

No. 19-2250

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

TANNER HIRSCHFELD; NATALIA MARSHALL,

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 *AMICUS CURIAE* GIFFORDS LAW CENTER TO
PREVENT GUN VIOLENCE IN SUPPORT OF
APPELLEES AND AFFIRMANCE**

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February 19, 2020

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Signature: /s/ Angela N. Ellis

Date: 2/19/2020

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INTEREST OF AMICUS CURIAE¹

Amicus curiae Giffords Law Center to Prevent Gun Violence (“Giffords Law Center”) is a non-profit policy organization dedicated to researching, writing, enacting, and defending laws and programs proven to effectively reduce gun violence. The organization was founded more than a quarter-century ago following a gun massacre at a San Francisco law firm and was renamed Giffords Law Center in October 2017 after joining forces with the gun-safety organization founded by former Congresswoman Gabrielle Giffords. Today, Giffords Law Center provides free assistance and expertise to lawmakers, advocates, legal professionals, law enforcement officials, and citizens who seek to improve the safety of their communities. Giffords Law Center participated as an *amicus curiae* before the District Court in the proceedings below, and was granted leave to participate in oral

¹ No counsel for a party authored this brief in whole or in part; no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than *amicus curiae*, its members, or its counsel made such a monetary contribution. See Fed. R. App. P. 29(a)(4)(E).

argument.² (J.A. 154, 409, 496.) Giffords Law Center has also provided informed analysis as an *amicus* in many other firearm-related cases, including *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress enacted the longstanding minimum age rules challenged in this appeal fifty years ago, following an extensive, “multi-year investigation” into rising rates of gun violence.³ That investigation “revealed a causal relationship between the easy availability of firearms to young people under 21 and [a] rise in crime.”⁴ In particular, Congress determined that (i) minors under the age of 21 committed a disproportionate share of “serious crimes of violence, including murder, rape, robbery, and aggravated assault”;⁵ (ii) handguns were the

² The Appellants and Appellees have both consented to Giffords Law Center filing this *amicus curiae* brief.

³ *Nat’l Rifle Assoc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 207 (5th Cir. 2012), *reh’g en banc denied*, 714 F.3d 334 (5th Cir. 2013), *cert. denied*, 571 U.S. 1196 (2014).

⁴ *Id.*

⁵ 114 Cong. Rec. 12309 (1968) (Sen. Thomas J. Dodd, Chairman, Sen. Subcomm. on Juvenile Delinquency).

“predominant[]” type of weapon used in such crimes;⁶ (iii) minors frequently evaded state firearm restrictions by crossing state lines to buy handguns;⁷ and (iv) federally licensed dealers were responsible for “almost all” handgun sales to minors.⁸

Confronted with these troubling findings, Congress crafted targeted, “safety-driven”⁹ legislation that prohibits federally licensed dealers (“FFLs”) from selling handguns to minors under the age of 21. *See* 18 U.S.C. §§ 922(b)(1), (c); 27 C.F.R. §§ 478.99(b)(1), 478.124(a), 478.96(b) (collectively the “Challenged Laws”) (reproduced in Appellees’ Add. at A1-A5). This solution was carefully “calibrated”¹⁰ to the specific public safety concerns Congress identified, and has been effective in addressing them. Subsequent developments in neuroscience and social

⁶ S. Rep. No. 89-1866, at 4 (1966).

⁷ *Id.* at 19.

⁸ *Federal Firearms Act: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Sen. Comm. on the Judiciary*, 89th Cong. 67 (1965) (statement of Sheldon S. Cohen, Commissioner of Internal Revenue).

⁹ *Nat’l Rifle Assoc.*, 700 F.3d at 199.

¹⁰ *Id.* at 209.

science in recent decades further confirm Congress's findings and the wisdom of its solution: minors under 21 with easy access to firearms pose a substantial risk to themselves and others because their brains are still developing. Studies show a connection between age restrictions and a decline in firearm-related adolescent deaths.

For these reasons, and others, the District Court applied this Court's well-established two-part framework for Second Amendment challenges, and found the Challenged Laws constitutional at both steps. In upholding the Challenged Laws at the second step of the framework, the District Court found that they trigger, and survive, intermediate scrutiny. This Court should affirm the District Court's holding that the Challenged Laws are constitutional under the Fourth Circuit's binding Second Amendment framework.

First, the Court should evaluate the Challenged Laws' constitutionality using the governing two-part framework for Second Amendment challenges. Although the parties take pains to evade it, the framework is well settled, both in this Circuit—where it has been affirmed repeatedly, including by the *en banc* Court in 2017—and in other Courts of Appeals. It is the clear consensus approach. *See Kolbe*

v. *Hogan*, 849 F.3d 114, 133 (4th Cir. 2017). This Court should not jettison binding precedent based on a handful of out-of-Circuit dissenting opinions. *See infra* Section I.

Second, the Second Amendment has long permitted sensible firearm regulations, like the Challenged Laws, that do not burden the core Second Amendment protection, and are substantially related to the legislature's public safety objectives. The Challenged Laws reflect Congress's well-founded and data-driven solution to address the grave problem of gun violence. Modern neuroscience and social science confirm the wisdom of age-based firearm restrictions: Data show that minors under 21 are at higher risk of using firearms to commit crime and attempt suicide, and are also disproportionately likely to be victims of firearm-related violence. *See infra* Section II.B.2-3. Because their brains are still developing, minors tend to be more impulsive than adults, and more likely to use guns irresponsibly. *See infra* Section II.B.1. For these reasons, researchers have found a connection between similar age restrictions and a decline in firearm-related adolescent deaths. *See infra* Section II.B.4.

In light of this data, the Challenged Laws easily pass constitutional muster.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY APPLIED THIS CIRCUIT'S TWO-PART FRAMEWORK FOR ANALYZING SECOND AMENDMENT CHALLENGES.

When the Supreme Court held that the Second Amendment protects an individual constitutional right, it was careful to observe that—like other constitutional rights—the Second Amendment right is “not unlimited.” *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008). The *Heller* Court emphasized that legislatures have at their disposal “a variety of tools for combatting [the problem of handgun violence],” *id.* at 636, but did not elaborate in detail on how courts should resolve other Second Amendment challenges.

This Court's subsequent jurisprudence has definitively answered the methodological question *Heller* left open. Like every Court of Appeals to adopt a post-*Heller* Second Amendment framework, the Fourth Circuit adopted “a two-part approach” for Second Amendment challenges. This approach first asks whether a challenged regulation burdens conduct within the scope of the Second

Amendment's protections. If so, then the court applies "an appropriate form of means-end scrutiny." *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *Kolbe*, 849 F.3d at 133.

Here, in holding that the Challenged Laws "[d]o [n]ot [v]iolate the Second Amendment," the District Court correctly "follow[ed] the Fourth Circuit's two-step framework." (J.A. 503, 505.) Doing so was proper because the framework is (i) binding law in the Fourth Circuit and (ii) fully consistent with *Heller* and well-reasoned.

A. The Governing Two-Part Framework for Analyzing Second Amendment Challenges Is Binding on This Panel.

In 2010, after the Supreme Court's decisions in *Heller* and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Fourth Circuit adopted "a two-part approach to Second Amendment claims." *Chester*, 628 F.3d at 680. Under this framework, a court must *first* answer "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee;" and *second*, if the law does impose such a burden, apply "an appropriate form of means-end scrutiny." *Id.* (internal quotation marks omitted). Since the Court's decision in *Chester*, courts have consistently applied the two-step

framework in Second Amendment challenges brought in this Circuit. The *en banc* Court in *Kolbe* reaffirmed this framework. 849 F.3d at 132-33.

The government does not acknowledge the framework at all, and focuses instead solely on history. Hirschfeld and Marshall, meanwhile, acknowledge *Chester*'s holding that "courts should consider heightened scrutiny analysis for Second Amendment challenges," (Appellants' Br. at 31-32), but nevertheless invite the panel to discard binding Circuit precedent in favor of a purely historical approach.

That position is untenable under the case law. *See, e.g., United States v. Collins*, 415 F.3d 304, 311 (4th Cir. 2005) ("A decision of a panel of this court becomes the law of the circuit and is binding on other panels" (internal quotation marks omitted)); *c.f. Ross v. Reed*, 704 F.2d 705, 707 (4th Cir. 1983), *aff'd*, 468 U.S. 1 (1984) ("This panel of the court is bound by [an] *en banc* decision"). It should come as no surprise, then, that Hirschfeld and Marshall have failed to cite a single authority at any stage of this proceeding to support the extraordinary position that the District Court, or this panel, can break with binding precedent. Their citation to a handful of out-of-Circuit dissenting and

concurring opinions that advocate a purely historical approach—the most prominent of which was drafted more than five years before the *en banc* Court’s affirmation of the framework in *Kolbe*—does not support departing from precedent. (*See* Appellants’ Br. at 32-33.)

The two-part framework applies “regardless of whether the parties invoke the standard, and irrespective of the parties’ views on whether it was correctly decided.” (J.A. 505 (citing *Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc.*, 783 F.3d 976, 980 (4th Cir. 2015) (“A party’s failure to identify the applicable legal rule certainly does not diminish a court’s responsibility to apply that rule.”)).) Instead, “[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.” (*Id.* (quoting *Dan Ryan Builders*, 783 F.3d at 980).)

For these reasons, the District Court correctly concluded that the two-step framework applies here. This Court should do the same.

B. The Fourth Circuit's Two-Part Framework Is Consistent with *Heller* and Well-Reasoned.

The Fourth Circuit's adoption of the two-part framework is consistent with the approach taken by the Courts of Appeals for the First, Second, Third, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits, all of which have done the same.¹¹

This is no accident. The consensus approach is fully consistent with *Heller* and *McDonald* and well-reasoned: it (i) treats Second Amendment rights like other constitutional rights; (ii) gives effect to *Heller*'s non-exhaustive list of "presumptively lawful regulatory measures," 554 U.S. at 627 n.26; and (iii) is far more administrable than a purely historical approach, which could strip legislators of the essential flexibility to enact lifesaving policies that protect the public.

First, consistent with *Heller* and *McDonald*, the two-part framework treats the Second Amendment right similarly to other constitutional rights, including the First Amendment, which *Heller*

¹¹ *Kolbe*, 849 F.3d at 132-33 (listing decisions); *Gould v. Morgan*, 907 F.3d 659, 669 (1st Cir. 2018), *petition for cert. filed* (U.S. Apr. 4, 2019) (No. 18-1272).

repeatedly invoked.¹² *See Chester*, 628 F.3d at 682 (“In the analogous First Amendment context, the level of scrutiny we apply depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right.”). There is no reason to exempt the Second Amendment from this traditional constitutional analysis. *See Nat’l Rifle Ass’n*, 700 F.3d at 198 (interpreting the Second Amendment “[i]n harmony with well-developed principles that have guided [the court’s] interpretation of the First Amendment”).

Second, the two-part framework is consistent with *Heller*’s recognition of numerous “presumptively lawful regulatory measures,” including “prohibitions on the possession of firearms by felons and the mentally ill,” and “laws imposing conditions and qualifications on the commercial sale of arms.” *Heller*, 554 U.S. at 626-27 & n.26. As this Court has recognized, *Heller* endorsed restrictions introduced for the

¹² *See Heller*, 554 U.S. at 595 (“[W]e do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*.”); *McDonald*, 561 U.S. at 780 (refusing to treat Second Amendment right as “subject to an entirely different body of rules than the other Bill of Rights guarantees that we have held to be incorporated into the Due Process Clause”).

first time in the mid-twentieth century, such as the felony firearm disqualification, *see United States v. Booker*, 644 F.3d 12, 24 (1st Cir. 2011), and did so “without alluding to any historical evidence.” *Chester*, 628 F.3d at 679. Means-end scrutiny is the only way to make sense of *Heller*’s list of “presumptively lawful regulatory measures,” which even Hirschfeld and Marshall appear to recognize.¹³

Third, the two-part framework is far easier to administer than a purely historical approach. Although the historical record clearly demonstrates that age restrictions on firearm purchases are deeply rooted in historical practices (*see, e.g., Appellees’ Br. at 13-16*), the historical inquiry in many other cases may be inconclusive. *See, e.g., Wrenn v. District of Columbia*, 864 F.3d 650, 659-60 (D.C. Cir. 2017) (discussing disagreement among scholars over whether a centuries-old English statute banned all firearms in crowded areas); *Chester*, 628 F.3d at 680-82 (proceeding to step two because the historical evidence was “not conclusive”).

¹³ *See Appellants’ Br. at 24* (urging the Panel to “recogniz[e] that *Heller*’s examples of ‘longstanding prohibitions’ are only ‘presumptively lawful’ because they survive heightened scrutiny while encompassing conduct within the Second Amendment’s scope of protection.”).

Likewise, a purely historical test provides little guidance to legislators grappling with rapidly changing firearm technologies such as guns manufactured with 3D-printers, which have few or no historical analogs. A test focused solely on history could hamstring legislative responses to evolving public safety threats. That is no small risk. As Judge Wilkinson put it in his concurring opinion in *Kolbe*:

Disenfranchising the American people on this life and death subject would be the gravest and most serious of steps. It is their community, not ours. It is their safety, not ours. It is their lives, not ours. To say in the wake of so many mass shootings in so many localities across this country that the people themselves are now to be rendered newly powerless, that all they can do is stand by and watch as federal courts design their destiny—this would deliver a body blow to democracy as we have known it since the very founding of this nation.

849 F.3d at 150.

In contrast, the Court's two-part framework suffers from none of these problems. Instead, it considers historical practices as a critical factor, while still giving legislatures necessary flexibility to devise effective solutions to gun violence. This approach is fully consistent with *Heller*, which was, after all, "a cautiously written

opinion, which reserved specific subjects upon which legislatures could still act.” *Id.*

II. THE DISTRICT COURT CORRECTLY DETERMINED THAT AT MOST, THE CHALLENGED LAWS’ RESTRICTION ON SOME HANDGUN PURCHASES BY 18-TO-20-YEAR-OLDS TRIGGERS, AND SURVIVES, INTERMEDIATE SCRUTINY.

The District Court correctly concluded that “the Challenged Laws do not implicate Second Amendment rights,” based on the historical record concerning age-based firearm restrictions. (J.A. 508-09.) This Court therefore should affirm the District Court’s holding at step one. (*See* Appellees’ Br. at 8-9, 13-20.)

But even if this Court decides, perhaps out of “an abundance of caution,” to “proceed to step two,” (*see, e.g.*, J.A. 509-12), it is “[u]nquestionabl[e]” that “the challenged federal laws trigger nothing more than ‘intermediate’ scrutiny.” *Nat’l Rifle Assoc.*, 700 F.3d at 204-05 (evaluating a nearly identical challenge). As social science and legislative history confirm, the Challenged Laws easily pass constitutional muster.

A. At Most, the Challenged Laws Trigger Intermediate Scrutiny.

The Fourth Circuit has explained that strict scrutiny is appropriate only where a challenged law “*severely* burden[s] the *core protection* of the Second Amendment, *i.e.*, the right of law-abiding, *responsible* citizens to *use* arms for self-defense in the home.” *Kolbe*, 849 F.3d at 138 (emphasis added). The Challenged Laws do not do so. As the District Court emphasized, they do not ban the use or the possession of firearms by minors under the age of 21. (J.A. 510-11.) Eighteen-to-twenty-year-olds may receive handguns as gifts, and are free to buy them from unlicensed private dealers. *Nat’l Rifle Assoc.*, 700 F.3d at 189-90. The Challenged Laws only affect the commercial sale of handguns to minors under 21 by federally-licensed dealers. *Id.* at 206. Such a limited restriction does not “severely burden the core protection of the Second Amendment.” *Kolbe*, 849 F.3d at 138. Therefore at most, intermediate scrutiny applies, requiring “a reasonable fit between the challenged regulation and a substantial government objective.” *Chester*, 628 F.3d at 683 (internal quotation marks omitted). And, as the legislative history and social science discussed *infra* confirm, the District Court was correct to hold that the Challenged Laws easily

satisfy intermediate scrutiny. *See Nat'l Rifle Assoc.*, 700 F.3d at 211 (“Because Congress’s intended scheme reasonably fits [its] objective, the ban at bar survives ‘intermediate’ scrutiny.”); J.A. 499-501, 509-12.

B. Extensive Evidence Confirms That the Challenged Laws Are a Data-Driven Solution to Promote Public Safety by Reducing Gun Violence.

Neuroscience and social science research confirm that 18-to-20-year-olds with easy access to firearms pose a substantial risk to themselves and others. Congress crafted a tailored, limited solution to address that risk. Courts have relied on this research in rejecting similar or identical challenges, including in the Fifth and Seventh Circuits,¹⁴ and the District Court was correct to do the same. (J.A. 513-14.)

1. *18-to-20-Year-Old Minors Are Generally More Impulsive Than Older Cohorts.*

The scientific literature shows that the human brain does not finish developing until the mid-to-late twenties.¹⁵ The *last* part of

¹⁴ *See Nat'l Rifle Assoc.*, 700 F.3d at 210 n.21; *Horsley v. Trame*, 808 F.3d 1126, 1133 (7th Cir. 2015).

¹⁵ Adam Winkler et al., *There's a Simple Way to Reduce Gun Violence: Raise the Gun Age*, WASH. POST (Jan. 6, 2016), <https://www.washingtonpost.com/posteverything/wp/2016/01/06/there-a->

the brain to mature is the prefrontal cortex, which is responsible for impulse control, judgment, and planning.¹⁶ The prefrontal cortex matures well after the limbic system, which controls basic emotions like fear, anger, and pleasure. As a result, people in their late teens and early twenties tend to have lower self-control and to make more impulsive decisions.¹⁷ 18-to-20-year-olds are prone to risk-taking, and they deprioritize long-term outcomes. *See Nat'l Rifle Ass'n*, 700 F.3d at 210 n.21 (“[M]odern scientific research supports the commonsense

simple-way-to-fight-mass-shootings-raise-the-gun-age/?utm_term=.e8adc7e6c1da (“The scientific literature over the past two decades has demonstrated repeatedly that the brain does not fully mature until the mid-to-late 20s.”).

¹⁶ *Id.*; see also J.A. 342, at 346, 349, Mariam Arain et al., *Maturation of the Adolescent Brain*, 9 NEUROPSYCHIATRIC DISEASE AND TREATMENT 449, 453, 456 (2013) (“Behavioral control requires a great involvement of cognitive and executive functions. These functions are localized in the prefrontal cortex, which matures independent of puberty and continues to evolve up until 24 years of age.”).

¹⁷ J.A. 342, at 346, Arain, *supra* note 16, at 453 (“[S]tudies involv[ing] comparing a teen brain to an adult brain determined that adolescents’ prefrontal cortices are used less often during interpersonal interactions and decision making than their adult counterparts . . . provid[ing] a partial explanation for certain characteristics of adolescents and adolescent behaviors, such as quickness to anger, intense mood swings, and making decisions on the basis of ‘gut’ feelings.”).

notion that 18-to-20-year-olds tend to be more impulsive than young adults aged 21 and over.”); *id.* (quoting submission from the American Medical Association: “The brain’s frontal lobes are still structurally immature well into late adolescence, and the prefrontal cortex is ‘one of the last brain regions to mature.’ This means that ‘response inhibition, emotional regulation, planning and organization . . . continue to develop between adolescence and young adulthood.”); *Horsley*, 808 F.3d at 1133 (“The evidence now is strong that the brain does not cease to mature until the early 20s in those relevant parts that govern impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable.” (quotation omitted)).

In addition, minors are uniquely prone to negative emotional states.¹⁸ Adolescents’ responses to “frequent” negative states “tend to be more intense, variable and subject to extremes relative to adults.”¹⁹

¹⁸ J.A. 356, at 357, Leah H. Somerville et al., *A Time of Change: Behavioral and Neural Correlates of Adolescent Sensitivity to Appetitive and Aversive Environmental Cues*, 72 *BRAIN AND COGNITION* 124, 125 (2010).

¹⁹ *Id.*

Scientists have reasoned that “[f]eeling sad, depressed, or hopeless may be associated with the heightened rates of affective disorders, attempted and completed suicide, and addiction also observed during adolescence.”²⁰ Minors are also more likely to *act* on negative emotions like stress or rage, because their limbic systems have matured while their cerebral cortexes (i.e., impulse control centers) are still developing.²¹

Because their brains are still developing, 18-to-20-year-olds are at a higher risk of violence when they have unfettered access to firearms.²² Indeed, educational institutions serving this age group—

²⁰ *Id.*; see also Richard A. Friedman, *Why Are Young Americans Killing Themselves? Suicide Is Now Their Second-Leading Cause of Death*, N.Y. TIMES (Jan. 6, 2020), <https://www.nytimes.com/2020/01/06/opinion/suicide-young-people.html?action=click&module=Opinion&pgtype=Homepage> (“While young people are generally physically healthy, they are psychiatrically vulnerable. Three-quarters of all the mental illness that we see in adults has already occurred by age 25.”).

²¹ J.A. 342, at 351, Arain, *supra* note 16, at 458 (“[T]he adolescent brain is structurally and functionally vulnerable to environmental stress.”).

²² See, e.g., Michael Dreyfuss et al., *Teens Impulsively React Rather Than Retreat from Threat*, 36 DEVELOPMENTAL NEUROSCIENCE 220, 220 (2014) (“Adolescents commit more crimes per capita than children or adults in the USA and in nearly all industrialized cultures. Their

such as colleges and military academies, which arguably admit only the most responsible young adults—recognize this risk. *See, e.g.*, U.S. Military Academy Regulation 190-3 at § II.1-6(b)(1) (“No pistols or handguns may be registered or carried by anyone under the age of twenty-one (21) to include Cadets.”) (on file with counsel).²³

2. *18-to-20-Year-Olds Are Disproportionately Likely to Commit Violent Crimes, Including Homicide, by Firearm.*

18-to-20-year-olds account for a disproportionate share of violent crimes and homicides—both as victims and as perpetrators. The statistics are stark:

- Arrests for homicide, rape, and robbery are highest among 18-to-20-year-olds.²⁴
- Though 18-to-20-year-olds make up less than 5% of the population, they account for more than 15% of homicide and

proclivity toward . . . risk taking has been suggested to underlie the inflection in criminal activity observed during this time.”).

²³ *See also* Matthew Miller et al., *Guns and Gun Threats at College*, 51 J. AM. COLL. HEALTH 57, 64 (2002) (“[O]ur findings also suggest that students who report having guns at college disproportionately engage in behaviors that put themselves and others at risk for injury.”).

²⁴ U.S. Department of Justice, *Crime in the United States, Arrests, by Age, 2017*, at Table 38, <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/tables/table-38>.

manslaughter arrests.²⁵ Moreover, FBI data suggest that this age group accounts for 17% of known homicide offenders.²⁶

- This general pattern has persisted over time. The following chart, showing homicide offending rate by age in 2009, vividly illustrates the disproportionate share of homicides committed by minors that year:²⁷



²⁵ *Id.*; U.S. Census Bureau, *Current Population Reports*, Population Projections of the United States by Age, Sex, Race, and Hispanic Origin: 1995 – 2050 at 76, available at <https://www.census.gov/prod/1/pop/p25-1130/p251130.pdf>.

²⁶ Calculated using data from the FBI's Supplementary Homicide Reports and U.S. Census Bureau. Uniform Crime Reporting Program: Supplementary Homicide Reports (SHR), Washington, DC: Department of Justice, Federal Bureau of Investigation; U.S. Census Bureau Population Estimates.

²⁷ J.A. 367, at 371, Daniel W. Webster et al., *The Case for Gun Policy Reforms in America*, JOHNS HOPKINS CTR. FOR GUN POLICY & RESEARCH 1, 5 (2012), https://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-policy-and-research/publications/WhitePaper020514_CaseforGunPolicyReforms.pdf.

- “Firearm homicides and violent crimes disproportionately involve individuals under age 21, both as perpetrators and as victims.”²⁸

3. *18-to-20Year-Olds Attempt Suicide at Disproportionately High Rates and Access to Firearms Increases the Likelihood and Lethality of Those Suicide Attempts.*

18-to-20-year-olds are also disproportionately at risk of attempting suicide, and firearm access exacerbates that risk. Many major psychiatric conditions first develop in adolescence,²⁹ and suicide risk “increase[s] steeply during the first few years after” an individual’s

²⁸ RAND Corporation, *The Science of Gun Policy: A Critical Synthesis of Research Evidence on the Effects of Gun Policies in the United States* 1, 145 (2018); see also *People v. Fields*, 24 N.E.3d 326, 344 (Ill. App. Ct. 2014) (“We also note that the 18-to-20-year-old age group is more likely to be directly interacting with and, thus, endangering juveniles under 18 years of age.”).

²⁹ Tomáš Paus et al., *Why Do Many Psychiatric Disorders Emerge During Adolescence?*, 9 NATURE REVIEWS NEUROSCIENCE 947, 952 (2008) (“Anxiety disorders, bipolar disorder, depression, eating disorder, psychosis (including schizophrenia) and substance abuse all most commonly emerge during adolescence.”); *Mental Health Disorder Statistics*, JOHNS HOPKINS MEDICINE, <https://www.hopkinsmedicine.org/health/wellness-and-prevention/mental-health-disorder-statistics> (explaining that schizophrenia typically “first appears in men during their late teens or early twenties”).

first contact with psychiatric services.³⁰ Data from the Centers for Disease Control and Prevention show that suicide accounts for a higher percentage of deaths for 15-to-24-year-olds than for any other age group.³¹ Indeed, suicide is the second-most common cause of death among 18-to-20-year-olds.³²

“Access to firearms is a key risk factor for suicide.”³³

Whereas just 4% of suicide attempts are fatal when the attempts do not involve a firearm,³⁴ 85% of suicide attempts involving a firearm are

³⁰ Merete Nordentoft et al., *Absolute Risk of Suicide after First Hospital Contact in Mental Disorder*, 68 ARCHIVES OF GENERAL PSYCHIATRY 1058, 1061 (2011).

³¹ Centers for Disease Control and Prevention, Web-based Injury Statistics Query and Reporting System (WISQARS), Leading Cause of Death Reports, <https://webappa.cdc.gov/sasweb/ncipc/leadcause.html>.

³² *Id.*

³³ American Public Health Association, *Reducing Suicides by Firearms* (2018), <https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2019/01/28/reducing-suicides-by-firearms>.

³⁴ Matthew Miller et al., *Suicide Mortality in the United States: The Importance of Attending to Method in Understanding Population-Level Disparities in the Burden of Suicide*, 33 ANN. REV. PUB. HEALTH 393, 397 (2012) (establishing that in 2001, there were 333,765 non-firearm suicide attempts and 13,753 fatalities).

fatal.³⁵ A suicide attempt with a firearm is the suicide attempt method with the highest fatality rate. People rarely die by repeated suicide attempt—more than 90% of people who survive a suicide attempt do not later die by suicide.³⁶ Therefore a minor’s access to firearms during a suicide attempt often determines whether he dies or recovers.

4. *Federal and State Minimum-Age Laws Have Proven Effective at Reducing Gun Violence Among Minors.*

As the District Court concluded, studies also show that there is a “reasonable fit” between the Challenged Laws and Congress’s public safety objective. *Chester*, 628 F.3d at 683; *see* J.A. 511. Studies have found a connection between age restrictions like the Challenged Laws and a decline in firearm-related adolescent deaths, especially suicides and unintentional shootings.³⁷ For instance, an August 2004

³⁵ *Id.*

³⁶ *Id.* at 402-03.

³⁷ The same concerns regarding minors’ heightened impulsiveness led to passage of laws in all 50 states establishing 21 as the minimum legal age for alcoholic beverage consumption. Studies confirm that these laws led to significant reductions in death from motor vehicle crashes involving minor drivers. William DeJong et al., *Case Closed: Research Evidence on the Positive Public Health Impact of the Age 21 Minimum Legal Drinking Age in the United States*, 17 J. STUD. ON ALCOHOL & DRUGS 108, 113 (2014) (“Recent research on the age 21

study found that state laws raising the minimum age for handgun purchases to 21 were associated with a nine percent decline in firearm suicide rates among 18-to-20-year-olds.³⁸ A survey of convicted gun offenders in 13 states found that a minimum legal age of 21 would have prohibited 17% of the offenders from obtaining firearms at the time of their crimes, a finding that “underscore[d] the importance of minimum-age restrictions.”³⁹

Research also confirms that federal minimum-age restrictions reduce youth suicide and unintentional deaths, and may be even more effective than state minimum-age restrictions.⁴⁰ According to a 2014 study, after Congress raised the minimum age for handgun

[minimum legal drinking age] has reinforced the position that the current law has served the nation well by reducing alcohol-related traffic crashes.”).

³⁸ Daniel W. Webster et al., *Association Between Youth-Focused Firearm Laws and Youth Suicides*, 292 JAMA 594, 598 (2004).

³⁹ J.A. 387, at 390-91, Katherine A. Vittes et al., *Legal Status and Source of Offenders’ Firearms in States with the Least Stringent Criteria for Gun Ownership*, 19 INJURY PREVENTION 26, 29-30 (2013).

⁴⁰ J.A. 394, at 399, Mark Gius, *The Impact of Minimum Age and Child Access Prevention Laws on Firearm-Related Youth Suicides and Unintentional Deaths*, 52 THE SOC. SCI. J. 168, 173 (2015).

possession to 18 in 1994, youth suicide rates dropped by 1.2 per 100,000 persons—decreasing from approximately 2.1 suicides per 100,000 in 1994 to .9 suicides per 100,000 in 2010.⁴¹ The decline in youth unintentional firearm death rates was also dramatic: in 1994, the rate of youth unintentional gun deaths was approximately 0.67 per 100,000 persons, but after the federal minimum-age law was enacted in 1994, the rate fell to approximately .2 per 100,000 persons for a total decrease of 0.47 per 100,000 persons.⁴²

In addition to studies confirming the specific efficacy of minimum age laws, studies also show that gun violence prevention laws generally reduce gun violence among young people, including in the 18-to-20-year-old range. An August 2019 study examined the 21,241 firearm-related deaths among U.S. children from 2011 to 2015. 18-to-21-year-olds made up more than half of these deaths (68.7%). But gun violence prevention efforts made a difference: using a point system to measure the strength of each state's gun laws, the study found that every 10-point increase in the strength of a state's gun laws

⁴¹ *Id.* at 173-74.

⁴² *Id.*

“decrease[d] the firearm-related mortality rate in children by 4%” in its fully adjusted model.⁴³ Another study published in August 2019 used the same point system and found that the quartile of states with the strictest laws “have an annual pediatric firearm mortality rate of 2.563 per 100,000 [children aged 0-to-19-years-old] compared with states in the lowest quartile [with the least strict laws], where the mortality rate is almost twice as high at 5.005 per 100,000.”⁴⁴

Finally, research demonstrates that most mass shooters obtain their weapons lawfully. In a report examining active shootings from 2000 to 2013, the FBI concluded that “only very small percentages [of shooters] obtain[ed] a firearm illegally,”⁴⁵ indicating that these perpetrators seek easy firearms access and are not necessarily

⁴³ Monika K. Goyal et al., *State Gun Laws and Pediatric Firearm-Related Mortality*, 144 PEDIATRICS No. 2, at 3 & tbl. 1 (2019).

⁴⁴ Sriraman Madhavan et al., *Firearm Legislation Stringency and Firearm-Related Fatalities Among Children in the US*, 229 J. AM. COLLEGE SURGEONS 150, 152 (2019).

⁴⁵ U.S. Department of Justice, Federal Bureau of Investigation, *A Study of the Pre-Attack Behaviors of Active Shooters in the United States Between 2000 and 2013*, at 7 (June 2018), <https://www.fbi.gov/file-repository/pre-attack-behaviors-of-active-shooters-in-us-2000-2013.pdf/view>.

sophisticated participants in the black market for guns. Lawmakers therefore can and should assume that restricting access to firearms will deter criminal use of firearms—precisely the type of reasonable assumption that underlies virtually all laws regulating dangerous products. *Accord, e.g., Nat’l Paint & Coatings Ass’n v. City of Chicago*, 45 F.3d 1124, 1128-29 (7th Cir. 1995) (“Legislatures often enact laws that reduce but cannot eliminate the effects of movements across municipal and state borders.”).

C. Congress Enacted a “Calibrated” Law to Address the Problem of Handgun Violence by Minors Under the Age of 21.

The Fourth Circuit has explained that the government’s “interest in the protection of its citizenry and the public safety is not only substantial, but compelling.” *Kolbe*, 849 F.3d at 139. In enacting legislation to advance this compelling interest, Congress is entitled to “weigh conflicting evidence and make policy judgments” without “second-guessing by a court,” and courts must “accord substantial deference to” Congress’s “predictive judgments.” *Id.* at 140 (internal quotation marks omitted); *see also United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011) (“We do not wish to be even minutely

responsible for some unspeakably tragic act of mayhem because in the peace of our judicial chambers we miscalculated as to Second Amendment rights.”). Applying these principles, the District Court correctly concluded that “[t]he text of the statute and legislative history make clear that ‘Congress designed [the challenged] scheme to solve a particular problem: violent crime associated with the trafficking of handguns from FFLs to young adults,’” and did so in a targeted, constitutional manner. (J.A. 511-12 (quoting *Nat’l Rifle Assoc.*, 700 F.3d at 211); *see also* J.A. 499-501.)

As Hirschfeld and Marshall acknowledge, the Challenged Laws were enacted to aid in the “fight against crime,” and *not* “to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes.” (J.A. 10 (quoting Pub. L. No. 90-618, Title I, § 101, 82 Stat. 1213, 1213-14 (1968)).) Indeed, the challenged restriction is narrow, regulating only: (i) sale (not possession or gifting); (ii) of handguns (not of rifles or shotguns); (iii) by FFLs (not by unlicensed sellers); (iv) to minors under the age of 21.⁴⁶

⁴⁶ *See, e.g.*, S. Rep. No. 90-1097, at 79 (1968) (“[A] minor or juvenile would not be restricted from owning, or learning the proper usage of [a]

This carefully “calibrated” restriction, *Nat’l Rifle Assoc.*, 700 F.3d at 209, targeted important problems Congress identified: “[t]he clandestine acquisition of firearms by juveniles and minors,” S. Rep. No. 90-1097, at 79 (1968), and the “causal relationship between the easy availability of firearms other than a rifle or shotgun and juvenile and youthful criminal behavior.” Pub. L. No. 90-351, Title IV, § 901(a)(6), 82 Stat. 197, 225-26 (1968).

Specifically, Congress’s multi-year investigation, which comprised both “field investigation and public hearings,” S. Rep. No. 88-1340, at 1 (1964), uncovered the following disturbing facts:

- “[M]inors account for 64 percent of the total arrests” for “serious crimes in the United States.” S. Rep. No. 90-1097, at 77 (1968).
- “[M]inors under the age of 21 years accounted for 35 percent of the arrests for the serious crimes of violence including murder, rape, robbery, and aggravated assault.” 114 Cong. Rec. 12309 (1968) (Sen. Thomas J. Dodd, Chairman, Sen. Subcomm. on Juvenile Delinquency).

firearm, since any firearm which his parent or guardian desired him to have could be obtained for the minor or juvenile by the parent or guardian.”); *see also* Bureau of Alcohol, Tobacco, and Firearms Chief Counsel’s Opinion 23362 (Dec. 5, 1983) (opining that a dealer may lawfully sell a firearm to a parent or guardian who is purchasing it for a minor child as long as the minor is not otherwise prohibited from receiving or possessing a firearm).

- According to federal law enforcement officials, at the time the law was enacted, “[t]he greatest growth of crime” was “in the area of young people, juveniles and young adults,” and “[t]he easy availability of weapons makes their tendency toward wild, and sometimes irrational behavior that much more violent, that much more deadly.” *Federal Firearms Act: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Sen. Comm. on the Judiciary*, 90th Cong. 57 (1967) (statement of Sheldon S. Cohen, Commissioner of Internal Revenue).
- Local law enforcement officers from around the country submitted “statistics documenting the misuse of firearms by juveniles and minors,” which “[took] on added significance when one considers the fact that in each of the jurisdictions . . . the lawful acquisition of concealable firearms by these persons was prohibited by statute,” S. Rep. No. 89-1866, at 59 (1966), and in light of the “serious problem of individuals going across State lines to procure firearms which they could not lawfully obtain or possess in their own State and without the knowledge of their local authorities,” *id.* at 19.
- “[A]lmost all of these firearms . . . are put into the hands of juveniles [and minors] by importers, manufacturers, and dealers who operate under licenses issued by the Federal Government.” *Federal Firearms Act: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Sen. Comm. on the Judiciary*, 89th Cong. 67 (1965) (statement of Sheldon S. Cohen, Commissioner of Internal Revenue).
- “[E]specially concern[ing]” was “the particular type of weapon that is predominantly used by the criminal”: the handgun. S. Rep. No. 89-1866, at 4 (1966). Indeed, the handgun’s “size, weight, and compactness make it easy to carry, to conceal, to dispose of, or to transport,” and “[a]ll

these factors make it the weapon most susceptible to criminal use” by minors. *Id.*⁴⁷

Based on these findings, Congress concluded that concealable firearms “have been widely sold by federally licensed importers and dealers to emotionally immature, or thrill-bent juveniles and minors prone to criminal behavior,” and “that only through adequate Federal control over interstate and foreign commerce in these weapons, and over all persons engaging in the businesses of importing, manufacturing, or dealing in them, can this grave problem be properly dealt with, and effective State and local regulation of this traffic be made possible.” Pub. L. No. 90-351, Title IV, §§ 901(a)(3), (a)(6), 82 Stat. 197, 225-26 (1968). Though fully aware “that there are some youngsters under the age of 21 who are more mature than others,” and

⁴⁷ Some of this evidence supports a broader restriction on all firearms, not just handguns. However, the fact that Congress did “not address all aspects of a problem in one fell swoop” does not make its targeted steps to achieve incremental results in reducing handgun crime unconstitutional. *Mance v. Sessions*, 896 F.3d 699, 708 (5th Cir. 2018) (upholding allegedly “underinclusiv[e]” interstate handgun sales restrictions because “policymakers may focus on their most pressing concerns” (internal quotation marks omitted)), *petition for cert. filed* (U.S. Nov. 21, 2018) (No. 18-663); *see also N.Y. State Rifle & Pistol Ass’n, Inc. v. Cuomo*, 804 F.3d 242, 263 (2d Cir. 2015) (“[G]un control legislation need not strike all evils at the same time to be constitutional.” (internal quotation marks omitted)).

that its age restriction “could cause minor inconveniences to certain youngsters who are mature, law abiding, and responsible,” Congress viewed its chosen compromise as necessary and reasonable “in light of the continuing increase of crimes of violence by persons under 21 years of age.” 114 Cong. Rec. 12309 (Sen. Dodd).

Together with the neuroscience and social science summarized above, the legislative history confirms that there is a more than “reasonable fit” between the Challenged Laws and “Congress’s interest in the protection of its citizenry and the public safety.” (J.A. 511.)

CONCLUSION

For the foregoing reasons and those set forth by the government, the longstanding federal laws Hirschfeld and Marshall challenge do not implicate the Second Amendment, and even if they did, they easily survive the appropriate level of scrutiny. The Challenged Laws represent Congress’s careful and considered solution to a grave public safety concern. In the decades since the Challenged Laws were enacted, neuroscience and social science have further confirmed that the problem Congress identified—minors under the age of 21 with easy

access to firearms—was substantial, and its tailed solution effective.

The District Court's judgment should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

Given the nature and importance of the constitutional questions at issue in this appeal, Giffords Law Center believes the Court would benefit from oral argument in this case. Giffords Law Center participated in oral argument before the District Court because there (as here) neither party addressed the proper application of the Fourth Circuit's governing two-step framework, and therefore only *amici* could provide argument concerning the genesis, rationale, and applicability of the framework. (*See* J.A. 496 (granting Giffords Law Center's motion for leave to participate in argument).) For these same reasons, if this Court schedules oral argument, Giffords Law Center respectfully intends to seek leave to participate under Federal Rule of Appellate Procedure 29(a)(8).

Dated: February 19, 2020 Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 19, 2020, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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February 19, 2020

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because this brief contains 6450 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.

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February 19, 2020