No. 19-2250

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

TANNER HIRSCHFELD, et al.,

Plaintiffs/Appellants,

vs.

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

BRIEF OF *AMICI CURIAE* GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE, BRADY, EVERYTOWN FOR GUN SAFETY SUPPORT FUND, AND MARCH FOR OUR LIVES ACTION FUND IN SUPPORT OF APPELLEES' PETITION FOR REHEARING OR REHEARING *EN BANC*

[Additional Counsel Listed on Signature Page]

Angela N. Ellis
SULLIVAN & CROMWELL LLP
1700 New York Ave. NW #700
Washington, DC 20006
(202) 956-6911

Counsel for Amici Curiae *Giffords Law Center to Prevent Gun Violence, Brady, Everytown for Gun Safety Support Fund, and March For Our Lives Action Fund*

September 3, 2021

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 19-2250 Caption: Hirschfeld v. Bureau of Alcohol, Tobacco, Firearms and Explosives

Pursuant to FRAP 26.1 and Local Rule 26.1,

Giffords Law Center to Prevent Gun Violence
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Angela N. Ellis Date: 09/03/2021

Counsel for: Giffords Law Center

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Brady
(name of party/amicus)

who is amicus, makes the following disclosure:
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Signature: /s/ Angela N. Ellis Date: 09/03/2021

Counsel for: Brady

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No. 19-2250 Caption: Hirschfeld v. Bureau of Alcohol, Tobacco, Firearms and Explosives

Pursuant to FRAP 26.1 and Local Rule 26.1,

Everytown for Gun Safety Support Fund
(name of party/amicus)

who is amicus, makes the following disclosure:
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Signature: /s/ Angela N. Ellis Date: 09/03/2021

Counsel for: Everytown for Gun Safety

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March For Our Lives Action Fund
(name of party/amicus)

who is amicus, makes the following disclosure:
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Signature: /s/ Angela N. Ellis Date: 09/03/2021

Counsel for: March For Our Lives Action Fund

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INTEREST OF *AMICI CURIAE*[1]

Giffords Law Center to Prevent Gun Violence ("Giffords"), Brady, Everytown for Gun Safety Support Fund ("Everytown"), and March For Our Lives Action Fund are non-profit policy organizations dedicated to researching, enacting, and defending laws and programs proven to effectively reduce gun violence. Giffords, Brady, and Everytown previously submitted *amicus* briefs in support of Appellees (ECF Nos. 15, 20, 21), and Giffords and Brady were granted leave to participate in oral argument (ECF No. 57).

INTRODUCTION

Americans experience remarkably high rates of gun-related violence and injury.[2] Children and teens are not spared; firearms are

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[1] No party or its counsel authored this brief in whole or in part, or made a monetary contribution for this brief.

[2] *Gun Violence in America*, Everytown Research & Policy, *available at* https://everytownresearch.org/report/gun-violence-in-america/ (last updated Apr. 27, 2021) (U.S. gun homicide rate is 25 times, and U.S. gun suicide rate is 10 times, that of other high-income countries).

their leading cause of death.[3] And access to firearms increases the risk of death by suicide and homicide for people of all ages.[4]

The problem is staggering, but not new. Fifty years ago, Congress undertook an extensive, multi-year investigation into rising rates of gun violence, which "revealed a causal relationship between the easy availability of firearms to young people under 21 and [a] rise in crime." (Dissent Op. at 108 (citation omitted).) That "careful, deliberative" effort (*id.* at 110), resulted in the modest legislation challenged here.

In case after case, when faced with challenges to similarly commonsense gun safety measures, this Circuit has consistently refused to second-guess legislative judgments, recognizing that "[i]f ever there was an occasion for restraint" in invalidating laws, "this would seem to be it." *United States* v. *Masciandaro*, 638 F.3d 458, 476 (4th Cir. 2011). The panel's decision here shows no such restraint. Instead,

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[3] *The Impact of Gun Violence on Children and Teens*, Everytown Research & Policy, *available at* https://everytownresearch.org/report/the-impact-of-gun-violence-on-children-and-teens/ (last updated Jan. 8, 2021).

[4] *See infra* p. 10 & n.12; (Giffords's Br., ECF No. 20-1, at 23).

it abruptly ends a modest federal regulatory scheme that has been on the books for more than half a century. And it does so based on reasoning that is unsound and irreconcilable with this Court's precedent. Rehearing *en banc* is necessary to allow the Court to correct the panel's grave error on this exceptionally important question.

ARGUMENT

I. *EN BANC* CONSIDERATION IS NECESSARY TO ENSURE UNIFORMITY IN THE DECISIONS OF THIS COURT.

The panel's opinion decisively breaks with this Circuit's well-established tradition of judicially modest Second Amendment jurisprudence. Where this Court's prior decisions have consistently urged judicial restraint in this life-and-death realm,[5] the panel opts instead for brash judicial policymaking. Under the guise of "intermediate scrutiny," the panel engages in a wholesale re-

[5] *See, e.g.*, *Kolbe* v. *Hogan*, 849 F.3d 114, 140, 145-46 (4th Cir. 2017) (*en banc*) (upholding firearm restriction; condemning "a trampling of the legislative prerogative to enact firearms regulations to protect all the people"); *Woollard* v. *Gallagher*, 712 F.3d 865, 882 (4th Cir. 2013) (upholding firearm restriction; district court "improperly conducted a review more reminiscent of strict scrutiny than intermediate scrutiny"); *Masciandaro*, 638 F.3d at 476 (upholding firearm restriction; "[i]f ever there was an occasion for restraint, this would seem to be it"); *United States* v. *Staten*, 666 F.3d 154, 167 (4th Cir. 2011) (upholding restriction because "[i]ntermediate scrutiny does not require a perfect fit").

examination of congressional decision-making—from attacking (on the basis of a 50-year-old record) the credentials of witnesses whom Congress observed live and found credible, to subjecting Congress's initiatives to an arbitrary statistical "threshold" that no court has ever endorsed. (Panel Op. at 71, 75-76.) The result is an outlier opinion that cannot be squared with this Court's precedents.

First, the panel's decision is incompatible with Circuit precedent upholding the constitutionality of longstanding conditions and qualifications on commercial firearm sales. In *United States* v. *Hosford*, this Court established that such a law is presumptively lawful if it (i) "covers only the commercial sale of firearms"; (ii) "imposes a mere condition or qualification"; and (iii) is "longstanding." 843 F.3d 161, 166 (4th Cir. 2016). Like the law upheld in *Hosford*, the minimum-age law challenged here (the "Law") regulates the commercial sale of firearms rather than other forms of exchange, e.g., sales from "one's own personal collection" or family gifts; like the law upheld in *Hosford*, which required licensed dealers to be "at least twenty-one years old," the Law establishes an age-based qualification (21 years); and like the law upheld in *Hosford*, passed in 1968, the Law is "longstanding"—it

was enacted in the same year as part of the same comprehensive legislation, and likewise has a pedigree based in similar laws from the early twentieth century (and before). *See id.* at 164-67; *Nat'l Rifle Ass'n of Am., Inc.* v. *Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 202-03 (5th Cir. 2012). The panel's decision to dispose of remarkably similar legislation cannot be squared with *Hosford*.[6]

Second, by giving virtually no weight to post-ratification sources, the panel's selective analysis at Step One of this Circuit's two-part framework is out of step with that of other Circuits and inconsistent with *Heller*. While the panel relies almost exclusively on

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[6] The panel attempts to limit "commercial" regulations—a category of gun restrictions that the Supreme Court in *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), deemed "presumptively lawful"—solely to "hoop[s] someone must jump through to *sell* a gun," and then mischaracterizes the Law as "a total ban on *buying* a gun." (Panel Op. at 14.) But neither *Hosford* nor *Heller* suggests such a limitation or otherwise supports the panel's choice to define a commercial regulation by reference to which party to the commercial exchange—buyer or seller—a court views as most burdened. (Panel Op. at 17.) In any event, as the dissent correctly notes, the Law here is *not* a total ban on gun purchases; rather, it places a "limited condition and qualification on whom a subset of sellers . . . may sell a subset of firearms." (Dissent Op. at 99.) That limited restriction falls squarely within the category of commercial regulations that *Heller* and *Hosford* deemed presumptively lawful.

"[t]he militia laws in force at the time of ratification" in its analysis (Panel Op. at 24), and discounts later historical sources cited by the Government (*id.* at 54-59), *Heller* looked to "how the Second Amendment was interpreted from immediately after its ratification *through the end of the 19th Century*." 554 U.S. at 605 (emphasis added). Indeed, *Heller* relied on commentaries published in 1825, 1833, 1840, and 1849, a speech from 1856, case law from the 1840s and 1850s, and post-Civil War legislation and commentaries. *Id.* at 608-19.[7] The panel's decision to assign virtually no persuasive value to post-ratification tradition—including the fact that over a third of states restricted gun ownership by those under age 21 by the end of the nineteenth century (*see* Panel Op. at 55-57)—is an error in direct

[7] Judges from other circuits have relied on similar sources, including related to the law challenged here. *See, e.g.*, *Heller* v. *District of Columbia*, 670 F.3d 1244, 1272 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (positing that "tradition (*that is, post-ratification history*) also matters" and "is a critical tool of constitutional interpretation") (citation omitted) (emphasis added); *BATFE*, 700 F.3d at 202-03 (relying on nineteenth- and twentieth-century law and commentary in concluding that conduct regulated by the Law likely "falls outside the Second Amendment's protection").

conflict with the Supreme Court's analysis of history and tradition in this context.

Third, the panel applies a version of heightened scrutiny at Step Two that is inconsistent with this Court's precedent and "intermediate" in name only. Where this Court has consistently recognized that "it is the legislature's job, not [the courts'], to weigh conflicting evidence and make policy judgments," *Kolbe*, 849 F.3d at 140 (citation omitted), the panel readily substitutes its own judgment for that of Congress, setting an exceedingly high bar for legislation that addresses an indisputably compelling interest. For example:

- The panel engages in freewheeling reweighing of the evidence before Congress, going so far as to question the credibility of live witnesses, that amounts to precisely the "second-guessing by a court" that this Court has condemned. (Panel Op. at 73-76); *see, e.g.*, *Kolbe*, 849 F.3d at 140 ("[W]e must accord substantial deference to the predictive judgments of [the legislature].") (citation omitted).
- The panel plucks an arbitrary statistic used in a single case, *Craig* v. *Boren*, 429 U.S. 190 (1976), to compel the conclusion that the Law fails to pass muster because less than 2% of 18-to-20-year-olds engage in violent crime. In *Craig*, the Supreme Court struck down a drinking law that differentiated between young men and women based on their statistical likelihood to drive drunk, observing that just 2% of young men were arrested for driving under the influence. *Id.* at 201. The panel then universalizes that single statistic to a threshold that it claims is dispositive here. (Panel Op.

at 71.) "But nothing in *Craig* purported to establish a roving two-percent threshold applicable to all contexts in which courts might apply intermediate scrutiny." (Dissent Op. at 133.) And this Court has long recognized that intermediate scrutiny does not require "scientific or statistical 'proof' of the wisdom of the legislature's chosen course." *Schleifer by Schleifer* v. *City of Charlottesville,* 159 F.3d 843, 849 (4th Cir. 1998). Moreover, *Craig* is inapposite because the normative principles underlying the Equal Protection Clause are not implicated in an age-based case. (*See* Gov't's Pet. for Reh'g, ECF No. 85, at 12.) There was ample evidence before the Court that 18-to-20-year-olds account for an outsized portion of violent crime (Giffords's Br., ECF No. 20-1, at 20-22), and the panel erred by discounting this evidence solely because it does not satisfy its invented statistical threshold.[8]

- In weighing the Law's significance, the panel incorrectly focused entirely on crime statistics, disregarding the robust evidence concerning suicides and accidental deaths amongst 18-to-20-year-olds. But evidence before the Court showed that suicide is the second-most common cause of death among 18-to-20-year-olds, that access to firearms is a key risk factor for successful suicide attempts, and that similar laws have been effective in decreasing successful suicide attempts by those aged 18-to-20. (Giffords's Br., ECF No. 20-1, at 22-27.) This evidence further establishes the reasonable relationship between the Law and the harms Congress sought to address.

- Notwithstanding Congress's reliance on testimony that "almost all" firearms purchased by "juveniles" came from FFLs before the Law was enacted (*id.* at 31), the panel

[8] In concluding that the Law is not justified by the substantial body of social science evidence before Congress and the Court, the panel also splits with the Fifth Circuit, which credited the extensive congressional findings supporting the Law. *BATFE*, 700 F.3d at 207-11.

derides the Government and *Amici* for failing to connect crimes of violence committed by 18-to-20-year-olds to firearms purchased from FFLs. (Panel Op. at 72-73.) But that fails to account for the successful operation of the Law, which for five decades has prohibited anyone under the age of 21 from purchasing handguns from FFLs. Rather than demonstrating a *problem* with the Law's tailoring, the panel opinion highlights its *effectiveness*.

II. THIS CASE INVOLVES EXCEPTIONALLY IMPORTANT QUESTIONS CONCERNING THE ABILITY OF LEGISLATURES TO ADDRESS GUN SAFETY.

The United States experiences levels of gun violence that dwarf other high-income nations.[9] Every year, more than 115,000 people are shot, about 40,000 of them fatally.[10] And the crisis is only becoming more acute, with 2020 being "the deadliest year of gun violence in at least two decades."[11] Accompanying these stark statistics are the indisputable facts that 18-to-20-year-olds experience a disproportionate share of violent crimes and homicides relative to older demographics—both as victims and perpetrators (Giffords's Br., ECF

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9 *See supra* n.2.

10 *Key Statistics*, Brady, *available at* https://www.bradyunited.org/key-statistics (last visited Aug. 30, 2021).

11 Reis Thebault, et al., *2020 Was the Deadliest Gun Violence Year in Decades. So Far, 2021 Is Worse.*, Wash. Post, June 14, 2021, *available at* https://www.washingtonpost.com/nation/2021/06/14/2021-gun-violence/.

No. 20-1, at 20-22)—and that access to firearms is directly linked to firearm violence.[12]

Yet the panel's opinion has the potential to greatly increase firearm access amongst the very population most at-risk for using those firearms to harm themselves and others. Several far-reaching consequences of the panel's decision further underscore its exceptional importance.

First, the panel's decision calls into question the constitutionality of laws in at least nineteen states and the District of Columbia, including states in the Fourth Circuit,[13] which, like the Law, prohibit dealers from transferring firearms to those under 21. (*See* Everytown's Br., ECF No. 21, at 7, A1-A9.) It has already been cited in

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[12] Lisa M. Hepburn & David Hemenway, *Firearm Availability and Homicide: A Review of the Literature*, 9 Aggression & Violent Behavior 417, 438 (2004). Although the panel focuses on the small absolute percentage of 18-to-20-year-olds that commit violent crime (Panel Op. at 68-72), it fails to account for the effect of increased availability of firearms. If .3% of 18-to-20-year-olds commit violent crimes today with robust protections such as the Law in place, what will that number be in the aftermath of the panel's ruling? How many more youth victims of gun violence will the ruling create?

[13] *See* Maryland (Md. Code, Pub. Safety § 5-134(b), (d)(1)); West Virginia (W. Va. Code § 61-7-10(d)).

litigation challenging such state laws. *See, e.g.*, Citation of Supplemental Authorities, *Jones* v. *Becerra*, No. 20-56174, ECF No. 80 (9th Cir. July 21, 2021). If left to stand, the dangerous effects of the panel's decision may well be amplified through the disruption of state statutory schemes, "empower[ing] the judiciary and leav[ing] . . . state legislatures, and everyone else[,] on the sidelines." *Kolbe*, 849 F.3d at 150 (Wilkinson, J., concurring).

Second, the panel's rewriting of intermediate scrutiny to effectively require narrow tailoring calls into question the ability of Congress or state legislatures to pass *any* prophylactic legislation to prevent gun violence by putting legislatures in a lose-lose situation where broad restrictions will be struck down as "over-inclusive" and narrow restrictions as "under-inclusive." (Panel Op. at 68, 78 (critiquing the Law for "over-inclusively restrict[ing]" rights while at the same time "rais[ing] an under-inclusivity problem").) Indeed, it is difficult to imagine how a legislature could produce evidence sufficient to satisfy the panel's standard without waiting for innumerable tragedies to provide the data to justify a law that might have prevented those tragedies in the first place. The panel's approach is not

compatible with well-established law holding that intermediate scrutiny requires only a "reasonable" and not "perfect" fit. *Kolbe*, 849 F.3d at 133.

Third, notwithstanding the panel's lukewarm caveat that it is "not suggesting that the protections of the Second Amendment *necessarily* extend *in full force* to those under 18" (Panel Op. at 26 (emphasis added)), its reasoning—which relies on the fact that other constitutional rights (such as First and Fourth Amendment rights) "apply to all people regardless of age" (*id.* at 25-27)—invites further challenges to restrictions targeted at younger adolescents. And the panel's reinterpretation of intermediate scrutiny offers few guardrails for legislative action at Step Two. If robust legislative history, crime statistics, and neuroscience research do not justify restrictions on 18-year-olds to further a public safety interest the panel *concedes* is "not only substantial, but compelling" (*id.* at 62), it is difficult to see how the panel's reasoning could not be used to invalidate restrictions on younger teenagers—a dangerous consequence that in and of itself justifies rehearing.

CONCLUSION

For the aforementioned reasons, *Amici* submit that the Government's Petition should be granted.

Dated: September 3, 2021 Respectfully submitted,

/s/ *Angela N. Ellis*

Angela N. Ellis
SULLIVAN & CROMWELL LLP
1700 New York Ave. NW #700
Washington, DC 20006
(202) 956-6911
ellisan@sullcrom.com

Counsel of Record for Amici Curiae *Giffords Law Center to Prevent Gun Violence, Brady, Everytown for Gun Safety Support Fund, and March For Our Lives Action Fund*

Of Counsel for Amicus Curiae *Giffords Law Center to Prevent Gun Violence:*

Hannah Shearer
Esther Sanchez-Gomez
GIFFORDS LAW CENTER
TO PREVENT GUN VIOLENCE
268 Bush St. #55
San Francisco, CA 94104
(415) 433-2062
hshearer@giffords.org

J. Adam Skaggs
GIFFORDS LAW CENTER TO
PREVENT GUN VIOLENCE
223 West 38th St. #90
New York, NY 10018
(917) 680-3473
askaggs@giffords.org

Of Counsel for Amicus Curiae *Brady:*

Jonathan E. Lowy
Christa Nicols
BRADY
840 First Street NE #400
Washington, DC 20002
(202) 370-8104
jlowy@bradyunited.org

Robert A. Sacks
Leonid Traps
D. Wil Gould
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004
(212) 558-4000
sacksr@sullcrom.com

Rachel H. VanGelder
Madeline B. Jenks
SULLIVAN & CROMWELL LLP
1700 New York Avenue NW
#700
Washington, DC 20006
(202) 956-7500
vangelderr@sullcrom.com

Of Counsel for Amicus Curiae
Everytown For Gun Safety
Support Fund:

Janet Carter
William J. Taylor, Jr.
Lisa Ebersole
Carina Bentata Gryting
EVERYTOWN FOR GUN SAFETY
SUPPORT FUND
450 Lexington Avenue #4184
New York, NY 10017
(646) 324-8215
wtaylor@everytown.org

CERTIFICATE OF SERVICE

I certify that on September 3, 2021, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

/s/ *Angela N. Ellis*
Angela N. Ellis

Counsel for Amici Curiae
Giffords Law Center to Prevent Gun Violence, Brady, Everytown for Gun Safety Support Fund, and March For Our Lives Action Fund

September 3, 2021

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(b)(4) because this brief contains 2,596 words, excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

/s/ *Angela N. Ellis*
Angela N. Ellis

Counsel for Amici Curiae
Giffords Law Center to Prevent Gun Violence, Brady, Everytown for Gun Safety Support Fund, and March For Our Lives Action Fund

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