

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN**

WILLIAM JOHNSON, JILL JOHNSON,
BRIAN MASON, NAOMI MASON, and
SECOND AMENDMENT FOUNDATION,
INC.,

Plaintiffs,

v.

NICK LYON, in his official capacity as
Director of the Michigan Department of
Health and Human Services,

Defendant.

Civil Action No. 2:17-cv-00124-PLM-TPG

BRIEF OF AMICUS CURIAE EVERYTOWN FOR GUN SAFETY
IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS
OR FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	1
PRELIMINARY STATEMENT	1
RESPONSIBLE GUN STORAGE SAVES LIVES	3
ARGUMENT	8
A. The Second Amendment Does Not Enshrine A Right To Endanger Children By Storing Weapons In An Irresponsible Manner.....	9
a. Since the Founding, To Protect Public Safety, Nearly Every State Has Regulated How Firearms Or Firearm Ammunition Is Stored.	10
b. Laws Regulating The Transfer Of Firearms To Children Have Roots Going Back To The Pre-Civil War Era.	13
B. The Foster Care Responsible Storage Regulation Is Substantially Related To The Government’s Compelling Interest In Protecting Its Most Vulnerable Citizens From The Unique Danger Posed By Firearms In The Home.	17
CONCLUSION.....	19

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Binford v. Johnston</i> , 82 Ind. 426 (Ind. 1882)	14
<i>Coleman v. State</i> , 32 Ala. 581 (Ala. 1858)	13, 15
<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008).....	passim
<i>Dixon v. Bell</i> , 1 Stark. 287, 290 (1816)	14, 15
<i>Eugene D. By and Through Olivia D. v. Karman</i> , 889 F.2d 701 (6th Cir. 1989)	19
<i>Friedman v. City of Highland Park</i> , 784 F.3d 406 (7th Cir. 2015), <i>cert. denied</i> , 136 S. Ct. 447 (2015).....	9, 10
<i>Hruska v. Parke, Davis & Co.</i> , 6 F.2d 536 (8th Cir. 1925)	14
<i>Huset v. J.I. Case Threshing Mach. Co.</i> , 120 F. 865 (8th Cir. 1903)	14
<i>Jackson v. City and County of San Francisco</i> , 746 F.3d 953 (9th Cir. 2014), <i>cert. denied</i> 135 S. Ct. 2799 (2015).....	9, 18, 19
<i>Lintz v. Skipski</i> , 815 F.Supp. 1066 (W.D. Mich. 1993)	19
<i>Madsen v. Women’s Health Ctr., Inc.</i> , 512 U.S. 753 (1994).....	18
<i>McDonald v. City of Chicago</i> , 561 U.S. 742 (2010).....	8
<i>McMillen v. Steele</i> , 275 Pa. 584 (Pa. 1922).....	15
<i>Meers v. McDowell</i> , 110 Ky. 926 (Ky. Ct. App. 1901)	14

Nat’l Rifle Ass’n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives,
700 F.3d 185 (5th Cir. 2012)17

Nat’l Treasury Emps. Union v. Von Raab,
489 U.S. 656 (1989).....18

Salisbury v. Crudale,
41 R.I. 33 (1918).....15

Spires v. Goldberg,
26 Ga. App. 530 (Ga. Ct. App. 1921).....15

State v. Allen,
94 Ind. 441 (Ind. 1884)13

State v. Callicutt,
69 Tenn. 714 (Tenn. 1878)14

Stimmel v. Lynch,
No. 5:14CV2081, 2015 WL 5730104 (N.D. Ohio Sept. 28, 2015)9

Tyler v. Hillsdale Cty. Sheriff’s Dep’t.,
837 F.3d 678 (6th Cir. 2016)9, 17, 18

United States v. Carey,
602 F.3d 738 (6th Cir. 2010)8

United States v. Greeno,
679 F.3d 510 (6th Cir. 2012)8, 9, 10

United States v. Rene E.,
583 F.3d 8 (1st Cir. 2009).....17

STATUTES

18 Pa. C.S. § 6110.1(c)16

18 U.S.C. § 922(x)17

140 Ann. Laws Mass § 131L(c).....16

11 Del. Code § 145616

11 Del. Code § 60316

1820, Ordinances of the Town of Columbia, An Ordinance to Prohibit the Keeping of more gun powder in the town of Columbia than a certain quantity, and for other purposes therein mentioned.....12

1828, Ordinances of the City of St. Louis, An Ordinance Containing Regulations as to Gun Powder, §§ 1-5.....12

1835, Ordinances of the City of Cincinnati12

1848, Ordinances of the City of Portland, Of Gunpowder, §§ 1-4.....12

1864, An Ordinance Regulating the Sale of Powder in the City of Covington, § 112

1887 Mont. Laws 68, An Act To Amend An Act Entitled An Act Concerning The Storage Of Gunpowder, § 212, 13

1890, North Dakota, Keeping Explosives, § 7290.....13

21 Okl. St. § 127316

720 Ill. Comp. Stat. § 5/24-916

Act of Mar. 1, 1783, chap. 13, 1783 Mass. Acts 21811

An Act for the better securing the city of Philadelphia and its liberties from danger of gunpowder Act of Dec. 6, 1783, chap. 1059, 11 Pa. Stat. 209 (Section I, P.L.).....11

An Ordinance to Regulate the Keeping of Gunpowder, §§ 1-4.....12

Cal. Pen. Code § 25000-2511016

Colo. Rev. Stat. § 18-12-108.716

Conn. Gen. Stat. § 29-37i, § 53a-217a.....16

Fla. Stat. § 790.174, § 784.0516

Ga. Code Ann. § 16-11-101.116

Haw. Rev. Stat. §§ 134-10.5, 707-714.5.....16

Ind. Code § 35-47-10-7.....16

Iowa Code § 724.2216

Ky. Sta. Ann § 527.110.....16

1782 Mass. Acts 119, An Act in Addition to the Several Acts Already Made for
the prudent Storage of Gun Powder within the Town of Boston, Chap. 46, § 111

Md. Crim. Law Code Ann. § 4-10416

Minn. Stat. § 609.666.....16

Miss. Code § 97-37-14.....16

Mo. Rev. Stat. § 571.06016

N.C. Gen. Stat. § 14-315.116

1786 N.H. Laws 383, An Act To Prevent The Keeping Of Large Quantities Of
Gun-Powder In Private Houses In Portsmouth And For Appointing A Keeper
Of The Magazine Belonging To Said Town.....11

N.H. Rev. Stat. Ann. § 650-C:116

N.J. Stat. § 2C:58-15.....16

Nev. Rev. Stat. Ann. § 202.30016

Ordinances of the City of Cincinnati, An Ordinance to Regulate the Keeping of
Gunpowder, §§ 1-412

Ordinances of the City of Pittsburgh, An Ordinance Containing Regulations as to
Gun-Powder, § 112

Ordinances of Salem, Fire, § 18, By an Act passed March 6, 184712

1781-1782 Pa. Laws Section XLII.....11

R.I. Gen. Laws § 11-47-60.1.....16

1762 R.I. Pub. Laws 132.....11

Tenn. Code Ann. § 39-17-132016

Tex. Penal Code § 46.1316

Utah Code Ann. § 76-10-509.6.....16

Va. Code Ann. § 18.2-56.216

1883 Wis. Sess. Laws 294, An Act To Revise, Consolidate And Amend The
Charter Of The City Of Wausau. Chap. 151, § 38.....13

Wisc. Stat. § 948.5516

OTHER AUTHORITIES

Second Amendment passim

Fourteenth Amendment8, 13

Ctrs. For Disease Control & Prevention, *Deaths: Final Data for 2014*, Ctrs. For Disease Control & Prevention, *Deaths: Final Data for 2014*, 65 Nat’l Vital Stat. Rep. 1, 41-45, https://www.cdc.gov/nchs/data/nvsr/nvsr65/nvsr65_04.pdf.....3, 4, 6, 7

David C. Grossman et al., *Gun Storage Practices and Risk of Youth Suicide and Unintentional Firearm Injuries*, 293 JAMA 707 (2005).....4, 5, 6, 7

David Owens et al., *Fatal and Non-Fatal Repetition of Self-Harm: Systematic Review*, 181 British J. of Psychiatry 193 (2002).....6

Eberhard A. Deisenhammer et al., *The Duration of the Suicidal Process: How Much Time is Left for Intervention Between Consideration and Accomplishment of a Suicide Attempt?*, 70 J. Clin. Psychiatry 19 (2009).....6

Frances Baxley & Matthew Miller, *Parental Misperceptions About Children and Firearms*, 160 Archives of Pediatric & Adolescent Med. 542 (2006).....7

Gabriel B. Eber et al., *Nonfatal and Fatal Firearm-Related Injuries Among Children Aged 14 Years and Younger: U. S., 1993-2000*, 113 Pediatrics 1686, (2004).....3, 5

Gun Safety & Moms Demand Action, *Innocents Lost: A Year of Accidental Gun Deaths* 3 (2014), <http://everytownresearch.org/documents/2015/04/innocents-lost.pdf>4

Katherine A. Fowler et al., *Childhood Firearm Injuries in the U.S.*, 140 Pediatrics 1 (2017).....6

Matthew Miller et al., *Suicide Mortality in the U. S.*, 33 Ann. Rev. of Pub. Health 393 (2012).....6

Michael Luo & Mike McIntire, *Children and Guns: The Hidden Toll*, N.Y. Times, Sept. 29, 20134

Nat’l Res. Ctr. For Family-Centered Practice and Permanency Planning at the Hunter Coll. of Social Work, *Firearms in Foster Homes* (July 26, 2005), http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/policy-issues/Firearms_in_Foster_Homes.pdf.....8, 16, 17

Renee M. Johnson et al., *Who are the Owners of Firearms Used in Adolescent Suicides?*, 40 Suicide and Life-Threatening Behav. 609 (2010).7

Thomas R. Simon, et al., *Characteristics of Impulsive Suicide Attempts and Attempters*, 32 *Suicide and Life-Threatening Behav.* 49 (2001)6

INTEREST OF AMICUS CURIAE

Everytown for Gun Safety is the largest gun-violence-prevention organization in the country, with supporters in every state, including thousands of Michigan residents and the mayors of twelve Michigan cities. Everytown has drawn on its substantial research on historical firearms laws, as well as its significant body of social science research, to file briefs in several recent Second Amendment cases. *See Wrenn v. District of Columbia*, No. 16-7025 (D.C. Cir.); *Peruta v. San Diego*, No. 10-56971 (9th Cir.); *Silvester v. Harris*, No. 14-16840 (9th Cir.); *Flanagan, et al. v. California Attorney General Xavier Becerra*, No. 2:16-cv-06164 (W.D. Cal.). As in those cases, Everytown seeks to assist this Court by providing relevant historical materials and social science research.

PRELIMINARY STATEMENT

Hundreds of American children die from suicides and unintentional shootings every year, and countless more suffer serious injuries. In an effort to combat this pressing public health problem, the Michigan Department of Health and Human Services in 2001 promulgated common-sense regulations designed to prevent these tragedies by ensuring that foster parents store their guns and ammunition in a safe manner. The foster care responsible storage regulation is part of a comprehensive suite of regulations designed to ensure that foster children remain safe.

The regulation at issue here does not prevent a foster parent from owning, carrying, or defending themselves with a gun. It simply requires foster parents to store hazardous materials, including firearms, in a safe manner. To comply with the regulation, foster parents must store weapons securely in a locked gun safe, either unloaded or with a trigger lock engaged, and must store ammunition in a separate, locked location. Many states have implemented similar

regulations, for the simple reason that they work. Evidence shows that responsible storage of firearms is associated with a materially lower risk of death from gun suicides and unintentional shootings.

Although the safety benefits of responsible gun storage are undeniable, Plaintiffs contend that the Michigan regulation treads on their Second Amendment right to store guns however they see fit – without regard to the safety of the State’s foster children. That argument fails for two reasons.

First, the foster care responsible storage requirement does not implicate the Second Amendment because it is consistent with a centuries-old tradition of regulating both the storage of firearms and ammunition, and the accessibility of firearms to children. These laws, enacted to protect both children and the public at large, have been widely adopted and fall within the category of presumptively lawful, longstanding regulations identified by the Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570, 626-27 & n.26 (2008) (stating “nothing in our opinion should be taken to cast doubt on longstanding prohibitions,” and noting that the list of presumptively lawful provisions “does not purport to be exhaustive.”). The challenged regulation therefore does not implicate Plaintiffs’ Second Amendment rights.

Second, even if the challenged regulation did implicate Second Amendment rights, the regulation would pass muster because it is substantially related to a significant government interest. It is beyond dispute that the state of Michigan’s interest in protecting the health and safety of children placed into its care is compelling. Overwhelming evidence supports Michigan’s decision to reduce the risk of injury or death to such children through implementation of common-sense regulations such as the foster care responsible storage regulation. The challenged regulation therefore easily survives judicial scrutiny.

RESPONSIBLE GUN STORAGE SAVES LIVES

Every day, at least one child will use a firearm to end their life. In 2015 alone, 565 children and adolescents died by suicide using a gun – the highest recorded number of child suicides by firearm, using statistics going back to 1999. Ctrs. for Disease Control and Prevention, Web-based Injury Statistics Query and Reporting System, *Fatal Injury Reports, Nat'l, Reg'l and State, 1981 – 2015*, <https://webappa.cdc.gov/sasweb/ncipc/mortrate.html>.

Every year, hundreds of children are also victims of unintentional shootings that result in serious injuries or death. Between 1993 and 2000, an estimated 22,661 children aged fourteen or younger suffered nonfatal firearms injuries; 43.1% of those nonfatal injuries – involving approximately 9,775 children – were the result of an unintentional shooting. Gabriel B. Eber et al., *Nonfatal and Fatal Firearm-Related Injuries Among Children Aged 14 Years and Younger: U. S., 1993-2000*, 113 *Pediatrics* 1686 (2004) (“*Firearm-Related Injuries*”). During that same time frame, 5,542 children were shot to death, and 20.7% of those deaths, involving 1,146 children, were the result of an unintentional shooting. *Id.*

Faced with this public health crisis, many states, including Michigan, have taken steps to protect some of their most vulnerable citizens, foster children. In 2001, the Michigan Department of Health and Human Services promulgated a rule requiring that foster parents take certain evidence-based steps to protect the children in their home from guns. The regulation provides:

R 400.9415 Hazardous materials. Rule 415. (1) A foster parent shall follow the agency's hazardous materials policy. (2) Dangerous and hazardous materials, objects, weapons, chemicals, medication, or equipment that may present a risk to children placed in the foster home shall be stored securely and out of the reach of children, as appropriate for the age and functioning level of the children. (3) Firearms are subject to the following conditions: (a) Stored in a locked metal or solid wood gun safe or (b) Triggerlocked and stored without ammunition in a locked area. (c) Ammunition shall be stored in a separate locked location. (d) A

handgun shall be registered. Documentation of the registration of the handgun shall be available for review.

This regulation mirrors gun storage practices recommended by a study published in the Journal of the American Medical Association, which found that “[t]he 4 practices of keeping a gun locked, unloaded, storing ammunition locked, and in a separate location are each associated with a protective effect and suggest a feasible strategy to reduce” firearms injuries “in homes with children and teenagers where guns are stored.” David C. Grossman et al., *Gun Storage Practices and Risk of Youth Suicide and Unintentional Firearm Injuries*, 293 JAMA 707 (2005) (“*Gun Storage Practices*”).

Responsible storage practices, like the ones Michigan requires in foster homes, save lives by preventing unintentional shootings. The tragic reality is that each year, hundreds of children are senselessly injured, or killed, because they have access to improperly stored firearms. According to government statistics, in 2014, of the 461 Americans killed as a result of the unintentional discharge of a firearm, sixty-nine were fourteen years old or younger. Ctrs. For Disease Control & Prevention, *Deaths: Final Data for 2014*, 65 Nat’l Vital Stat. Rep. 1, 41-45, https://www.cdc.gov/nchs/data/nvsr/nvsr65/nvsr65_04.pdf. A review conducted by Everytown found that the number of children killed in unintentional shootings from December 2012 to December 2013 was even higher, concluding that “at least 100 children were killed in unintentional shootings—almost two each week, 61 percent higher than federal data reflect.” Everytown for Gun Safety & Moms Demand Action, *Innocents Lost: A Year of Accidental Gun Deaths* 3 (2014), <http://everytownresearch.org/documents/2015/04/innocents-lost.pdf> (unintentional shootings are often miscategorized as homicides in government reporting); see also Michael Luo & Mike McIntire, *Children and Guns: The Hidden Toll*, N.Y. Times, Sept. 29, 2013, at A1, <http://www.nytimes.com/2013/09/29/us/children-and-guns-the-hidden-toll.html>.

Because official statistics do not always represent the full scale of the problem, Everytown for Gun Safety maintains its own online database that tracks publicly reported unintentional shootings by those under seventeen years of age through its “Not An Accident Index.”¹ Since January 1, 2015, in Michigan alone, at least forty-six people have unintentionally been shot – including seventeen fatally – by children seventeen years old or younger. The victims of these deadly firearms accidents range in age from twenty-eight to only one year old. Everytown’s analysis of these shootings concludes that fully ninety-six percent of these injuries – forty-four out of the forty-six – could have been prevented had the gun been stored as the foster care responsible storage regulation requires: locked, unloaded, and separate from ammunition.²

Indeed, studies have shown that safe gun storage practices are effective in preventing unintentional shootings such as these. One study, which analyzed the incidence of fatal and nonfatal firearms injuries in children under fourteen between the years 1993 and 2000, partly credited “[g]rowing prevention efforts aimed at reducing unsupervised access to guns by children” for a reported decline in shooting-related injuries. *Firearm-Related Injuries*, at 1689. The study’s authors concluded that their findings “support recommendations to encourage parents to reduce their children’s risk of unsupervised access to firearms through storing firearms safely in their home and discussing unsupervised access to firearms and responsible storage practices with their relatives and with the parents of their children’s friends.” *Id.* A subsequent study published by the Journal of the American Medical Association reached the same

¹ The “Not An Accident” index is available at: <https://everytownresearch.org/notanaccident/>.

² *See id.*

conclusion, leading the study authors to recommend the precise responsible storage practices required of Michigan foster parents. *Gun Storage Practices*, at 1.

Responsible storage practices like those required by Michigan also prevent children from dying by suicide with a firearm. Every year, almost 500 children die by gun suicide in America – which amounts to, on average, almost ten children per week killing themselves with a gun. Katherine A. Fowler et al., *Childhood Firearm Injuries in the U.S.*, 140 *Pediatrics* 1 (2017). While guns are accountable for a fairly small percentage of the total youth suicide *attempts*, they account for approximately 40% of *completed* child suicides. *Id.* This is because a child who attempts suicide using a gun is exceedingly likely to succeed: approximately 90% of gun suicide attempts end in death. Matthew Miller et al., *Suicide Mortality in the U. S.*, 33 *Ann. Rev. of Pub. Health* 393 (2012). This is particularly devastating, because suicide attempts are often impulsive, spur-of-the-moment decisions, and survivors are unlikely to repeat the attempt. Eberhard A. Deisenhammer et al., *The Duration of the Suicidal Process: How Much Time is Left for Intervention Between Consideration and Accomplishment of a Suicide Attempt?*, 70 *J. Clin. Psychiatry* 19 (2009); Thomas R. Simon, et al., *Characteristics of Impulsive Suicide Attempts and Attempters*, 32 *Suicide and Life-Threatening Behav.* 49 (2001). Ninety percent of people who survive a suicide attempt will not die as a result of suicide, and two-thirds of such survivors will never attempt suicide again. David Owens et al., *Fatal and Non-Fatal Repetition of Self-Harm: Systematic Review*, 181 *British J. of Psychiatry* 193 (2002).

The problem of teen suicide is, regrettably, growing worse. Nearly half of teen firearm deaths are the result of gun suicide attempts. Ctrs. for Disease Control and Prevention, Web-based Injury Statistics Query and Reporting System, *Fatal Injury Reports, National, Regional and State, 1981 – 2015*, <https://webappa.cdc.gov/sasweb/ncipc/mortrate.html>. And between

2007 and 2015, child firearm suicide rates rose approximately 70%, reaching their highest rate in over a decade. *Id.* In 2015, 565 children and adolescents died by firearm suicide – the highest number of child firearm suicide deaths to date, using statistics going back to 1999. *Id.*

The evidence shows, however, that responsible storage practices can help solve this burgeoning crisis. One study concluded that the practices required by the foster care responsible storage regulation “were shown to be protective for unintentional firearm shootings and suicide attempts among adolescents and children.” *Gun Storage Practices*, at 712. These storage practices are simple and effective means to “reduce these types of injuries in homes with children and adolescents where guns are stored.” *Id.* at 712-13.

Parents often assume that they have safely stored their guns out of reach of their children, even if they are not following the responsible storage procedures recommended by researchers and mandated by the foster care responsible storage regulation. Not so. Seventy percent of children under age ten in gun-owning households report that they know where their parents hide their guns, and 36% of those children reported handling their parents’ gun without permission. Frances Baxley & Matthew Miller, *Parental Misperceptions About Children and Firearms*, 160 *Archives of Pediatric & Adolescent Med.* 542 (2006). Of parents who thought that their children did not know where their guns were located, fully 39% were contradicted by their children. *Id.* And 20% of parents who thought their children had never handled their gun were wrong. *Id.* It is no surprise, then, that over 80% of children who die by firearm suicide used a gun from their own home. Renee M. Johnson et al., *Who are the Owners of Firearms Used in Adolescent Suicides?*, 40 *Suicide and Life-Threatening Behav.* 609 (2010).

In promulgating this regulation to protect its foster children from these harms, Michigan is in good company. All but two states regulate firearms in the homes of foster parents. Nat’l

Res. Ctr. For Family-Centered Practice and Permanency Planning at the Hunter Coll. of Social Work, *Firearms in Foster Homes* (July 26, 2005), http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/policy-issues/Firearms_in_Foster_Homes.pdf. Of these, twenty-six states and the District of Columbia require foster parents to undertake specific safety measures to keep weapons and other dangerous items out of the reach of children. *Id.* The remaining twenty-two states require that foster parents, at a minimum, safely store or lock their guns. *Id.*

ARGUMENT

The Supreme Court has held that the Second Amendment protects a citizen's right to keep and bear arms for the purpose of self-defense. *Heller*, 554 U.S. at 599; *see also United States v. Carey*, 602 F.3d 738, 741 (6th Cir. 2010). The Fourteenth Amendment renders this Second Amendment right "fully applicable" to the States. *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010).

However, "[l]ike most rights, the right secured by the Second Amendment is not unlimited." *Heller*, 554 U.S. at 626; *see also McDonald*, 561 U.S. at 786 (noting that the Second Amendment "does not imperil every law regulating firearms"); *United States v. Greeno*, 679 F.3d 510, 517 (6th Cir. 2012). That is to say, the Second Amendment does not enshrine "a right to keep and carry any weapon whatsoever in any manner whatsoever for whatever purpose." *Heller* at 626. To the contrary, the Supreme Court has specifically instructed that a variety of regulations on the possession, carrying, purchase and sale, and type of firearms are presumptively lawful. *Heller*, at 626-27. The Court also indicated that the specific list of presumptively lawful regulations is not exhaustive and other laws could be found presumptively lawful. *Heller*, at n.26. While the "need for defense of self, family, and property is most acute"

in the home, *Heller*, 554 U.S. at 628, this does not mean that *any* restriction that implicates self-defense within the home is *per se* invalid. See, e.g., *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 447 (2015) (upholding ordinance prohibiting possession, sale or manufacture of semi-automatic assault weapons and large capacity magazines); *Jackson v. City and County of San Francisco*, 746 F.3d 953 (9th Cir. 2014), *cert. denied* 135 S. Ct. 2799 (2015) (upholding city ordinances regulating storage of a handgun within the home).

The Sixth Circuit utilizes a two-pronged approach in assessing the constitutionality of a firearms regulation. *Greeno*, 679 F.3d at 518. The first prong “asks whether the challenged law burdens conduct that falls within the scope of the Second Amendment right, as historically understood.” *Id.* In other words, the Court must first determine whether a law “regulate[s] activity falling outside the scope of the Second Amendment as it was understood at the relevant historical moment – 1791 [Bill of Rights ratification] or 1868 [Fourteenth Amendment].” *Stimmel v. Lynch*, No. 5:14CV2081, 2015 WL 5730104, at *2 (N.D. Ohio Sept. 28, 2015) (quoting *United States v. Chester*, 628 F.3d 673, 702-03 (4th Cir. 2010)); *Tyler v. Hillsdale Cty. Sheriff’s Dep’t.*, 837 F.3d 678, 685 (6th Cir. 2016) (same).³ If a law does regulate activity within the scope of the Second Amendment, the Court will apply the second prong, which “ascertain[s] the appropriate level of scrutiny and examine[s] the strength of the government’s justification for restricting or regulating the exercise of Second Amendment rights.” *Tyler*, 837 F.3d 686. Under either prong, Michigan’s foster care responsible storage regulation passes muster.

A. The Second Amendment Does Not Enshrine A Right To Endanger Children

³ This historical analysis is not strictly confined by the specific year in which the Second and Fourteenth Amendments were ratified; *Heller* itself looked to statutes and regulations well after 1791 in analyzing the contours of the Second Amendment right.

By Storing Weapons In An Irresponsible Manner.

At its core, Plaintiffs' complaint asserts a right to store weapons around children in an unsafe manner if doing so might make such weapons more readily available when needed. The Second Amendment does not protect such a right.

Step one of the *Heller* analysis considers historical sources to determine whether the challenged conduct falls within the contours of the Second Amendment right "as historically understood." *Greeno*, 679 F.3d at 518. A precise historical analogue to the challenged regulation is not required to satisfy this historical analysis – indeed, the "mere fact" that a law was "not enacted until recently does not automatically render [the prohibited conduct] within the scope of the Second Amendment right as historically understood. Nothing in *Heller* suggests such a static reading of the Second Amendment." *Greeno*, 679 F.3d at 519; *see also Friedman*, 784 F.3d at 410 (observing that federal firearms restrictions "need not mirror restrictions that were on the books in 1791" to survive scrutiny).

Regulations imposing age- and storage-based restrictions on firearms, such as the challenged regulation, have a long pedigree. Although the specific conduct prohibited here – irresponsible storage of firearms by foster parents – is a product of modern society and has no precise historical analogue, the historical record is replete with firearms regulations which together reflect that the prohibited conduct falls outside historical understandings of the Second Amendment.

- a. Since the Founding, To Protect Public Safety, Nearly Every State Has Regulated How Firearms Or Firearm Ammunition Is Stored.

The roots of Michigan's foster care safe storage requirement stretch as far back as the nation's founding. *See* Appendix A, Table 1, at 1-3. Five of the thirteen original states – Massachusetts, New Hampshire, New York, Pennsylvania and Rhode Island – had laws

requiring the responsible storage of dangerous weapons or gunpowder. *See, e.g.*, 1782 Mass. Acts 119, An Act in Addition to the Several Acts Already Made for the prudent Storage of Gun Powder within the Town of Boston, Chap. 46, § 1.⁴ One Massachusetts statute is particularly noteworthy here: it declared that “depositing of loaded arms in the houses of the town of Boston is dangerous,” and consequently, it forbade loaded firearms in any “dwelling-house, stable, barn, out-house, ware-house, store, shop or other building.” Act of Mar. 1, 1783, chap. 13, 1783 Mass. Acts 218. At least one town, then, regarded firearms to be of such a particular concern that it prohibited residents from possessing them at all within city limits. *Id.*

More generally, these statutes establish that the responsible storage of firearms and gunpowder was a paramount public safety concern. All five states regulated the manner in which an individual could store their gunpowder: in Massachusetts, it could not be stored with other weapons, 1782 Mass. Acts 119; in New Hampshire, it had to be stored in a secured tin canister, 1786 N.H. Laws 383; in New York, in jugs or canisters, none of which could hold more than seven pounds, N.Y. Laws of 1784, chap. 28, at 627; in Pennsylvania, on the top floor of a house, 1781-1782 Pa. Laws, Section XLII, at 41; and in Rhode Island, *only* at the powderhouse – in other words, not in the home at all, 1762 R.I. Pub. Laws 132 (this regulation excluded gunpowder necessary for immediate personal use). These laws, which were primarily designed to prevent the public danger caused by explosions and fires, limited an individual’s immediate access to firearms or, more commonly, ammunition, in order to protect public safety.

⁴ Act of Mar. 1, 1783, chap. 13, 1783 Mass. Acts 218; 1786 N.H. Laws 383, An Act To Prevent The Keeping Of Large Quantities Of Gun-Powder In Private Houses In Portsmouth And For Appointing A Keeper Of The Magazine Belonging To Said Town; N.Y. Laws of 1784, chap. 28, at 627; Section XLII, 1781-1782 Pa. Laws at 41; An Act for the better securing the city of Philadelphia and its liberties from danger of gunpowder Act of Dec. 6, 1783, chap. 1059, 11 Pa. Stat. 209 (Section I, P.L.); 1762 R.I. Pub. Laws 132.

Throughout the early nineteenth century, states and their municipalities continued to regulate responsible storage of gunpowder. *See* Appendix A, Table 1, at 3-19. Alabama, California, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah and Washington either added new, or expanded upon existing, responsible storage laws. Again, several of these statutes limited the quantities of gunpowder that individuals could store, ranging from the fairly low, such as Connecticut (one pound only), 1848, A Law Relative to the Storage and Sale of Gunpowder; to the quite high, such as Kentucky (no more than 100 pounds in any one building), 1864, An Ordinance Regulating the Sale of Power in the City of Covington, § 1.⁵

Regulations concerning the manner in which gunpowder could be stored continued to be passed as well. In Salem, Massachusetts, gunpowder was permitted only if it was “well secured in tight casks or canisters,” Ordinances of Salem, Fire, § 18, By an Act passed March 6, 1847, and in Cincinnati, Ohio, individuals were permitted only “twenty-five pounds, to be divided into six equal parts.” Ordinances of the City of Cincinnati, An Ordinance to Regulate the Keeping of Gunpowder, §§ 1-4.

⁵ Maine (one pound only), 1848, Ordinances of the City of Portland, Of Gunpowder, §§ 1-4; Missouri (thirty pounds), 1828, Ordinances of the City of St. Louis, An Ordinance Containing Regulations as to Gun Powder, §§ 1-5, Ohio (twenty-five pounds), 1835, Ordinances of the City of Cincinnati, An Ordinance to Regulate the Keeping of Gunpowder, §§ 1-4; Pennsylvania (thirty pounds), Ordinances of the City of Pittsburgh, An Ordinance Containing Regulations as to Gun-Powder, § 1; Rhode Island (twenty-eight pounds), 1798-1813 R.I. Pub. Laws 85, An Act Relative To The Keeping Gun-Powder In The Town Of Providence, §2; South Carolina (fifty pounds), 1820, Ordinances of the Town of Columbia, An Ordinance to Prohibit the Keeping of more gun powder in the town of Columbia than a certain quantity, and for other purposes therein mentioned.

After the enactment of the Fourteenth Amendment, numerous states – including Georgia, Hawaii, Minnesota, Montana, Nevada, North Carolina, North Dakota, Oklahoma, South Dakota, Vermont, West Virginia, Wisconsin and Wyoming – either further strengthened existing rules or imposed new regulations governing the responsible storage of gunpowder and other hazardous materials. *See* Appendix A, Table 1, at 20-24. Here again, Montana and Wisconsin limited the quantity of gunpowder that could be stored – in Montana, fifty pounds was permissible, 1887 Mont. Laws 68, An Act To Amend An Act Entitled An Act Concerning The Storage Of Gunpowder, § 2; and in Wausau, Wisconsin, only twenty-five pounds. 1883 Wis. Sess. Laws 294, An Act To Revise, Consolidate And Amend The Charter Of The City Of Wausau. Chap. 151, § 38. Additionally, North Dakota established a far-reaching regulation making it a misdemeanor to “make or keep gunpowder” “within any city, town or village.” 1890, North Dakota, Keeping Explosives, § 7290. All told, then, of the forty-eight states in the Union in the early twentieth century (Alaska and Hawaii did not become states until 1959), at least forty-seven had laws regulating the responsible storage of gunpowder or firearms by individuals.

b. Laws Regulating The Transfer Of Firearms To Children Have Roots Going Back To The Pre-Civil War Era.

Both legislatures and courts have also long recognized the unique dangers posed by providing minors access to deadly weapons. Beginning in the mid-1800s, a number of states, including Alabama, Illinois, Iowa, Indiana, Kentucky, Michigan, New York, Pennsylvania, South Carolina, Tennessee and Washington, made it a criminal offense to sell or transfer dangerous weapons to minors. *See* Appendix A, Table 2, at 25-33. These statutes were enforced against violators, *Coleman v. State*, 32 Ala. 581 (Ala. 1858) (upholding conviction for transferring firearm to a minor) and *State v. Allen*, 94 Ind. 441 (Ind. 1884) (upholding indictment against defendant who sold a deadly weapon to a minor), and survived constitutional challenge,

State v. Callicutt, 69 Tenn. 714 (Tenn. 1878) (upholding against a constitutional challenge Tennessee statute making it a misdemeanor to give a dangerous weapon to a minor, holding that the statute “do[es] not in fact abridge, the constitutional right of the citizens of the State to keep and bear arms for their common defense,” and finding it “wise and salutary in all its provisions”).

Concern for the unique dangers posed by allowing children to access firearms was also reflected in contemporaneous court decisions. For example, in *Binford v. Johnston*, 82 Ind. 426 (Ind. 1882), the Court addressed whether a shop owner was liable for injuries caused by “pistol cartridges loaded with powder and ball,” which he had sold to two young boys aged twelve and ten years; after the boys purchased the cartridges, they loaded them into a toy pistol, which discharged, killing one of the children. *Id.* at 427. The Court held that “the common law both of England and America requires of him who deals with dangerous explosives to refrain from placing them in the hands of children of tender age.” *Id.* at 430. Consequently, the shop owner was held liable, because he “knew the dangerous character of the cartridges, ... and that the lads were unfit to be entrusted with articles of such a character.” *Id.* at 427, 430. Likewise, in the English case of *Dixon v. Bell*, 1 Stark. 287, 290 (1816), which has been repeatedly cited with approval by courts in this country, the court found a defendant liable for injuries that occurred after he entrusted a gun to a young servant; the gun had gone off while in the servant’s possession, wounding another child. Because the gun belonged to the defendant, he remained liable for the injuries, because “[i]t was incumbent on the defendant to render the instrument safe and innoxious ... the mischief happened for want of taking effectual care.” *Id.* at 476, *cited with approval by Hruska v. Parke, Davis & Co.*, 6 F.2d 536, 538 (8th Cir. 1925); *Huset v. J.I. Case Threshing Mach. Co.*, 120 F. 865, 870 (8th Cir. 1903); *Meers v. McDowell*, 110 Ky. 926 (Ky. Ct.

App. 1901). *Dixon v. Bell* has been treated as a “leading [case] ... discussed in every book on Torts ... cited in innumerable arguments ...” and, according to one decision, never “judicially questioned.” *Salisbury v. Crudale*, 41 R.I. 33, 45 (1918).

Most analogously, in *Coleman v. State*, 32 Ala. 581 (Ala. 1858), the Supreme Court of Alabama reached a similar result: it upheld a conviction for the crime of transferring firearms to a minor; the minor in question had taken a firearm belonging to his uncle, who was a shopkeeper. The minor saw a pistol in the store, and asked his uncle to lend it to him. The uncle replied that he was holding it for someone else, and that the minor could take it if he wanted to. Later that day, the minor went back to the store and took the pistol. Although the uncle did not actively transfer the weapon to his nephew, he was nonetheless found guilty because he had failed to properly secure it.

This tradition of regulating minors’ access to firearms continued into the early twentieth century, by which time at least thirty-five states – including Alabama, California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wisconsin and Wyoming – either regulated or prohibited the sale or transfer of firearms to minors. *See* Appendix A, Table 2, at 33-37.

This development is reflected in the case law as well. For example, in *McMillen v. Steele*, 275 Pa. 584 (Pa. 1922), the court held a shopkeeper negligent because he illegally sold a gun to a minor; according to the court “children under [sixteen] have been legislatively declared utterly unfit to handle firearms.” *Id.* at 587. *Spires v. Goldberg*, 26 Ga. App. 530 (Ga. Ct. App.

1921), had a similar result: here, the court held a shopkeeper negligent *per se* because he illegally sold a gun to a minor.

Over the course of the twentieth century, laws have increasingly criminalized reckless or negligent storage when children access firearms, or in some cases, where a child *could* access a firearm due to negligent storage. Today, fourteen states – Mississippi, Tennessee, Georgia, Colorado, Kentucky, Missouri, Utah, Oklahoma, Nevada, Pennsylvania, Indiana, Virginia, Delaware and Wisconsin – had statutes criminalizing recklessly making a firearm available to a minor.⁶ Eleven states (Rhode Island, Connecticut, Illinois, New Hampshire, North Carolina, Iowa, Florida, Hawaii, Maryland, New Jersey and Texas)⁷ have criminalized carelessly storing a gun if a child has accessed it, and three more (Minnesota, California and Massachusetts)⁸ have criminalized storing a gun in a manner where a child *could* access it.

By the early 2000's, forty-eight states, including Michigan, had also enacted regulations on guns in foster homes. Nat'l Res. Ctr. For Family-Centered Practice and Permanency Planning at the Hunter Coll. of Social Work, *Firearms in Foster Homes* (July 26, 2005), http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/policy-issues/Firearms_in_Foster_Homes.pdf. Twenty-six states and the District of Columbia require

⁶ Miss. Code § 97-37-14; Tenn. Code Ann. § 39-17-1320; Ga. Code Ann. § 16-11-101.1; Colo. Rev. Stat. § 18-12-108.7; Ky. Sta. Ann § 527.110; Mo. Rev. Stat. § 571.060; Utah Code Ann. § 76-10-509.6; 21 Okl. St. § 1273; Nev. Rev. Stat. Ann. § 202.300; 18 Pa. C.S. § 6110.1(c); Ind. Code § 35-47-10-7; Va. Code Ann. § 18.2-56.2; 11 Del. Code § 1456; 11 Del. Code § 603; Wisc. Stat. § 948.55.

⁷ R.I. Gen. Laws § 11-47-60.1; Conn. Gen. Stat. § 29-37i, § 53a-217a; 720 Ill. Comp. Stat. § 5/24-9; N.H. Rev. Stat. Ann. § 650-C:1; N.C. Gen. Stat. § 14-315.1; Iowa Code § 724.22; Fla. Stat. § 790.174, § 784.05; Haw. Rev. Stat. §§ 134-10.5, 707-714.5; Md. Crim. Law Code Ann. § 4-104; N.J. Stat. § 2C:58-15; Tex. Penal Code § 46.13.

⁸ Minn. Stat. § 609.666; Cal. Pen. Code § 25000-25110; 140 Ann. Laws Mass § 131L(c).

foster parents to undertake specific safety measures to keep weapons and other dangerous items out of the reach of children. *Id.* The remaining twenty-two states require that foster parents, at a minimum, safely store or lock their guns. *Id.*

Taken together, the thrust of the historical record is clear: there is “considerable historical evidence of age- and safety-based restrictions on the ability to access guns.” *Nat’l Rifle Ass’n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 203-04 (5th Cir. 2012); *see also United States v. Rene E.*, 583 F.3d 8 (1st Cir. 2009) (upholding the constitutionality of 18 U.S.C. § 922(x), which prohibits persons under age eighteen from possessing handguns and prohibits transfers of handguns to such persons). Responsible storage of weaponry, particularly around children, has been of paramount importance throughout American history. These traditions have only grown stronger over time, with increasingly more states and municipalities imposing limitations both on citizens’ ability to store firearms and gunpowder, and a firmly rooted tradition of holding individuals criminally or civilly liable for permitting children to access guns. Indeed, both the Fifth and the First Circuits have recognized this important, “longstanding tradition” of protecting children from deadly weaponry. *Nat’l Rifle Ass’n*, 700 F.3d at 204; *Rene E.*, 583 F.3d at 12.

In light of this longstanding historical tradition, the Second Amendment simply does not apply here. Consequently, “the activity is unprotected and the [regulation] is not subjected to further constitutional scrutiny.” *Tyler*, 837 F.3d at 686-87.

B. The Foster Care Responsible Storage Regulation Is Substantially Related To The Government’s Compelling Interest In Protecting Its Most Vulnerable Citizens From The Unique Danger Posed By Firearms In The Home.

Even if the foster care responsible storage regulation did somehow burden Second Amendment rights, it would still pass constitutional muster because it is substantially related to a significant governmental interest.

When addressing the second prong of the *Heller* analysis, courts in the Sixth Circuit “must ascertain the appropriate level of scrutiny and examine the strength of the government’s justification for restricting or regulating the exercise of Second Amendment rights.” *Tyler*, 837 F.3d at 686. This analysis should be “informed by (1) how close the law comes to the core of the Second Amendment right, and (2) the severity of the law’s burden on the right.” *Id.* at 690 (citations omitted). In selecting the level of scrutiny, *Tyler* cautions “against imposing too high a burden on the government to justify its gun safety regulations....” *Id.* at 691.

Here, the challenged regulation does not infringe on the “core” Second Amendment right recognized in *Heller* because it does not prevent any citizen from possessing a handgun at home for self-protection. Although the regulation does apply to individuals in their own home, it does not “impose the sort of severe burden imposed by the handgun ban at issue in *Heller*.” *Jackson*, 746 F.3d at 964 (upholding ordinance requiring responsible storage for all firearms, regardless of whether children were present). In fact, Plaintiffs may purchase *any* gun they wish, so long as it is properly stored. The regulation is therefore subject to intermediate scrutiny, which, in the Sixth Circuit, “require[s] (1) the government’s stated objective to be significant, substantial, or important; and (2) a reasonable fit between the challenged regulation and the asserted objective.” *Tyler*, 837 F.3d at 693. In this case, the foster care responsible storage regulation readily survives this test.

As an initial matter, there can be little doubt that the state of Michigan has a substantial interest in protecting its citizenry from physical harm. *See, e.g., Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 768 (1994) (“The State [] has a strong interest in ensuring the public safety and order”); *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 670-71, 677 (1989) (citing government’s substantial interest in public safety in upholding practice of drug

testing border agents who carry firearms). Indeed, “[i]t is self-evident’ that public safety is an important government interest.” *Jackson*, 746 F.3d at 965. This already-significant interest is even more compelling where, as here, the health and safety of foster children – who enjoy “a constitutionally protected right to be free from harm while in state foster care” – is at stake. *Eugene D. By and Through Olivia D. v. Karman*, 889 F.2d 701, 707-08 (6th Cir. 1989); *see also Lintz v. Skipski*, 815 F.Supp. 1066 (W.D. Mich. 1993).

Moreover, there is a substantial relationship between the challenged regulation and the State’s important interest in protecting the safety of its citizens. Extensive data demonstrate that accidental shootings and gun suicides are pressing public health concerns. *See supra*, “Responsible Gun Storage Saves Lives.” Substantial evidence also demonstrates that many accidental gunshots and gun suicides could be prevented by responsible storage of firearms. *See id.* On this point, the data are unequivocal: responsible storage of firearms in the home, particularly when children are present, saves lives. The challenged regulation – backed by solid statistical evidence that more than establishes the requisite fit between the challenged regulation and the objective of reducing firearms injuries and accidents – directly advances public safety and saves lives. The regulation readily passes intermediate scrutiny.

CONCLUSION

For the foregoing reasons, the foster care responsible storage regulation should be upheld.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of October, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notifications of such filing to all CM/ECF participants in this case.

/s/Amanda C. Wiley

Amanda C. Wiley