearms to persons who were unable to equip themselves, Representative John Vining "asked by what means minors were to provide themselves with the requisite articles?" *See* JA 307-13 (2 *The Debates and Proceedings In The Congress Of The United States* 1854-55 (1834)). The remedy, according to Representative Jeremiah Wadsworth, was that "as to minors, their parents or guardians would prefer furnishing them with arms themselves." JA 310.[10]

3. Plaintiffs suggest that fundamental rights are not subject to age qualifications. *See* Br. 12 ("A fundamental liberty has never been deemed inapplicable to a class of adult citizens in such a fashion."). But plaintiffs do not seriously contend that the federal and state governments are constitutionally precluded from regulating sales of firearms to children. And the Constitution itself establishes age limits on the right to vote and the right to hold federal elective office. *See, e.g.*, U.S. CONST. amend. XXVI, § 2; *id.* Art. I, §§ 2-3; *id.* Art. II § 1.

Plaintiffs' observation (Br. 8-10) that "[t]hose who are eighteen and older constitute 'the people,'" as contemplated in the Bill of Rights likewise adds nothing to

[10] Although the Act conscripted "each and every free able-bodied white male citizen of the respective States, [or] resident therein" between the ages of eighteen and forty-five, Militia Act of 1792 § 1, 1 Stat. 271, it also granted States broad discretion to impose age qualifications on service, including discretion to except from service persons below 21 years old. *Id.* § 2, 1 Stat. 272.

their argument. The Supreme Court in *Heller* admonished that "nothing in [its] opinion should be taken to cast doubt" either on "longstanding prohibitions on the possession of firearms by felons and the mentally ill," although such sales would be made to persons who constituted "the people." 554 U.S. at 626-67.

Plaintiffs seek to contrast (Br. 24-26) the challenged laws here with prohibitions on firearm possession by felons and the mentally ill. But the validity of age restrictions is based on the long-established and universal understanding that age qualifications like those at issue here are appropriate, without regard to the restrictions on other classes of persons. In any event, scholars and courts comparing the various traditional restrictions on firearms have noted commonality in the "longstanding tradition of targeting select groups' ability to access and to use arms for the sake of public safety." *NRA*, 700 F.3d at 203. Indeed, the First Circuit analogized to "criminals" and "the mentally imbalanced" in rejecting a Second Amendment challenge to the Youth Handgun Safety Act's prohibition (subject to exceptions) on firearm possession by juveniles under the age of 18. *See* 18 U.S.C. § 922(x)(2), (3) (establishing exceptions for, *inter alia*, hunting and military service); *United States v. Rene E.*, 583 F.3d 8, 15 (1st Cir. 2009) (surveying historical evidence demonstrating that the "regulati[on] [of] juvenile access to handguns was permissible on public safety grounds and did not offend constitutional guarantees of the right to keep and bear arms").

C. While plaintiffs further assert that the challenged laws violate their right to equal protection under the law, the government "may discriminate on the basis of age without offending" the Constitution "if the age classification in question is rationally related to a legitimate state interest." *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 83 (2000). "The rationality commanded by the Equal Protection Clause does not require" the government "to match age distinctions and the legitimate interests they serve with razorlike precision." *Id.* Unlike classifications based on race or sex, it is permissible to "rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the [legislature's] legitimate interests," and "[t]he Constitution does not preclude reliance on such generalizations," even if "age proves to be an inaccurate proxy in any individual case." *Id.* at 84.

As the district court explained, plaintiffs have not established an impermissible interference with their Second Amendment rights, and "age is not a suspect classification under the Equal Protection Clause." JA 513 (quoting *Kimel*, 528 U.S. at 83). Congress reasonably regulated the sale of firearms by FFLs to persons under 21 years through statutory provisions designed to address "[t]he clandestine acquisition of firearms by juveniles and minors." S. Rep. 90-1097, at 79. Plaintiffs do not dispute the "causal relationship" that Congress found "between the easy availability of firearms other than a rifle or shotgun and juvenile and youthful criminal behavior." Pub. L. No. 90-351, tit. IV, § 901(a)(6), 82 Stat. at 225-26. Nor do they dispute that "almost all of these firearms[] [we]re put into the hands of juveniles by importers,

manufacturers, and dealers who operate under licenses issued by the Federal Government." Firearms Act: 1965 Hearings (testimony of Sheldon S. Cohen). In light of the legislative record, *see supra* pp. 1-5, plaintiffs cannot meet their burden of showing that Congress's differential treatment of 18-to-20-year olds "is so unrelated to the achievement of any combination of legitimate purposes that [a court] can only conclude that the [legislature's] actions were irrational." *Gregory v. Ashcroft*, 501 U.S. 452, 471 (1991).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 5,858 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

s/ Thais-Lyn Trayer
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CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Thais-Lyn Trayer
Thais-Lyn Trayer

ADDENDUM

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18 U.S.C. § 922(b)(1)

§ 922 Unlawful acts

* * *

(b) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver--

> (1) any firearm or ammunition to any individual who the licensee knows or has reasonable cause to believe is less than eighteen years of age, and, if the firearm, or ammunition is other than a shotgun or rifle, or ammunition for a shotgun or rifle, to any individual who the licensee knows or has reasonable cause to believe is less than twenty-one years of age.

* * *

18 U.S.C. § 922(c)(1)

§ 922 Unlawful acts

* * *

(c) In any case not otherwise prohibited by this chapter, a licensed importer, licensed manufacturer, or licensed dealer may sell a firearm to a person who does not appear in person at the licensee's business premises (other than another licensed importer, manufacturer, or dealer) only if--

(1) the transferee submits to the transferor a sworn statement in the following form:

"Subject to penalties provided by law, I swear that, in the case of any firearm other than a shotgun or a rifle, I am twenty-one years or more of age, or that, in the case of a shotgun or a rifle, I am eighteen years or more of age; that I am not prohibited by the provisions of chapter 44 of title 18, United States Code, from receiving a firearm in interstate or foreign commerce; and that my receipt of this firearm will not be in violation of any statute of the State and published ordinance applicable to the locality in which I reside. Further, the true title, name, and address of the principal law enforcement officer of the locality to which the firearm will be delivered are

Signature ..... Date ....."

and containing blank spaces for the attachment of a true copy of any permit or other information required pursuant to such statute or published ordinance.

* * *

27 C.F.R. § 478.99(b)(1)

§ 478.99 Certain prohibited sales or deliveries.

* * *

(b) Sales or deliveries to underaged persons. A licensed importer, licensed manufacturer, licensed dealer, or licensed collector shall not sell or deliver

(1) any firearm or ammunition to any individual who the importer, manufacturer, dealer, or collector knows or has reasonable cause to believe is less than 18 years of age, and, if the firearm, or ammunition, is other than a shotgun or rifle, or ammunition for a shotgun or rifle, to any individual who the importer, manufacturer, dealer, or collector knows or has reasonable cause to believe is less than 21 years of age.

* * *

27 C.F.R. § 478.124(a)

§ 478.124 Firearms transaction record.

* * *

(a) A licensed importer, licensed manufacturer, or licensed dealer shall not sell or otherwise dispose, temporarily or permanently, of any firearm to any person, other than another licensee, unless the licensee records the transaction on a firearms transaction record, Form 4473: Provided, That a firearms transaction record, Form 4473, shall not be required to record the disposition made of a firearm delivered to a licensee for the sole purpose of repair or customizing when such firearm or a replacement firearm is returned to the person from whom received.

* * *

27 C.F.R. § 478.96(b)

§ 478.96 Out-of-State and mail order sales.

* * *

(b) A licensed importer, licensed manufacturer, or licensed dealer may sell a firearm that is not subject to the provisions of § 478.102(a) to a nonlicensee who does not appear in person at the licensee's business premises if the nonlicensee is a resident of the same State in which the licensee's business premises are located, and the nonlicensee furnishes to the licensee the firearms transaction record, Form 4473, required by § 478.124. The nonlicensee shall attach to such record a true copy of any permit or other information required pursuant to any statute of the State and published ordinance applicable to the locality in which he resides. The licensee shall prior to shipment or delivery of the firearm, forward by registered or certified mail (return receipt requested) a copy of the record, Form 4473, to the chief law enforcement officer named on such record, and delay shipment or delivery of the firearm for a period of at least 7 days following receipt by the licensee of the return receipt evidencing delivery of the copy of the record to such chief law enforcement officer, or the return of the copy of the record to him due to the refusal of such chief law enforcement officer to accept same in accordance with U.S. Postal Service regulations. The original Form 4473, and evidence of receipt or rejection of delivery of the copy of the Form 4473 sent to the chief law enforcement officer shall be retained by the licensee as a part of the records required of him to be kept under the provisions of subpart H of this part.

* * *