THE HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DANIEL MITCHELL, et al.,

Plaintiffs,

v.

CHARLES ATKINS, et al.,

Defendants,

and

SAFE SCHOOLS SAFE COMMUNITIES,

Intervenor-Defendant.

No. 3:19-cv-5106

EVERYTOWN FOR GUN SAFETY SUPPORT FUND'S AMICUS BRIEF IN SUPPORT OF DEFENDANTS' AND INTERVENOR-DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT



**Perkins Coie LLP**
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

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1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

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**Perkins Coie LLP**
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

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Phone: 206.359.8000
Fax: 206.359.9000

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**Perkins Coie LLP**
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

## INTEREST OF AMICUS CURIAE

*Amicus curiae* Everytown for Gun Safety Support Fund ("Everytown") is the education, research, and litigation arm of Everytown for Gun Safety, the nation's largest gun-violence-prevention organization, with nearly six million supporters across all fifty states. Everytown for Gun Safety was founded in 2014 as the combined efforts 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 the murder of twenty children and six adults in an elementary school in Newtown, Conn. by a 20-year-old using a Bushmaster XM-15 semiautomatic rifle. The mayors of nine cities in the State of Washington 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 gun laws through the filing of amicus briefs providing historical context, social science and public policy research, and doctrinal analysis that might otherwise be overlooked. Everytown has filed such briefs in numerous Second Amendment cases, including cases, like this one, involving challenges to minimum-age restrictions and restrictions on the purchase and sale of firearms, *see, e.g. Colo. Outfitters Ass'n v. Hickenlooper*, Nos. 14-1290, 14-1292 (10th Cir.); *Silvester v. Harris*, No. 14-16840 (9th Cir.); *Nat'l Rifle Ass'n v. Swearingen*, No. 4:18-cv-00137 (N.D. Fla.) (Dkt. 83), and in a case in this District, *Washington v. U.S. Dep't of State*, No. 2:18-cv-01115 (W.D. Wash.) (Dkt 47, Dkt. 95 at 2 n.2). Several courts have expressly relied on Everytown's amicus briefs in deciding Second Amendment and other gun cases. *See 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), *app. 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).



**Perkins Coie LLP**
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

## INTRODUCTION

This case is about the right of the people of Washington to be free from gun violence and the state's power to pass laws to protect that freedom. By adopting Initiative Measure No. 1639 ("I-1639"), Washingtonians chose to expand background checks, to prohibit those under age 21 from purchasing a semiautomatic assault rifle (the "Age Provision"),[1] and to prohibit in-person sales of such rifles to out-of-state purchasers (the "Nonresident Sales Provision"). Plaintiffs ask this Court to override these choices and declare the age and out-of-state purchaser limitations unconstitutional.

Plaintiffs challenge the Age Provision under the Second Amendment. They assert that I-1639 is "the broadest, most expansive firearms ban in the nation." Pls. Mot. For Summ. J., Dkt. 76 at p. 1. But this is not so. It is comparable to minimum-age laws on the purchase and sale of firearms that have been enacted and upheld by federal and state courts throughout the country. Indeed, plaintiffs' portrayal largely disregards the age-related aspects of I-1639 and seeks to paint it as an outright *ban* on semiautomatic assault rifles. But their rhetoric cannot mask the fact that I-1639 is not as restrictive as (and certainly not more restrictive than) laws generally prohibiting and restricting the purchase and possession of assault weapons to persons of any age—laws that, like minimum-age laws, have been upheld by federal and state appellate courts against Second Amendment challenges. And considered, as it must be, only as an age-based restriction, this limitation in I-1639 falls outside the protection of the Second Amendment. Regulating access to firearms for those under 21 has clear historical pedigree extending from the founding era through the modern era.

Plaintiffs also challenge the Nonresident Sales Provision under the dormant Commerce Clause. Despite their contention, this restriction is not a "ban on interstate sales." Dkt. 76 at p. 1,

[1] "Semiautomatic assault rifle" is defined to include "any rifle which utilizes a portion of the energy of a firing cartridge to extract the fired cartridge case and chamber the next round, and which requires a separate pull of the trigger to fire each cartridge" and to exclude "antique firearms" and those that have been made permanently inoperable. RCW § 9.41.010(26). Washington law, like federal law, also prohibits the purchase of pistols by those under 21, RCW § 9.41.240, but plaintiffs have not challenged that provision in this litigation.



**Perkins Coie LLP**
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

16. As the Attorney General has explained, "nothing in the Initiative prohibits an FFL [in Washington] from transferring a semiautomatic assault rifle to an FFL in a different state consistent with federal law—a practice long utilized for interstate sales of pistols and other types of firearms"—for sale to a non-Washington resident.[2] I-1639 does not discriminate against out-of-state commercial interests and it does not excessively burden commerce relative to Washington's substantial interest in promoting public safety through enhanced background checks.

Everytown files this amicus brief in support of the defendants' and intervenor-defendant's Cross-Motion for Summary Judgment and Opposition to Plaintiffs' Motion for Summary Judgment, and, in particular, to provide additional background for the Court on two issues. First, 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. Second, the government's interest in enhanced background checks, which cannot be conducted adequately on nonresidents of Washington, is substantial (indeed, compelling) for purposes of the dormant Commerce Clause analysis.

## ARGUMENT

### I. Longstanding Restrictions on the Sale of Firearms to Persons Under 21 Establish That I-1639's Age Limitation Regulates Conduct Outside the Second Amendment's Scope

The Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008), held that the Second Amendment protects an individual right to bear arms. Its opinion emphasized, however, that the right "is not unlimited," and that "nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms." *Id.* 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. These "exclusions need not mirror limits that were on the books in 1791." *United States v. Skoien*, 614

[2] https://www.atg.wa.gov/initiative-1639.



**Perkins Coie LLP**
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

F.3d 638, 641 (7th Cir. 2010) (en banc) (upholding federal law prohibiting the possession of firearms for persons convicted of misdemeanor domestic violence crimes); *see 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 is to ask "whether the challenged law burdens conduct protected by the Second Amendment." *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013). Courts examine "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). Where such evidence exists, the law should be upheld because it falls outside the Second Amendment's scope; there is no need to proceed to the step-two scrutiny analysis. *Id.* at 829–30.

That is precisely the situation here. Restrictions on the sale or transfer of firearms to persons under the age of 21 are 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). Plaintiffs' claim thus fails at step one of the Second Amendment analysis, and the Court need not reach the second step. *See 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 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. Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 700 F.3d 185, 204 (5th Cir. 2012) ("*NRA*") ("Although we are inclined to uphold the



**Perkins Coie LLP**
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

challenged federal laws [prohibiting selling handguns to individuals under 21] at step one of our analytical framework, in an abundance of caution, we proceed to step two.").

Inexplicably, plaintiffs contest the restriction on sales to persons under 21 with virtually no reference to that age limitation or its historical pedigree. Instead, they argue as though I-1639 banned *all* sales of semiautomatic assault rifles *to anyone*, calling it "immense and unprecedented" in scope and "akin to the blanket handgun ban at issue in *Heller*." Dkt. 76 at p. 9. But that is not the case, and thus, as defendants explain, the question is not whether semiautomatic rifles fall within the Second Amendment's protection, but whether sales of those firearms to 18- to 20-year-olds do so. Defs. and Intervenor-Def. Cross Mot. for Summ. J. and Opp. to Pls. Mot. for Summ. J., Dkt. 84 at p. 12. Because plaintiffs omitted the relevant framework for historical analysis from their brief, we provide that framework to assist the Court.

### A. The relevant time period for the historical analysis begins when the Fourteenth Amendment was ratified.

Because plaintiffs are challenging a state law under the Second and Fourteenth Amendments, the historical analysis should begin in 1868, when ratification of the Fourteenth Amendment made the Second Amendment 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)."), *petition for cert. filed*, No. 18-1272 (Apr. 1, 2019); *Ezell v. City of Chicago*, 651 F.3d 684, 702 (7th Cir. 2011) ("If 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 Chicago*, 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).



**Perkins Coie LLP**
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

The Court's historical inquiry should not end in 1868, however. *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." *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); *NRA*, 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 looked to regulations from the early twentieth century, commenting that "these early twentieth century regulations might nevertheless demonstrate a history of longstanding regulation if their historical prevalence and significance is properly developed in the record." *Fyock*, 779 F.3d at 997 (declining to preliminarily enjoin city ordinance banning possession of large-capacity magazines).[3]

In this case, it does not matter whether the Court looks to the timeframe most relevant for the Fourteenth Amendment, or to the time of the Second Amendment's ratification, or even to much more recent history. As the sections that follow explain, the historical record from the founding era through the modern era supports restrictions on the sale and transfer of firearms to 18- to-20-year-olds.

### B. For most of the history of the United States, persons under 21 were considered minors.

In 1791 when the Second Amendment was ratified, in 1868 when the Fourteenth Amendment was ratified and made the Second Amendment applicable to the States, and for most of the history of the United States, persons under the age of 21 were considered minors. At

[3] A panel of the Ninth Circuit recognized the relevance of post-Civil War history in *Young v. Hawaii* but ascribed lesser importance to this later history even though the case involved a challenge to a state law. *See* 896 F.3d 1044, 1059 (9th Cir. 2018), *reh'g en banc granted*, 915 F.3d 681 (9th Cir. 2019). The *Young* panel decision, however, is no longer precedential in light of the grant of en banc review. *See* 915 F.3d at 682.



**Perkins Coie LLP**
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

common law, the age of majority was 21, and the term "minor" or "infant" applied to anyone under 21. *See NRA*, 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.'").[4] Indeed, until 1969, the age of majority for unmarried men was 21 in every state. Declaration of Carolyn Gilbert ("Gilbert Decl."), Ex. 6, Larry D. Barnett, *The Roots of Law*, 15 Am. U. J. Gender, Soc. Pol'y & L. 613, 681–86 (2007); *NRA*, 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.

### C. Restrictions on the sale or transfer of firearms to minors have existed for more than 150 years.

As defendants explain, statutes restricting the purchase and transfer of firearms by those under the age of 21 are "longstanding," *Heller*, 554 U.S. at 626, having existed for over 150 years. *See* Dkt. 84 at pp. 13–14. The following historical context confirms and expands on defendants' analysis.

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

[4] *See also* Gilbert Decl., Ex. 1, 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."); Gilbert Decl., Ex. 2, 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"); Gilbert Decl., Ex. 3, 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."); Gilbert Decl., Ex. 4, T.E. James, *The Age of Majority*, 4 Am. J. Legal Hist. 22, 30 (1960) ("[i]n the eyes of the common law, all persons were esteemed infants until they attained [21 years of age]"); *id.* at 26 (noting that at the time of the Magna Carta, the age of majority was 21 years); Gilbert Decl., Ex. 5, James Kent, 2 *Commentaries on American Law* 191 (1827), Lecture 31 of Infants ("The 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.").



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1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

Columbia. *See, e.g.*, Gilbert Decl., Ex. 7 (chart compiling the earliest nineteenth century state laws restricting the purchase of firearms by, and transfer of firearms to, minors); *see also NRA*, 700 F.3d at 202. Moreover, laws analogous to the Second Amendment existed in twelve of the states and the District of Columbia at the time those laws restricting the ability of minors to purchase or use particular firearms were enacted. *See* Gilbert Decl., Ex. 8 (chart compiling nineteenth century state analogues to the Second Amendment).

Courts and leading scholars of the era considered these laws to be constitutional. For example, in 1878, the Supreme Court of Tennessee rejected a challenge to a law prohibiting the sale (and even gifting) of pistols to minors (defined as those under age 21),[5] 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." *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.* Similarly, in 1858, the Supreme Court of Alabama upheld a conviction for violating a state law that made it a misdemeanor to "sell, or give, or lend" a pistol "to any male minor."[6] *Coleman v. State*, 32 Ala. 581, 582 (1858); *see also, e.g.*, *State v. Allen*, 94 Ind. 441, 443 (1884) (reversing dismissal of indictment where 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, commonly called a revolver'").

[5] *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).

[6] At that time, the age of majority in Alabama was 21. *See Walker v. Walker*, 17 Ala. 396, 399–400 (1850).



**Perkins Coie LLP**
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

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." Gilbert Decl., Ex. 9, Thomas M. Cooley, *A Treatise on Constitutional Limitations* 740 n.4 (5th ed. 1883). Cooley recognized the validity of age restrictions and concurrently 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—observing no 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); *Biffer v. City of Chicago*, 116 N.E. 182, 184–85 (Ill. 1917) (upholding city ordinance that denied minors permits to carry concealed weapons); *cf. State v. Quail*, 92 A. 859, 859 (Del. Gen. Sess. 1914) (denying defendant's request to dismiss indictment based on statute criminalizing "knowingly sell[ing] a deadly weapon to a minor other than an ordinary pocket knife").

### D. Courts have accepted the historical pedigree of age-based restrictions and upheld those restrictions.

As defendants explain, there is a clear consensus that, in light of the historical record, restrictions on firearm purchases by those under 21 fall outside the protection of the Second Amendment. Dkt. 84 at pp. 14–15. Plaintiffs engage with none of this case law—not even *NRA*, the seminal 2012 decision in which the Fifth Circuit upheld federal prohibitions on selling handguns or handgun ammunition to individuals under 21.[7] Nor do plaintiffs engage with federal

[7] The Fifth Circuit concluded that the federal age restrictions were "consistent with a longstanding, historical tradition, which suggests that the conduct at issue falls outside the Second Amendment's protection" and thus was "inclined to uphold the challenged federal laws at step one of our analytical framework." *NRA*, 700 F.3d at 203–04. "[I]n an abundance of caution," the court proceeded to step two and held that the challenged laws "pass constitutional muster *even if* they implicate the Second Amendment guarantee." *Id.* (emphasis added); *see also Hirschfeld v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 417 F. Supp. 3d 747, 756 (W.D. Va. 2019), *app. docketed*, No. 19-2250 (4th Cir. Nov. 7, 2019) (concluding that the same federal age restrictions do not



**Perkins Coie LLP**
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

and state case law upholding similar regulations affecting the ability of young people to obtain firearms.[8] The unavoidable conclusion is that plaintiffs have no tenable response to the consensus of state and federal courts across the country: the historical record establishes that age-based firearms restrictions are "longstanding," and thus permissible under the Second Amendment.[9]

## II. Washington Has a Compelling Interest in the Public-Safety Value of Enhanced Background Checks, Given its Limited Access to Criminal, Mental Health, and Domestic Violence Information About Nonresidents

Plaintiffs also challenge I-1639 under the dormant Commerce Clause. The new law excludes semiautomatic assault rifles from the categories of firearms that Washington dealers may sell directly, in person, to non-state purchasers—placing semiautomatic assault rifles in the same category as handguns. *See* Dkt. 84 at 9. As defendants explain, this exclusion does not violate the dormant Commerce Clause, including because it does not discriminate against

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implicate Second Amendment rights, relying on the "historical record of legislation, court decisions, and scholarship" as well as the reasoning in *NRA*).

[8] *See United States v. Rene E.*, 583 F.3d 8, 16 (1st Cir. 2009) (upholding 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"); *Horsley v. Trame*, 808 F.3d 1126, 1134 (7th Cir. 2015) (upholding state law restricting the ability of persons under the age of 21 from acquiring a firearm license without parental consent); *Powell v. Tompkins*, 926 F. Supp. 2d 367, 387 (D. Mass. 2013), *aff'd on other grounds*, 783 F.3d 332 (1st Cir. 2015) (holding that Massachusetts's limiting public carry licenses to those 21 and older "comports with the Second Amendment and imposes no burden on the rights of eighteen- to twenty-year-olds to keep and bear arms"); *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 age restrictions in Louisiana dating from as early as 1890); *People v. Aguilar*, 2 N.E.3d 321, 329 (Ill. 2013) ("[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") (emphasis in original); *People v. Mosley*, 33 N.E.3d 137, 155 (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"); *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'").

[9] For the reasons set out in defendants' brief, even if the Court were to proceed to step two of the constitutional analysis, it should apply intermediate scrutiny and conclude that I-1639's age provision does not violate the Second Amendment. The provision does not severely burden a core right (*see* Dkt. 84 at 16–19) and it has, at the very least, a "reasonable fit" with Washington's substantial interest in promoting public safety and reducing gun violence (*see* Dkt. 84 at 20–26).



**Perkins Coie LLP**
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

interstate commerce (*see id.* at 27–31) and, even if it indirectly burdens interstate commerce, it easily passes muster under the applicable balancing test (*see id.* at 31–32).

The case establishing that balancing test is *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Under *Pike*, a non-discriminatory measure that indirectly burdens interstate commerce is constitutional unless the burden is "clearly excessive in relation to the putative local benefits." 397 U.S. at 142; *see also, e.g.*, *Int'l Franchise Ass'n v. City of Seattle*, 97 F. Supp. 3d 1256, 1277 (W.D. Wash. 2015), *aff'd* 803 F.3d 389 (9th Cir. 2015). As defendants explain, the "local benefits" of limiting in-person sales of semiautomatic assault rifles to residents of the state arise from Washington's substantial interest in ensuring the proper processing of its enhanced background checks, which cannot adequately be run on nonresidents.

Compelling public-policy considerations support that interest. The federal background check system performs an indispensable function in reducing the chances that individuals not permitted to possess firearms will nevertheless be able to acquire them. Queries to the National Instant Criminal Background Check System ("NICS") yield information from three databases, containing (1) information about fugitives from justice, terrorists, and those subject to domestic violence protection orders; (2) state and national fingerprint records of people charged with felonies or misdemeanors; and (3) other prohibitor information not contained in (1) or (2).[10] Nevertheless, the system is not perfect: "states voluntarily provide records for use in the databases accessed by NICS. … [F]or various reasons, some records are not timely provided, or are not provided at all." *Mance v. Sessions*, 896 F.3d 699, 707 (5th Cir. 2018) (denying Second Amendment and equal-protection challenges to federal prohibition on in-person sales of handguns to nonresidents), *petition for cert. filed*, 18-663 (Nov. 19, 2018); *see also Culp v. Raoul*, 921 F.3d 646, 648 (7th Cir. 2019), (rejecting Second Amendment and Article IV cl. 2 challenges to Illinois law limiting concealed carry permits to in-state residents and residents of

[10] *See* Candee Decl. ¶ 7. In addition, ICE databases may be queried through NICS for records on non-U.S. citizens attempting to receive firearms. *See id.*



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1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

states with licensing standards substantially similar to Illinois's, in light of "Illinois's inability to obtain complete and timely information about nonresidents—for example, about a recent arrest for domestic violence or a voluntary commitment for inpatient mental health treatment[—given that] Illinois cannot compel this information from other states, nor at this time do national databases otherwise contain the information"), *petition for cert. filed,* No. 19-487 (Oct. 10, 2019).

Washington's enhanced background checks are critical to supplement the federal system for those firearms that Washingtonians have determined merit additional safeguards—*i.e.*, handguns and semiautomatic assault rifles. When only NICS checks are available, as is the case for most nonresident purchasers, the limitations in coverage reduce Washington's ability to ensure that applicants are actually law-abiding and responsible. Washington, therefore, has a compelling interest in permitting in-person sales of semiautomatic assault rifles only to those for whom an enhanced background check is feasible—*i.e.*, Washington residents. That policy has substantial "local benefits" and any purported burden on interstate commerce does not outweigh—let alone "clearly exce[ed]"—those benefits.[11]

### A. Inconsistencies in the record reporting processes of several states demonstrate the importance of Washington's enhanced background check system.

As defendants explain, I-1639's background check provision provides for an "enhanced" background check for semiautomatic assault rifles, the same process Washington currently has in place for handguns. Local law enforcement performs these checks, and they involve querying not only NICS but also multiple additional databases and agency sources. *See* Dkt. 84 at 8.

Kateri Candee, Washington State Patrol's Assistant Division Administrator for ACCESS, the system that enables state agencies to query law enforcement data, explains in a declaration

[11] *See Pike*, 397 U.S. at 142. Although strict scrutiny is not the applicable standard, *see* Dkt. 84 at 27–31, these compelling state interests would guide the analysis even if it did apply. *See id.* at 32–35 (explaining that nonresident sales provision would also survive strict scrutiny). In other words, the explanation set out in this section for why Washington has a compelling interest in enhanced background checks that cannot adequately be run on nonresidents applies under either standard.



**Perkins Coie LLP**
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

that Washington's enhanced background checks are "far more thorough than a NICS check alon[e]." Candee Decl. ¶ 18. As Candee explains, "participation by the states in NICS is voluntary. This means that the type and volume of records available in NICS databases varies widely from state to state." *Id.* ¶ 8. In addition, Washington's enhanced checks can identify several categories of information not available via NICS. *See id.* 15–17. Furthermore, "because the bulk of state and local databases queried in an enhanced background check contain exclusively Washington records, conducting an effective enhanced background check on a resident of a state other than Washington would be extremely difficult, if not impossible." *Id.* ¶ 18. Such a check would "require contacting … jurisdictions outside the state—which may or may not be cooperative and responsive to the agency's request." *Id.*

Brandi Belcher, a Records Specialist at the Spokane Police Department, likewise explains that "it is virtually impossible to run a thorough and comprehensive background check on a non-Washington resident. The kind of information I can uncover in a local check is often not available to me for non-residents." Belcher Decl. ¶ 8. Belcher explains, for example, that there are, in Belcher's experience, disqualifying mental-health records that are not available in the databases accessed via NICS but are available in Washington's state records, and that a NICS search would likewise not reveal "a non-Washington conviction for which [an applicant was] never finger printed." *Id.* ¶¶ 6–8. And Belcher also emphasizes that NICS's coverage is limited by the fact that submission of information is voluntary and sometimes by errors in data transfer. *Id.* ¶ 6. Belcher illustrates these issues with a tragic example: an individual received a Washington concealed pistol license despite a mental health disqualifier known to Hawaii, because Hawaii had not submitted the disqualifier to NICS and Washington and Hawaii do not exchange mental health information, and the individual obtained a firearm and used it to shoot and kill another person. *Id.* ¶ 9.

As the following subsections explain, substantial information from federal and state entities that examine and report on the NICS system supports Candee's and Belcher's



**Perkins Coie LLP**
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

observations. Together, they compel the conclusion that Washington has a robust interest in permitting sales of semiautomatic assault rifles only to those for whom an enhanced background check is feasible—Washington residents.

**1. Criminal history records**

Most importantly, there are significant state-level disparities in reporting criminal records to the national system, with some reporting nearly all records and others failing to report a significant portion of criminal convictions. The failures of certain states to do a thorough reporting job results in a substantial number of criminal records being excluded from the federal system. A 2013 report (cited in and attached to Candee's declaration) found that nationwide, states fail to make available to the federal criminal-background-check system records of twenty-five percent of felony convictions, totaling more than seven million missing records. National Consortium for Justice Information and Statistics (SEARCH), *Improving the National Instant Background Screening System for Firearm Purchases* 19 (2013), *available at* http://bit.ly/2oat4Ha ("SEARCH REPORT"); *see also* Candee Decl. ¶ 8 & Exh. B.[12] The most recent available statistics show that the criminal records of as many as 18.7 million individuals contained in state repositories may not be available through III. Bureau of Justice Statistics, *Survey of State Criminal History Information Systems* 2016 ("BJS Report"), Tables 1, 20 (Feb. 2018), *available at* www.ncjrs.gov/pdffiles1/bjs/grants/251516.pdf.

Relatedly, backlogs in certain states' record reporting mean that there are a significant number of records that have never been entered into the state databases that populate III. Twenty states have a backlog of 1,000 or more records, ranging from 1,000 to over 520,000. BJS Report

[12] Most states hold criminal records in their state criminal record databases, which are also made available through an entry in the Interstate Identification Index ("III"), the national database for records of arrests, indictments, and dispositions for all 50 states (and which in turn is one of the three databases that compose NICS). *See* SEARCH Report at p. 6; Candee Decl. ¶ 7. Among other reasons, some records maintained at the state level are unavailable in a national check because some law enforcement agencies do not collect the fingerprints of offenders—and III will not accept the submission of records that do not contain fingerprints. SEARCH, State Progress in Record Reporting for Firearm-Related Background Checks: Misdemeanor Crimes of Domestic Violence, 6 (2016), *available at* https://bit.ly/2pMnDQd. When a criminal record lacks a fingerprint, the record is unavailable beyond the local or state level. As a result, many records of misdemeanor crimes of domestic violence are not available through III. *Id.*



**Perkins Coie LLP**
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

at Table 13.[13] While many states do an effective job of reporting criminal records, these failures of other states to report such records or report them timely would undermine Washington's ability to conduct its background checks on nonresidents.

Moreover, certain states make criminal records available through III only after significant delays. This flaw has two elements: (1) a delay between a felony adjudication and the receipt of a conviction record by the state record repository, and (2) a delay between the records being received by a repository and records being entered into a state database, which feeds into the national database.[14] Nine states take at least thirty days for felony records to be received by the state repository and an additional thirteen states take between eight and thirty days for their state repositories to receive records. BJS Report at Table 8b.[15] Once records are received, nine states take at least thirty days to then enter that felony adjudication into the state repository, and five states take between eight and thirty days to do so. BJS Report at Table 8b.[16] Together, in low-performing states, these reporting delays can lead to long gaps between a felony conviction and the entry of records into a database accessible through the federal system—over two years in Kansas, over a year in Indiana and Mississippi, at least 212 days in New Mexico, 189 days West

[13] Arizona (520,009 records); Connecticut (331,200); Pennsylvania (225,500); Virginia (172,700); Hawaii (148,000); Kansas (140,800); New Jersey (133,700); Idaho (129,800); Nevada (119,000); Alabama (100,000); Utah (73,500); Missouri (65,600); Oregon (55,000); West Virginia (50,200); Indiana (10,000); New Mexico (6,800); Montana (4,000); Ohio (4,000); North Dakota (2,400); Alaska (1,000).

[14] III, which supplies criminal history records for the federal background check system, relies on state criminal records databases to populate the system. When a state agency queries III, state databases with responsive records are identified which can then be searched. This means failure of states to enter records in their own databases also deprives the federal system of the records. *See* 28 CFR 20.3(m); BJS Report at glossary v–vi.

[15] Indiana, Kansas, and Mississippi (more than one year); North Dakota (91–180 days); Arizona, Nevada, New Mexico, North Carolina, and Ohio (31–90 days); Arkansas, California, Florida, Georgia, Hawaii, Missouri, Montana, Oklahoma, South Dakota, Texas, Vermont, Virginia, and West Virginia (8–30 days). BJS Report at Table 8b.

[16] Kansas (more than one year); New Mexico and West Virginia (181–365 days); Arizona, California, Montana, Nevada, North Dakota, and Ohio (31–90); Georgia, Oklahoma, South Dakota, Vermont, and Virginia (8–30 days). BJS Report at Table 8b.



**Perkins Coie LLP**
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

Virginia, 122 days in North Dakota and 62 days in Arizona, Nevada and Ohio—posing serious public safety threats. BJS Report at Table 8b.[17]

**2. Protective orders**

There are also significant failures in certain states to report protective orders into the national database. A number of states only report a fraction of the protective orders indexed in their state databases into the national system. BJS Report at Tables 4, 4a.[18] Nationally, there is a disparity of approximately 164,000 protective orders between state databases and the federal background-check system. *Id.* Some of the disparity may be due to the regular entry and expiration of short-term orders, but the size of the disparity is concerning.[19] Additionally, some states cannot reliably report protective orders to the National Crime Information Center ("NCIC") file (which is one of the databases that NICS comprises) because (1) courts cannot meet NCIC technical requirements, (2) some courts and law enforcement agencies lack adequate staff, and (3) some protective orders lack all of the data elements required for entry into NCIC.[20] Whatever the reason for this disparity, it denies important information to the state of Washington.

[17] Kansas (over two years); Indiana, Mississippi (over one year); New Mexico (212–455 days); West Virginia (189–395 days); North Dakota (122–270 days); Arizona, Nevada, Ohio (62–180 days); California and Montana (39–120 days); North Carolina (32–91 days); Georgia, Oklahoma, South Dakota, Vermont, and Virginia (16–60 days); Arkansas (10–37 days); Florida, Hawaii, Missouri, and Texas (9–31 days). BJS Report at Table 8b.

[18] Alabama (4,721 of 13,542); Colorado (112,156 of 230,678); Florida (194,803 of 319,218); Hawaii (5,272 of 13,747); Iowa (25,462 of 50,180); Massachusetts (19,785 of 35,605); Michigan (16,076 of 30,421); Mississippi (826 of 17,441); Nebraska (2,094 of 5,027); Nevada (110 of 2,380); North Dakota (1,297 of 2,683); Rhode Island (15,567 of 50,980); South Dakota (3,010 of 4,371); Texas (17,743 of 44,610); Utah (10,446 of 38,450); Vermont (2,119 of 3,873). BJS Report at Tables 4, 4a.

[19] SEARCH, State Progress in Record Reporting for Firearm-Related Background Checks: Protection Order Submissions, 5 (2016), *available at* https://bit.ly/2GklRwa.

[20] *Id.*



**Perkins Coie LLP**
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

### 3. Mental health records

There are also failures in certain states in reporting prohibiting mental health records.[21] Two nearby states—Montana and Wyoming—and the U.S. territories functionally fail to report prohibiting mental health records. Active Records in the NICS Indices by State, *available at* https://bit.ly/2JISsPk.[22] In states that do report records, a number do so at a per-capita rate that is aberrantly low compared to other states, indicating either underreporting or differences in state law leading to the failure to include seriously ill individuals.[23] The median state, Mississippi, reports prohibiting mental health records at a rate of 711 per 100,000 (a total of 21,150 records for a state of 2,976,149 people). Sixteen states report prohibiting records at less than half the median rate, and nine states report a rate at or below one-fourth of the median.[24] Again, some of these disparities can likely be explained by policy differences, rather than reporting failures. Some states may provide less access to treatment to the severely mentally ill, or otherwise employ commitment procedures that do not require reporting committed individuals to NICS. But these differences in policy do not mitigate the need of Washington to identify people prohibited by mental illness when selling semiautomatic assault rifles.

## B. Oregon, Idaho, and Montana Share Many of the Same Record Reporting Flaws as Other States.

Plaintiff Daniel Mitchell's store is located in Vancouver, Washington, *see* Mitchell Decl. ¶ 1, which lies on the state border next to Portland, Oregon. According to his declaration, his out-

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[21] Federal law prohibits the possession of firearms by anyone "who has been adjudicated as a mental defective or who has been committed to a mental institution." 18 U.S.C. 922(g)(4); *see also* RCW §§ 9.41.040(2)(a)(iv), 9.41.047, 71.05.182.

[22] Wyoming (13 Records); Montana (36 Records).

[23] States do not meaningfully differ in their underlying rates of mental illness. *See* D. Hemenway & M. Miller, *Association of rates of household handgun ownership, lifetime major depression, and serious suicidal thoughts with rates of suicide across US census regions*, 8 Injury Prevention 313, 314 (2002), *available at* https://bit.ly/2V9Pxoe.

[24] Wyoming (2 per 100,000); Montana (3); New Hampshire (44); Alaska (92); Rhode Island (135); Georgia (136); Oklahoma (144); Arkansas (155); South Dakota (170); Louisiana (191); Indiana (193); Alabama (214); Kansas (263); Maryland (281); Nevada (303); Vermont (336). Washington's own reporting rate is more than twice the median rate, at 1,898 per 100,000.



**Perkins Coie LLP**
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

of-state purchasers are primarily from Oregon. *See id.* ¶ 16 ("The majority of my sales are to Washington and Oregon residents."). Similarly, stores in eastern Washington presumably are likely to serve customers from Idaho and Montana. Many of the state-level reporting problems just discussed are also present in these three states. As noted above, Montana functionally fails to report any prohibiting mental-health records. *See supra.* And in 2016, Oregon and Idaho each had enormous backlogs of unprocessed and partially processed dispositions not yet properly entered into their respective state criminal record repositories: Idaho had a backlog of 129,800 records, and Oregon had a backlog of 55,000 records. *See* BJS Report at Table 13. Similarly, after a felony adjudication, Montana takes between 8 and 30 days to forward the record to the state repository and then between 31 and 90 days to enter the adjudication into the repository, making it one of the slow states on record entry. *See* BJS Report at Table 8b.

Each of these shortcomings would undermine Washington's ability to ensure that purchasers of semiautomatic assault rifles are qualified and responsible, if the state were limited to NICS checks.[25] And given that enhanced background checks are virtually impossible to run on nonresidents, *see* Belcher Decl. ¶ 8; Candee Decl. ¶ 18, these shortcomings further establish Washington's compelling interest in limiting such sales to Washington residents. Accordingly, the nonresident sales limitation is clearly constitutional under *Pike*. *See* Dkt. 84 at 31–32 (plaintiffs have not adequately established any burden on interstate commerce and, in any event, the "local benefit" of enabling enhanced background checks "outweighs any alleged burden").

## CONCLUSION

The court should grant Defendants' and Intervenor-Defendant's Cross Motion for Summary Judgment and should deny Plaintiffs' Motion for Summary Judgment.

[25] Recently enacted federal legislation will (1) require states to form a plan to improve their record reporting, (2) incentivize states to comply with their improvement plans, and (3) provide funding to states to improve their record reporting systems. *See* Consolidated Appropriations Act, 2018, Fix NICS Act of 2018, Pub. L. 115–141, §§ 601–605 (2018). But the results of this increased funding and attention are yet to be realized.



**Perkins Coie LLP**
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

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By: *s/ Mica D. Klein*
By: *s/ Carolyn S. Gilbert*
Mica D. Klein, WSBA No. 46596
MicaKlein@perkinscoie.com
Carolyn S. Gilbert, WSBA No. 51285
CarolynGilbert@perkinscoie.com
**Perkins Coie LLP**
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000

*Attorneys for Amicus Curiae Everytown for Gun Safety Support Fund*

**CERTIFICATE OF SERVICE**

The undersigned certifies that on April 7, 2020, I caused to be served via the CM/ECF system a true and correct copy of the foregoing document and that service of this document was accomplished on all parties in the case by the CM/ECF system.

*s/ Mica D. Klein*
Mica D. Klein, WSBA No. 46596
MicaKlein@perkinscoie.com



**Perkins Coie LLP**
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000