No. 21-

IN THE

Supreme Court of the United States

NATALIA MARSHALL,

Petitioner,

v.

BUREAU OF ALCOHOL, FIREARMS, TOBACCO & EXPLOSIVES; MARVIN RICHARDSON, ACTING DIRECTOR OF THE BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES; MERRICK B. GARLAND, ATTORNEY GENERAL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a suit seeking a declaratory judgment and injunctive relief is rendered moot on appeal if the plaintiff remains negatively impacted by the laws at issue but the nature of the injury or capacity in which she maintains standing differs from when the suit was initiated.

II. Whether the Fourth Circuit's decision to vacate its prior opinion in *Hirschfeld I* due to mootness was the equitable relief most consonant with justice when, *arguendo*, mootness came as a direct consequence of the laws at issue and such laws were held to facially violate the Second Amendment.

PARTIES TO THE PROCEEDING

The Petitioner is Ms. Natalia Marshall.

The Respondents are the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"); Mr. Marvin Richardson, in his official capacity as Acting Director of the ATF; and Mr. Merrick B. Garland, in his official capacity as Attorney General of the United States.

The Respondents are hereinafter referred to collectively as "the Respondents" or "the Government."

RELATED PROCEEDINGS

Fourth Circuit Court of Appeals:

Hirschfeld, et al. v. BATFE, et al.,
Case No. 19-2250, Fourth Circuit Court of Appeals.
Judgment entered Nov. 19, 2021.

Hirschfeld, et al. v. BATFE, et al.,
Case No. 19-2250, Fourth Circuit Court of Appeals.
Judgment entered Sept. 22, 2021.

Hirschfeld, et al. v. BATFE, et al.,
Case No. 19-2250, Fourth Circuit Court of Appeals.
Judgment entered July 13, 2021.

United States District Court for the Western District of Virginia

Hirschfeld, et al. v. BATFE, et al.,
Case No. 18-CV-00103, Western District of Virginia. Judgment entered Oct. 4, 2019.

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Ms. Natalia Marshall respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The order of the Fourth Circuit denying Ms. Marshall's petition for a rehearing of the opinion rendered in *Hirschfeld II* was entered on November 19, 2021. App. 34a, 35a.

Hirschfeld II and its order to vacate *Hirschfeld I* are available in the Appendix and published as *Hirschfeld, v. BATFE*, 14 F.4th 322 (4th Cir. 2021). App. 1a–9a (hereinafter "*Hirschfeld II*").

The Fourth Circuit's original opinion, *Hirschfeld I*, and its order vacating and reversing the district court in favor of Ms. Marshall are available at *Hirschfeld v. BATFE*, 5 F.4th 407 (4th Cir. 2021) (published as amended on July 15, 2021) (hereinafter "*Hirschfeld I*").

The district court opinion and order granting the Government's Motion to Dismiss and denying Ms. Marshall's Motion for Summary Judgment are available at *Hirschfeld, et al. v. BATFE, et al.*, 417 F. Supp. 3d 747 (W.D. Va. 2019). App. 10a–33a.

JURISDICTION

The Fourth Circuit denied Ms. Marshall's timely petition for a rehearing on November 19, 2021. App. 35a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AT ISSUE

Article III, Section 2, Clause 1 of the Constitution states:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The Second Amendment of the Constitution states:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

STATUTORY PROVISIONS AT ISSUE

18 U.S.C. § 922(a)(1)(A) states:

> It shall be unlawful for any person except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the

> business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce.

18 U.S.C. § 922(b)(1) states:

> It shall be unlawful for any . . . licensed dealer . . . to sell or deliver . . . any firearm or ammunition to any individual who the licensee knows or has reasonable cause to believe is less than eighteen years of age, and, if the firearm, or ammunition is other than a shotgun or rifle, or ammunition for a shotgun or rifle, to any individual who the licensee knows or has reasonable cause to believe is less than twenty-one years of age.

18 U.S.C. § 922(c)(1) states:

> In any case not otherwise prohibited by this chapter, a . . . licensed dealer may sell a firearm to a person who does not appear in person at the licensee's business premises (other than another licensed importer, manufacturer, or dealer) only if . . . the transferee submits to the transferor a sworn statement in the following form: "Subject to penalties provided by law, I swear that, in the case of any firearm other than a shotgun or a rifle, I am twenty-one years or more of age . . . ."

27 C.F.R. § 478.99(b)(1) states:

> A . . . licensed dealer . . . shall not sell or deliver (1) any firearm or ammunition . . . , if the firearm, or ammunition, is other than a shotgun or rifle, or ammunition for a shotgun or rifle, to any individual who the importer, manufacturer, dealer, or collector knows or has reasonable cause to believe is less than 21 years of age . . . .

27 C.F.R. § 478.124(a) states:

> A . . . licensed dealer shall not sell or otherwise dispose, temporarily or permanently, of any firearm to any person, other than another licensee, unless the licensee records the transaction on a firearms transaction record, Form 4473 . . . .

27 C.F.R. § 478.96(b) states:

> A . . . licensed dealer may sell a firearm that is not subject to the provisions of § 478.102(a) to a nonlicensee who does not appear in person at the licensee's business premises if the nonlicensee is a resident of the same State in which the licensee's business premises are located, and the nonlicensee furnishes to the licensee the firearms transaction record, Form 4473, required by § 478.124 . . . .

27 C.F.R. § 478.124(f) states:

> The Form 4473 shall show the name, address, date and place of birth, height, weight, and race of

> the transferee; and the title, name, and address of the principal law enforcement officer of the locality to which the firearm will be delivered. The transferee also must date and execute the sworn statement contained on the form showing, in case the firearm to be transferred is a firearm other than a shotgun or rifle, the transferee is 21 years or more of age . . . .

STATEMENT OF THE CASE

I. Factual history.

The facts have never been in dispute. Ms. Marshall is an adult citizen who attempted to purchase a handgun from a federal firearm licensed dealer (hereinafter "FFL") when she was eighteen years old. She was denied because she was not yet twenty-one and was prohibited from making such a purchase pursuant to the Gun Control Act of 1968 and its derivative federal regulations. Specifically, 18 U.S.C. §§ 922(b)(1) and (c)(1), and derivative regulations such as 27 C.F.R. §§ 478.99(b)(1), 478.124(a), and 478.96(b) (hereinafter the "laws at issue"), are those which bar the sale of handguns or handgun ammunition by FFLs to those under twenty-one years old.

Ms. Marshall was well-versed in firearms training when she initiated this suit and "had good reason to seek protection." *Hirschfeld I*, 5 F.4th at 411. She had received a no-contact protective order against her abusive ex-boyfriend which required him to refrain from being in her presence. *Id.* During this time, Ms. Marshall also worked in remote, rural conditions in central Virginia and was required to regularly interact with unfamiliar adults while alone in an isolated environment. *Id.*

While subject to the protective order, Ms. Marshall's ex-boyfriend was stopped for a traffic violation by police and found to be in the unlawful possession of a firearm and controlled substances. *Id.* He was subsequently released on bail but failed to appear for court, which resulted in the issuance of a capias for his arrest. *Id.* Ms. Marshall sought to purchase a new handgun and ammunition for the primary purpose of self-defense and she believed a handgun to be the most suitable firearm for this purpose due to the ease of open-carrying, training, and use. *Id.* She wanted to purchase a handgun from an FFL for several reasons, including the larger supply, the reputation of regulated dealers, and the ability to purchase new firearms[1] with a guarantee that they have not been used, stolen, or tampered with. *Id.* In October of 2018, Ms. Marshall attempted to purchase a Ruger American Pistol and ammunition from an FFL but was denied due to her age. *Id.* If the laws at issue were not in place, she would have been permitted to purchase this handgun and ammunition from the FFL. *Id.*

II. Proceedings below.

Ms. Marshall, along with Mr. Tanner Hirschfeld, a former party to the case, filed suit seeking an injunction and declaratory judgment that the laws at issue violate the

1. Federal firearm licenses are required for anyone engaging in the business of dealing firearms. 18 U.S.C. § 922(a)(1)(A). Other regulations applicable to FFLs limit the dealing of firearms from licensed manufacturers to licensed dealers. Together, these regulations materially restrict the market for handguns and, as applied to those under twenty-one, they constitute a categorical ban on the purchase of *new* handguns and ammunition, thereby banning the purchase of a class of firearms (new handguns).

Second Amendment as well as the right to equal protection and due process secured by the Fifth Amendment to the United States Constitution. App. 11a.

Per an agreement by the parties, the district court ordered disposition of the case on the legal arguments because there was no factual dispute. App. 11a. The Government moved to dismiss the case pursuant to Fed. R. Civ. P. 12(b)(6) and Ms. Marshall filed her opposition along with her own motion for summary judgment. App. 11a. The district court entered an order with a published opinion granting the Government's motion to dismiss and denying Ms. Marshall's motion for summary judgment. App. 10a–33a (published at *Hirschfeld, et al. v. BATFE, et al.*, 417 F. Supp. 3d 747 (W.D. Va. 2019). The district court held that age-based prohibitions on the purchase of handguns from FFLs by adults do not violate the Second or Fifth Amendment. App. 19a, 31a.

On July 13, 2021, the Fourth Circuit issued its opinion in a split panel decision and vacated the district court's judgment, reversing the decision and remanding it for further proceedings. *Hirschfeld I*, 5 F.4th 407 (published as amended on July 15, 2021). *Hirschfeld I* established a direct split with the Fifth Circuit, the only other court of appeals to address the underlying issue concerning the Second Amendment in this case. *See NRA v. BATFE*, 700 F.3d 185 (5th Cir. 2012), *rehearing en banc denied*, 714 F.3d 334 (5th Cir. 2013) (noting a vote of eight to seven against granting a rehearing en banc), *cert. denied*, 571 U.S. 1196 (2014)).

Though Mr. Hirschfeld turned twenty-one prior to *Hirschfeld I*, Ms. Marshall remained younger than

twenty-one. *Id.* at 411. Mr. Hirschfeld did not petition for a rehearing insofar as it concerned the Court's decision regarding mootness in *Hirschfeld I* however the Government moved for the Fourth Circuit to deem the entire case moot and vacate *Hirschfeld I* following Ms. Marshall's twenty-first birthday. App. 2a.

Ms. Marshall opposed the Government's motion and submitted a sworn affidavit to supplement the record, noting that although the barriers to her purchase of the handgun were no longer applicable, she remains impacted by the laws at issue as a prospective private seller[2] of these firearms in Virginia. App. 4a; *see also Craig v. Boren*, 429 U.S. 190, 195–97 (1976) (finding sellers have standing to seek vindication of customers' rights to purchase); *Carey v. Population Services, Int'l*, 431 U.S. 678, 683 (1977).

Ms. Marshall alerted the Fourth Circuit to the fact that for all firearm sales in Virginia, a seller must receive "verification from a licensed dealer in firearms

2. The Fourth Circuit stated that Ms. Marshall sought to bring her claims related to her personal sale of a handgun to someone under twenty-one "within th[e] court's purview by alleging that she *wishes* to use a federally licensed firearm dealer to facilitate sales." App. 4a (emphasis added). It is not that she does or does not "wish" to conduct a background check before the sale—Virginia law requires it. *Elhert v. Settle*, 105 Va. Cir. 326 (Lynchburg Cir. Ct. July 14, 2020). The interplay between the age-related laws at issue and federal laws governing the FFL's involvement in background checks to facilitate private transfers make it such that no one can sell a handgun to those under twenty-one in Virginia and the Commonwealth conceded as much. *Id.* at 334 ("Agreeing that adults under 21 years of age can no longer purchase handguns under the present setup, the Commonwealth deflects by saying the problem lies with federal law, not the Act.").

that information on the prospective purchaser has been submitted for a criminal history record information check" and "that a determination has been received from the Department of State Police that the prospective purchaser is not prohibited under state or federal law from possessing a firearm or such sale is specifically exempted by state or federal law." Va. Code § 18.2-308.2:5; *see also Recordkeeping and Background Check Procedure for Facilitation of Private Party Firearms Transfers*, ATF PROCEDURE 2020-2 (Sept. 2, 2020).

The interplay between Virginia's "universal background check" requirement and the laws at issue results in a system that bars all sales of handguns to those under twenty-one. The laws at issue require FFLs to facilitate these private transactions by taking the firearm into inventory from the private seller and recording it before transferring it to the buyer. To obtain a background check from the FBI's National Instant Criminal Background Check System ("NICS system"), both the buyer's age and type of firearm are required and the NICS system automatically rejects a handgun transfer to someone under twenty-one. *See, e.g.*, 27 C.F.R. § 478.102; 27 C.F.R. §§ 478.124(c)(1)–(5), (f).

If the laws at issue are invalidated, Ms. Marshall can procure these necessary background checks and conduct private transactions in Virginia with adults under twenty-one. In her opposition to the Government's motion seeking a declaration of mootness and vacatur of *Hirschfeld I*, Ms. Marshall argued that she maintains standing as a prospective seller. *See, e.g.*, *Craig*, 429 U.S. at 195–97; *Carey*, 431 U.S. at 683. The Fourth Circuit held that Ms. Marshall's claims are moot in spite of

her standing as a prospective seller and granted the Government's motion to vacate *Hirschfeld I*. App. 1a. Ms. Marshall moved for a panel rehearing to reconsider *Hirschfeld II* but was denied. App. 34a. This petition for certiorari now follows.

REASONS FOR GRANTING THE PETITION

I. This Case Is Not Moot And The Fourth Circuit's Holding To The Contrary Created A Split With The Third And Ninth Circuits.

The Fourth Circuit held that cases are rendered moot even if the plaintiff maintains standing but her injury or capacity in which she is impacted differs from when the suit was initiated. App. 4a. This decision conflicts with those of the Third and Ninth Circuits. *Compare* App. 4a; *with Freedom from Religion Found. Inc. v. New Kensington Arnold Sch. Dist.*, 832 F.3d 469, 477 (3d Cir. 2016) ("[A] court will not dismiss a case as moot, *even if the nature of the injury changes during the lawsuit*, if secondary or 'collateral' injuries survive after resolution of the primary injury.") (citing *Chong v. Dist. Dir., I.N.S.*, 264 F.3d 378, 384 (3d Cir. 2001)) (emphasis added); *see also Cantrell v. City of Long Beach*, 241 F.3d 674, 678 (9th Cir. 2001) ("[T]he question is not whether the precise relief sought at the time the application for an injunction was filed is still available. The question is whether there can be *any* effective relief.").

Such a material split regarding the scope of the judiciary's constitutional jurisdiction pursuant to Article III and the assessment of a litigant's standing in a case such as this warrant thorough review by this Court.

A. A Case Is Not Moot When A Party Maintains A Direct Benefit From A Favorable Ruling And From Any Form of Available Relief.

Standing ensures each plaintiff has "[t]he requisite personal interest . . . at the commencement of the litigation," while mootness ensures that this requisite personal interest "continue[s] throughout" the duration of the case. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997).

To establish constitutional standing, a plaintiff must show (1) it has an "injury in fact" that is "(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000). The plaintiff has the burden of demonstrating that these requirements are met at the "commencement of the litigation," and must do so "separately for each form of relief sought." *Id.* at 170, 184–85.

When evaluating a plaintiff's standing, the Court's primary role is to separate those with a true stake in the controversy from those asserting "the generalized interest of all citizens in constitutional governance." *Valley Forge Christian Coll. v. Ams. United For Separation of Church & State, Inc.*, 454 U.S. 464, 483 (1982) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 223 n.13 (1979)).

Ms. Marshall had standing as a buyer when she initiated her suit and she has standing now as a seller to pursue these ongoing claims for a declaratory judgment and injunctive relief from the laws at issue. A challenge to constitutional standing is an issue that is never waived, therefore such challenges inherently require the presentation of factual development to the reviewing court at the time of review. Standing must be established and exist at each level of litigation, throughout litigation. The doctrine of mootness "ensures that the litigant's interest in the outcome continues to exist throughout the life of the lawsuit." *See Cook v. Colgate Univ.*, 992 F.2d 17, 19 (2d Cir. 1993).

The party asserting that a claim is moot must show it is "absolutely clear that the allegedly wrongful behavior [is] not reasonably [ ] expected to recur." *Friends of the Earth, Inc.*, 528 U.S. at 189. The Government was correct that Ms. Marshall will not be subject to the laws at issue in her same original capacity, as she is now legally eligible to purchase a handgun from an FFL. Nevertheless, she remains impacted by the laws at issue because she is prohibited from selling these firearms to those under twenty-one and her unchallenged, verified affidavit is legally eligible for review and remains subject to the court's evaluation of standing. Those who engage as sellers maintain standing in suits such as this. *See, e.g.*, *Craig*, 429 U.S. at 195–97 (finding sellers have standing to seek vindication of customers' rights to purchase); *Carey*, 431 U.S. at 683 (1977).

"[A] court will not dismiss a case as moot," even if the nature of the injury changes during the lawsuit, if "secondary or 'collateral' injuries survive after resolution

of the primary injury." *Chong*, 264 F.3d at 384; *Cantrell*, 241 F.3d at 678. Mootness is a declaration that must be issued in limited circumstances and only when there is no prospect for relief to the plaintiff whatsoever. Courts are routinely asked to consider new facts and legal issues surrounding the Constitution's "case and controversy" requirement. Even when a litigant is unable to meet the requirements of the general mootness inquiry, the litigant may invoke an exception to the mootness doctrine to maintain judicial review in several cases. *Chong*, 264 F.3d at 384.

B. Should The Case Be Considered Moot, The Court Can Clarify When The Collateral Injury Exception To Mootness Applies.

Courts will not dismiss a case as moot if: (1) secondary or "collateral" injuries survive after resolution of the primary injury; (2) the issue is deemed a wrong capable of repetition yet evading review; (3) the defendant voluntarily ceases an allegedly illegal practice but is free to resume it at any time; or (4) it is a properly certified class action suit. *Artway v. Attorney Gen. of N.J.*, 81 F.3d 1235, 1246 n.6 (3d Cir. 1996). Should this Court find that Ms. Marshall's claims are moot, it has an opportunity to clarify whether suits such as hers fall into the first of these four exceptions to mootness.

The Fourth Circuit held that Ms. Marshall's standing as a verified, prospective seller of handguns in private transactions was barred from consideration because it "was raised for the first time on appeal" [3] and after Ms.

3. The Fourth Circuit ultimately declared Mr. Hirschfeld's case was moot in *Hirschfeld I* while finding Ms. Marshall's case

Marshall turned twenty-one. App. 4a. This decision was in error for several reasons.

First, *Hirschfeld II* failed to engage in the requisite factual review for a challenge to standing because such an inquiry inherently requires assessment of facts supplemented in the record at the time of challenge. Second, the decision to ignore the merits of Ms. Marshall's supplemented claim in support of standing conflicts with the Third and Ninth Circuits.

The Third Circuit has repeatedly held that "a court will not dismiss a case as moot, even if the nature of the injury changes during the lawsuit, if secondary or 'collateral' injuries survive after resolution of the primary injury." *Freedom from Religion Found. Inc.*, 832 F.3d at 477 (citing *Chong*, 264 F.3d at 384). Similarly, the Ninth

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remained justiciable because she was not yet twenty-one. 5 F.4th at 411. It was not until this initial mootness declaration concerning Mr. Hirschfeld, and the Government's subsequent motion seeking a declaration of mootness following Ms. Marshall's twenty-first birthday, that the issue of standing was squarely contested by both parties before the Fourth Circuit. Being entitled to oppose the Government's motion and defend her standing to maintain this suit, Ms. Marshall responded in a timely fashion and submitted a sworn, notarized affidavit attesting to facts sufficient to verify her ongoing standing as a prospective seller of handguns and handgun ammunition in Virginia. App. 4a (referring to allegations from Ms. Marshall's affidavit). There are no additional facts necessary to establish her standing to challenge the laws at issue in the same manner while seeking the same available remedies. Nevertheless, should a remand to the district court be necessary to confirm the facts are sufficient for standing, Ms. Marshall still maintains a direct benefit of a declaratory judgment from *Hirschfeld I* and her case is not moot.

Circuit held that "the question is not whether the precise relief sought at the time the application for an injunction was filed is still available. The question is whether there can be any effective relief." *Cantrell*, 241 F.3d at 678.

A case "becomes moot only when it is impossible for a court to grant *any* effectual relief *whatever* to the prevailing party." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (citing *Knox v. Service Employees*, 567 U.S. 298, 307 (2012)) (emphasis added); *cf. Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) ("[I]f an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed."). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Knox*, 567 U.S. at 307–08.

If this Court does not reverse the Fourth Circuit's holding as to mootness, Ms. Marshall will be required to file suit in the same district court against the same defendants to seek the same relief from the same laws on the same grounds. Regardless of the outcome, an appeal will inevitably go before the same Fourth Circuit and then petitioned back to this Court. The Constitution's "case and controversy" requirement does not require such a technical, absurd result. Even if such a process is required, Ms. Marshall will still benefit from *Hirschfeld I* and a declaratory judgment in her favor, as these decisions can be incorporated in future litigation concerning her claims as a prospective seller. *See, e.g., Prison Legal News v. Fed. Bureau of Prisons*, 944 F.3d 868, 879–80 (10th Cir. 2019) ("The mootness of a plaintiff's claim for *injunctive relief* is not necessarily dispositive regarding the mootness

of his claim for a *declaratory judgment*." (emphasis added)).

The Fourth Circuit should have maintained *Hirschfeld I* in its entirety and relief should, at a minimum, consist of an order for a declaratory judgment that finds the laws at issue are unconstitutional. Ms. Marshall's current suit remains justiciable but if she is forced to initiate a new suit as a seller rather than buyer, a declaratory judgment from *Hirschfeld I* would continue to benefit her in such future claims. This case is not moot and every factor weighs in favor of reversing the Fourth Circuit's opinion concerning mootness and vacatur as a result.

II. The Court Can Resolve A Fundamental Constitutional Question Concerning The Second Amendment And Find That Equity Does Not Favor Vacating *Hirschfeld I* Regardless of Whether The Case Is Moot.

When "a civil case from a court in the federal system . . . has become moot while on its way" to the Supreme Court, this Court's "established practice" is "to reverse or vacate the judgment below and remand with a direction to dismiss." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). Nevertheless, vacatur is not considered the de facto remedy following a mootness declaration. *See U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 25 (1994). The practice is rooted in "equity," therefore, the decision whether to vacate turns on "the conditions and circumstances of the particular case." *United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U.S. 466, 478 (1916).

A. Principles of Equity Do Not Support Vacatur In Favor of The Government When Mootness Is Caused By The Limited Duration of The Unconstitutional Laws At Issue Relative To The Time Needed For Final Judicial Review On The Merits.

Vacatur must be reserved for cases where review is "prevented through happenstance"—that is, where a controversy presented has "become moot due to circumstances unattributable to any of the parties." *Karcher v. May*, 484 U.S. 72, 82 (1987). In *Bancorp*, this Court held that a judgment should remain intact after a declaration of mootness because mootness did not come as a result of "the vagaries of circumstance." 513 U.S. 18, 25 (1994). Instead, the party seeking review "caused the mootness by voluntary action" by virtue of a settlement. *Id.*, at 24. The party "voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari." *Id.*, at 25. Compared to mootness caused by "happenstance," considerations of "equity" and "fairness" tilted against vacatur. *Id.*, at 25–26.

The Fourth Circuit held that that it could not "assign fault to either party here." App. 6a. The laws at issue were intentionally crafted by Congress and the system the Government now executes facially violates the liberties of young adult citizens who seek to purchase firearms—but only for a three-year period. Unlike those cases where the passage of time may result in mootness via happenstance, the impact of time on the applicability of the laws at issue is by design. *See NRA*, 700 F.3d at 207 (finding laws at issue are constitutional because "the temporary nature of the burden reduces its severity.").

The contested question is whether a court must vacate its own judgment after mootness subsequently comes as a result of temporal limitations intentionally applied to otherwise invalid laws. This case deserves the Court's consideration and a ruling that the Government cannot avoid the repercussions of a correctly decided final judgment on the merits due to mootness subsequently rendered by such temporal limitations. The Court has an opportunity to review whether equity weighs in favor or against vacatur as a remedy in this circumstance. The decision in *Munsingwear* and the post-*Munsingwear* practice of vacatur cannot bear the weight of the present case. *Cf. Bancorp*, 513 U.S. at 23.

In *Munsingwear* the Court's description of the "established practice" for vacatur "was dictum;" *id.*, all "that was needful for the decision was (at most) the proposition that vacatur should have been sought, not that it necessarily would have been granted." *Id.* As *Munsingwear* acknowledged, *see* 340 U.S. at 40, n. 2, the "established practice" was neither considered nor entirely uniform, as at least three cases were dismissed for mootness without vacatur within the four Terms preceding *Munsingwear*. *See Bancorp*, 513 U.S. at 23 (citing *Schenley Distilling Corp. v. Anderson*, 333 U.S. 878 (1948) (per curiam)).

The post-*Munsingwear* practice has not been uniform either. *Bancorp*, 513 U.S. at 24 (citing *Allen & Co. v. Pacific Dunlop Holdings, Inc.*, 510 U.S. 1160 (1994); *Minnesota Newspaper Assn., Inc. v. Postmaster General*, 488 U.S. 998 (1989); *St. Luke's Federation of Nurses and Health Professionals v. Presbyterian/St. Luke's Medical Center*, 459 U.S. 1025 (1982)). Prior to *Bancorp*, the post-

Munsingwear decisions granting and denying vacatur were *per curiam*, with the single exception of *Karcher*, in which the Court declined to vacate. *Bancorp*, 513 U.S. at 24.

Principles that have always been implicit in this Court's treatment of moot cases counsel against extending *Munsingwear* and vacatur in this case. This Court disposes of moot cases in the manner "'most consonant to justice' . . . in view of the nature and character of the conditions which have caused the case to become moot." *Hamburg-Amerikanische*, 239 U.S. at 477–78. Historically, the principal condition to which this Court looks is whether the party seeking relief from judgment caused mootness by voluntary action. *See Hamburg-Amerikanische*, 239 U.S. at 478 (remanding moot case for dismissal because "ends of justice exact that the judgment below should not be permitted to stand when without any fault of the [petitioner] there is no power to review it upon the merits"); *Heitmuller v. Stokes*, 256 U.S. 359, 362 (1921) (remanding for dismissal because "without fault of the plaintiff in error, the defendant in error, after the proceedings below, . . . caused the case to become moot").

Ms. Marshall had been eighteen for only three months when she initiated this suit but even after expediting review in district court due to the lack of a factual dispute, she was only two weeks from no longer being subject to the laws at issue as a buyer when the Fourth Circuit issued *Hirschfeld I*. These laws are crafted in a manner that results in the practical evasion of final appellate review. The Government maintained the opportunity to seek a petition for en banc review and a petition for certiorari to

this Court would likely follow. It is effectively impossible for an individual over the age of eighteen to receive a final decision on the claims at issue before she will "age out" of the class prohibited from making these relevant firearm purchases. For the Government to receive the benefit of vacatur is to allow it to maintain an unconstitutional system by avoiding final judicial scrutiny due to mootness rendered by its own devices. Vacatur must be denied in this situation pursuant to fundamental principles of due process and equity.

It is the Government's burden, as the "party seeking relief from the status quo of the appellate judgment, to demonstrate . . . equitable entitlement to the extraordinary remedy of vacatur." *Bancorp*, 513 U.S. at 26. Justice does not allow the Government to maintain an unconstitutional system that practically avoids final review from those challenges presented by individual citizens directly harmed by its laws. Additionally, the judiciary cannot render equitable relief such as vacatur when it will result in the reimposition of those laws that facially violate the Second Amendment in favor of a party, such as the Government, that is otherwise capable of seeking future judicial review[4] of the matters at issue. Any other decision relegates adult citizens suffering from such temporal restrictions to a second-class status by requiring relief to come via assistance from third-parties with permanent standing such as organizational plaintiffs, class-actions,

4. For example, in *Hirschfeld II* the Fourth Circuit also denied a motion to intervene by a nineteen-year-old Virginia resident and a FFL seeking the same relief as Ms. Marshall. Had the Court declined to vacate *Hirschfeld I* after mootness, the Government would have maintained a live controversy for review as it applied to these movants.

or those seeking to sell rather than purchase firearms. Equity, equal protection, and due process do not favor vacatur when it results in laws escaping review when they have otherwise been held to infringe on fundamental civil liberties.

When mootness results from settlement, the denial of vacatur is merely an application of the principle that "[a] suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks." *Sanders v. United States*, 373 U.S. 1, 17 (1963) (citing *Fay v. Noia*, 372 U.S. 391, 438 (1963)). The "suitor's conduct," *id.*, in this case consists of the Government incorporating temporal elements in otherwise invalid laws and then relying on those elements as a means of avoiding final judicial review. Ms. Marshall went so far as to move for accelerated review in the Fourth Circuit but the Government contested the effort and her motion was denied. If this Court affirms *Hirschfeld II*'s determination that Ms. Marshall's claims are moot, it should find that the Fourth Circuit's decision in *Hirschfeld II* to vacate *Hirschfeld I* failed to properly weigh the fundamental liberties and the balance of equities at issue.

B. The Court Can Clarify Whether Age-Based Restrictions On The Purchase of Handguns By Adult Citizens Violate The Second Amendment.

Hirschfeld I held that the laws at issue are facially invalid and violate those liberties protected by the Second Amendment. *Hirschfeld I*, 5 F.4th at 452. This decision created a circuit split in direct conflict with the Fifth Circuit's opinion in *NRA v. BATFE*, which held the age-based restrictions on the purchase of firearms by

otherwise eligible adult citizens are longstanding and are therefore outside the scope of the Second Amendment's protections. 700 F.3d 185 (finding laws at issue do not violate the Second Amendment).

This case gives the Court an opportunity to consider the merits of *Hirschfeld I* and, depending on how the Court rules on the issues presented, it can resolve a material constitutional question concerning the scope of the Second Amendment while providing guidance in active and contemporary cases throughout the United States. *See, e.g.*, *Lara v. Evanchick*, 534 F. Supp. 3d 478, 492 (W.D. Pa. 2021) ("In light of the consensus amongst federal courts that age-based restrictions . . . fall under the class of 'longstanding' and 'presumptively lawful' regulations recognized in *Heller*, the Court is compelled to find that the age-based restrictions at issue here fall outside the scope of the Second Amendment."); *NRA of Am., Inc. v. Swearingen*, 2021 U.S. Dist. LEXIS 117837 (N.D. Fla. June 24, 2021) (finding age-restrictions on the purchase of firearms to be valid as applied to those under twenty-one); *Jones v. Becerra*, 498 F. Supp. 3d 1317, (S.D. Cal. 2020) (affirming California's ban on the purchase of firearms by those under twenty-one); *Mitchell v. Atkins*, 483 F. Supp. 3d 985 (W.D. Wash. 2020) (finding age-based restrictions to be valid as applied to those under twenty-one).

If this case is moot, the manner of disposal "most consonant to justice" would have been for the Fourth Circuit to maintain *Hirschfeld I* and an order for a declaratory judgment rather than vacate *Hirschfeld I* in favor of the unconstitutional laws at issue. By granting certiorari, this Court can resolve the underlying constitutional claims on the merits and should find the

Fourth Circuit correctly decided *Hirschfeld I* but did not bestow the equitable remedy most consonant with justice when vacating the judgment in *Hirschfeld II*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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February 17, 2022

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED SEPTEMBER 22, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Argued: October 30, 2020
Decided: September 22, 2021

No. 19-2250

TANNER HIRSCHFELD; NATALIA MARSHALL,

Plaintiffs-Appellants,

v.

BUREAU OF ALCOHOL, FIREARMS, TOBACCO & EXPLOSIVES; MARVIN RICHARDSON, Acting Director of the Bureau of Alcohol, Tobacco, Firearms, and Explosives; MERRICK B. GARLAND, Attorney General,

Defendants-Appellees.

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BRADY; GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE; EVERYTOWN FOR GUN SAFETY SUPPORT FUND,

Amici Supporting Appellee.

Appendix A

ILLINOIS; CALIFORNIA; CONNECTICUT; DELAWARE; THE DISTRICT OF COLUMBIA; HAWAII; MASSACHUSETTS; MICHIGAN; MINNESOTA; NEW JERSEY; NEW MEXICO; NEW YORK; NORTH CAROLINA; OREGON; PENNSYLVANIA; RHODE ISLAND; VERMONT; WASHINGTON; COMMONWEALTH OF VIRGINIA; STATE OF MARYLAND; MARCH FOR OUR LIVES ACTION FUND,

Amici Supporting Rehearing Petition.

Appeal from the United States District Court for the Western District of Virginia at Charlottesville. Glen E. Conrad, Senior District Judge. (3:18−cv−00103−GEC)

Before AGEE, WYNN, and RICHARDSON, Circuit Judges.

Motion to intervene or join new parties denied; motion to vacate prior opinions granted; remanded with directions to dismiss. Judge Richardson wrote the opinion, in which Judge Agee joined. Judge Wynn wrote an opinion concurring in the result.

RICHARDSON, Circuit Judge:

Plaintiff Natalia Marshall, while under the age of 21, wished to purchase a handgun from a federally licensed firearms dealer and sued to challenge the constitutionality of the federal laws and regulations which prohibited her from doing so while she was 18-20 years old. A divided panel

of this court found those laws violated the text, structure, history, and tradition of the Second Amendment. After the opinion issued but before the mandate, Marshall turned 21. And that made her claims moot. Despite efforts to add parties and reframe her claimed injuries, it is too late to revive this case. So it must be dismissed as moot.

Once a case is rendered moot on appeal, we customarily vacate the opinions and remand with direction to dismiss. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40, 71 S. Ct. 104, 95 L. Ed. 36 (1950); *Norfolk S. Ry. v. City of Alexandria*, 608 F.3d 150, 161 (4th Cir. 2010). After weighing the equities, we follow that custom here.

I. This case is moot

We, of course, have only the power to adjudicate "Cases" and "Controversies." U.S. Const. art. III, § 2. A "Case" or "Controversy" under Article III no longer exists "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91, 133 S. Ct. 721, 184 L. Ed. 2d 553 (2013) (quoting *Murphy v. Hunt*, 455 U.S. 478, 481, 102 S. Ct. 1181, 71 L. Ed. 2d 353 (1982) (per curiam)). The case is instead moot and must be dismissed, "[n]o matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit." *Id.* Here, Marshall challenged the prohibition on buying a handgun from a federally licensed firearms dealer while she was under 21. Once she turned 21, nothing prohibited her from buying the handgun she desired from a dealer of her choice. So her

original claims are now moot. *See Craig v. Boren*, 429 U.S. 190, 192, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976).[1]

To try to breathe new life into her claims after they became moot, Marshall alleged for the first time that she wishes to sell handguns to friends under 21. Those private sales would not typically be affected by the challenged laws and regulations. But Marshall seeks to bring those sales within this court's purview by alleging that she wishes to use a federally licensed firearm dealer to facilitate the sales (by, for example, running background checks on her friends).[2] This newly alleged injury was raised for the first time on appeal, and only after the case became moot, so we refuse to consider it here.

A second effort to revive this case by adding new parties also fails. Surely recognizing the mootness concern, Plaintiff's attorney moved in the district court on July 24—the day before Marshall turned 21—to join new parties that might keep the case alive. But the district court lacked jurisdiction to grant the motion. *See Doe v. Pub. Citizen*, 749 F.3d 246, 258 (4th Cir. 2014) ("[A]n effective notice of appeal divests a district court of jurisdiction to entertain an intervention motion.").[3]

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1. Marshall made no effort to claim she may seek damages.

2. *See Recordkeeping and Background Check Procedure for Facilitation of Private Party Firearms Transfers*, ATF PROCEDURE 2020-2 (Sept. 2, 2020).

3. We have held that a motion to intervene can avoid being mooted by the dismissal of the underlying action if the motion was made when the case was live and the intervenors can still seek a

Plaintiff's attorney only submitted a motion to our court on July 27, two days after Marshall turned 21. By that time, the case was moot. And we cannot grant a motion to join new parties that was filed after a case is moot. *See Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 72-75, 133 S. Ct. 1523, 185 L. Ed. 2d 636 (2013).[4] So the requests

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remedy. *CVLR Performance Horses, Inc. v. Wynne*, 792 F.3d 469, 475 (4th Cir. 2015). But in that case the court had a pending appeal on the intervention issue before the case became moot. *Id.* And if the appeal succeeded, a properly granted motion to intervene would have prevented the case from ever being moot in the first place. *Id.* at 476. Here, we did not have a motion before us until after the case was moot, and no valid appeal exists for the district court's denial of the jurisdictionally improper motion.

4. There is a line of cases in which the Supreme Court has permitted dropping a non-diverse party to cure problems with jurisdiction that existed at the time of filing. *See Caterpillar Inc. v. Lewis*, 519 U.S. 61, 73, 117 S. Ct. 467, 136 L. Ed. 2d 437 (1996); *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 832-33, 109 S. Ct. 2218, 104 L. Ed. 2d 893 (1989). Those cases seem to indicate that we can cure jurisdictional defects by joining or dropping parties. But these cases addressed issues with complete diversity. *Id.* Minimal diversity was present. So the Court was curing a problem with statutory jurisdiction, not Article III jurisdiction. *See Newman-Green*, 490 U.S. at 829 n.1; *Caterpillar*, 519 U.S. at 68 n.3; *Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 572, 577-78 n.6, 124 S. Ct. 1920, 158 L. Ed. 2d 866 (2004); *id.* at 584, 588-99 (Ginsburg, J., dissenting).

We note one case, *Mullaney v. Anderson*, where the Supreme Court allowed the joinder of several parties with standing under Rule 21 in response to concerns about the standing of the original parties. 342 U.S. 415, 416-17, 72 S. Ct. 428, 96 L. Ed. 458, 13 Alaska 574 (1952). This implies that whether the original parties had standing was irrelevant because the joinder of proper parties could cure any lack of Article III jurisdiction. But we do not take such assumptions

to join new parties are denied. This case is moot and must be dismissed.

II. The opinions are vacated

As the case is moot and must be dismissed, the government asks that we also vacate both the panel opinions and district court opinions. This is indeed our customary practice. *See Norfolk S. Ry.*, 608 F.3d at 161. But it is not, as once commonly thought, mandatory. *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25-26, 115 S. Ct. 386, 130 L. Ed. 2d 233 (1994).[5] Rather, it is an "equitable tradition" informed by equitable reasoning. *Id.* In determining whether to exercise the discretion to vacate our panel decision (and that of the district court), we are "informed almost entirely, if not entirely, by the twin considerations of fault and public interest." *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 118 (4th Cir. 2000).

We cannot assign fault to either party here. Marshall was bound to turn 21 in time. And though the efforts to

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as holdings. *See Webster v. Fall*, 266 U.S. 507, 511, 45 S. Ct. 148, 69 L. Ed. 411 (1925).

5. Before *Bancorp*, some believed dictum in *Munsingwear* required vacating opinions after the case became moot. *See, e.g., In re Ghandtchi*, 705 F.2d 1315, 1316 (11th Cir. 1983). *But see Clipper v. Takoma Park*, 898 F.2d 18 (4th Cir. 1989) (en banc). But *Bancorp* explained that the *Munsingwear* "mandate" was dicta and that equitable principles govern the practice. *Bancorp*, 513 U.S. at 23; *see also Azar v. Garza*, 138 S. Ct. 1790, 1792, 201 L. Ed. 2d 118 (2018) ("Because this practice is rooted in equity, the decision whether to vacate turns on 'the conditions and circumstances of the particular case.'"); *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 121 (4th Cir. 2000); *SD Voice v Noem*, 987 F.3d 1186, 1190-91 (8th Cir. 2021).

remedy mootness came at the eleventh hour, they do not reflect any fault in Marshall's original case. So our decision turns on the public interest.

There are strong reasons to avoid vacatur here. The constitutional interests implicated and the short timeframe in which to challenge the restrictions mean there is a strong public interest in this precedent. And "[j]udicial precedents are presumptively correct and valuable to the legal community as a whole." *Bancorp*, 513 U.S. at 26; *see also Humphreys v. Drug Enf't Admin.*, 105 F.3d 112, 116 (3d Cir. 1996); *Hall v. Louisiana*, 884 F.3d 546, 553 (5th Cir. 2018).

Yet the public interest still favors vacating the opinions. To begin, our "customary practice when a case is rendered moot on appeal is to vacate the moot aspects of the lower court's judgment" and remand with directions to dismiss. *Norfolk S. Ry.*, 608 F.3d at 161. Adherence to our custom promotes the "orderly operation of the federal judicial system" and thus protects the public interest. *Bancorp*, 513 U.S. at 27. This course also "clears the path for future relitigation of the issues between the parties." *Alvarez v. Smith*, 558 U.S. 87, 94, 130 S. Ct. 576, 175 L. Ed. 2d 447 (2009) (quoting *Munsingwear*, 340 U.S. at 40). That the case became moot by happenstance also favors vacatur. *Bancorp*, 513 U.S. at 25 n.3 ("[M]ootness by happenstance provides sufficient reason to vacate."). And we are reluctant to leave a preclusive judgment standing against a federal agency responsible for enforcing federal law while cutting off the appellate process, particularly where the panel is split in its views.

Finally, we note that the public and the "legal community as a whole," *Bancorp*, 513 U.S. at 26, will

still retain some benefit from the panel opinion even if vacated, because the exchange of ideas between the panel and dissent will remain available as a persuasive source. *See Hirschfeld v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 5 F.4th 407 (4th Cir. 2021) (*now vacated as moot*).

As a result, we deny the motion to intervene or join new parties; we reject the attempt to recast Marshall's injuries; we find the case moot; we remand to the district court with directions to dismiss as moot; and we vacate the prior panel opinions and the opinions of the district court.

MOTIONS GRANTED IN PART AND DENIED IN PART; VACATED AND REMANDED WITH DIRECTIONS TO DISMISS AS MOOT

WYNN, Circuit Judge, concurring in the result of the Orders of Dismissal and Vacatur:

I join my fine colleague's opinion *in adhering* to our usual practice of vacatur in mooted cases like this one. I write separately to emphasize that while, thanks to today's technology, *all* vacated opinions remain available in the public sphere, they have no legal value. "Once vacated, [a prior opinion] los[es] precedential value within this circuit."[*] *In re Naranjo*, 768 F.3d 332, 344 n.15 (4th Cir. 2014) (quoting *In re Grand Jury Matter*, 926 F.2d 348, 350 (4th Cir. 1991)); *see also Quesinberry v. Life Ins. Co. of N. Am.*, 987 F.2d 1017, 1029 n.10 (4th Cir. 1993) (panel

* We have previously assumed without deciding "that when a judgment of this Court has been vacated by the Supreme Court, the opinion containing that judgment is still entitled to some precedential value" as to those grounds not covered by the Supreme Court's ruling.

opinion vacated upon grant of rehearing en banc has "no precedential value"). The outcome here is that not only is the panel opinion vacated, but the entire matter including the district court's decision is moot and therefore vacated. That is, this action from its inception is mooted.

To be sure, vacated opinions do not even bear the label of dicta. So if there is any persuasive value arising from vacated opinions, it can be no more than the value of newspaper editorials. Thus, my fine colleagues' statement that "the panel and dissent will remain available as a persuasive source" means, like newspaper editorials, readers may themselves be persuaded one way or the other by our exchanges, but these vacated opinions have no persuasive value whatsoever as to how this Court would decide this issue.

This point is especially important here, where the opinions arising from our deeply divided panel became moot before the Court's en banc process could be undertaken. It stands to reason that because the now-vacated panel majority opinion created a circuit split while overturning a fifty-year-old federal law, this matter surely met the requirements of Rule 35 for en banc review.

With that said, I join in the dismissal of this matter as moot and the vacatur of the panel opinions. Perhaps our circuit will again confront this issue, but today is not that day.

E.E.O.C. v. City of Norfolk Police Dep't, 45 F.3d 80, 83 (4th Cir. 1995). But we noted that it "is not at all clear" that that is the case. *Id.* at 83 n.4. In any event, that is not what happened here.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, CHARLOTTESVILLE DIVISION, FILED OCTOBER 4, 2019

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

Civil Action No. 3:18CV00103

TANNER HIRSCHFELD AND
NATALIA MARSHALL,

Plaintiffs,

v.

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

Defendants.

By: Hon. Glen E. Conrad
Senior United States District Judge

MEMORANDUM OPINION

Plaintiffs Tanner Hirschfeld and Natalia Marshall (the "Prospective Buyers") challenge the constitutionality of federal criminal statutes making it unlawful for federal firearms licensees ("FFLs") to sell handguns and handgun ammunition to people under 21 years of age, 18 U.S.C.

§§ 922(b)(1), (c), and federal regulations implementing those statutory provisions, 27 C.F.R. §§ 478.99(b)(1), 478.124(a), 478.96(b) (together, the "Challenged Laws"). The Prospective Buyers seek a declaratory judgment that the Challenged Laws violate their Second Amendment rights to keep and bear arms, and also violate their Fifth Amendment rights to equal protection of the law. On that basis, the Prospective Buyers also seek to enjoin enforcement of the Challenged Laws by the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF"); Thomas E. Brandon, in his official capacity as the Deputy and Acting Director of ATF; and William P. Barr,[1] in his official capacity as Attorney General of the United States (together, the "Government").

The Government moved to dismiss under Rule 12 of the Federal Rules of Civil Procedure. ECF No. 15. The Prospective Buyers and the Government agree there is no dispute of material fact in this case and therefore no need for discovery or a trial, as the suit can be resolved on the legal merits and the briefs. ECF No. 26 at 2. The Prospective Buyers cross-moved for summary judgment under Rule 56. ECF No. 31. Amici parties Brady and the Giffords Law Center to Prevent Gun Violence (together, the "Amici Parties") filed briefs in support of the Government. ECF Nos. 28, 38. For the reasons set forth below, the court will grant the Government's motion to dismiss and deny the Prospective Buyers' motion for summary judgment.

1. William P. Barr is now the Attorney General of the United States, and he is automatically substituted as a party pursuant to Federal Rule of Civil Procedure 25(d).

Appendix B

Background

The Prospective Buyers are two adult citizens under the age of twenty-one. Compl ¶¶ 24, 30. Both Prospective Buyers wish to purchase a handgun for self defense. *Id.* ¶¶ 27, 34. Each of the Prospective Buyers attempted to purchase handguns and ammunition from local FFLs, but were denied due to their age pursuant to the Challenged Laws. *Id.* ¶¶ 25, 36. Plaintiffs allege that but for the Challenged Laws, both Prospective Buyers would be permitted to purchase handguns. *Id.* ¶¶ 24-26, 29, 36-37.

Statutory Background

Together, the Challenged Laws prevent adults under the age of 21 from purchasing handguns from FFLs. Under 18 U.S.C. § 922(b)(1), it is:

> unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver any firearm or ammunition to any individual who the licensee knows or has reasonable cause to believe is less than eighteen years of age, and, if the firearm, or ammunition is other than a shotgun or rifle, or ammunition for a shotgun or rifle, to any individual who the licensee knows or has reasonable cause to believe is less than twenty-one years of age.

27 C.F.R. § 478.99(b)(1) contains substantively identical language.[2] 18 U.S.C. § 922(c) provides in relevant part that: "a licensed importer, licensed manufacturer, or licensed dealer may sell a firearm to a person who does not appear in person at the licensee's business premises . . . only if the transferee submits to the transferor a sworn statement" affirming "that, in the case of any firearm other than a shotgun or a rifle, I am twenty-one years or more of age. . . ."

27 C.F.R. § 478.124(a) mandates that "[a] licensed importer, licensed manufacturer, or licensed dealer shall not sell or otherwise dispose, temporarily or permanently, of any firearm to any person, other than another licensee, unless the licensee records the transaction on a firearms transaction record, Form 4473. . ." 27 C.F.R. § 478.96(b) imposes the same restrictions on out-of-state and mail order sales. Form 4473 requires that an FFL enter a prospective firearm buyer's or transferee's

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2. The regulation provides that:

> A licensed importer, licensed manufacturer, licensed dealer, or licensed collector shall not sell or deliver (1) any firearm or ammunition to any individual who the importer, manufacturer, dealer, or collector knows or has reasonable cause to believe is less than 18 years of age, and, if the firearm, or ammunition, is other than a shotgun or rifle, or ammunition for a shotgun or rifle, to any individual who the importer, manufacturer, dealer, or collector knows or has reasonable cause to believe is less than 21 years of age. . . .

27 C.F.R. § 478.99(b)(1).

birthdate (Box 7) and describe the type of firearm (Box 16), and states that the information provided "will be used to determine" whether the buyer or transferee is "prohibited from receiving a firearm." ATF, Form 4473, available at https://www.atf.gov/firearms/docs/4473-part-1-firearms-transaction-record-over-counter-atf-form-53009/download.

Legislative History

The Challenged Laws arose from a "multi-year inquiry into violent crime that included 'field investigation and public hearings.'" *Nat'l Rifle Ass'n. of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 198 (5th Cir. 2012), *rehearing en banc denied*, 714 F.3d 334 (5th Cir. 2013), *cert. denied*, 571 U.S. 1196, 134 S. Ct. 1364, 188 L. Ed. 2d 296 (2014) ("*BATFE*") (quoting S. Rep. No. 88-1340, at 1 (1964)). Congress found that young people were responsible for a significant portion of crime nationally. *See, e.g.*, S. Rep. No. 90-1097, at 77 (1968) ("[J]uveniles account for some 49 percent of the arrests for serious crimes in the United States and minors account for 64 percent of [such] total arrests"). Law enforcement 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 58-59 (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. That inquiry also found that "the handgun is the type of firearm that is principally used in the commission of serious crime," and "the most troublesome and difficult factor in the unlawful use of firearms." *Id.* at 4-7. 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." *Id.*

Congress further found a "causal relationship between the easy availability" of handguns "and juvenile and youthful criminal behavior, and that such firearms have been widely sold by federally licensed importers and dealers to emotionally immature, or thrill-bent juveniles and minors prone to criminal behavior." Pub. L. No. 90-351, § 901(a)(6), 82 Stat. 197, 225-226. Congress focused on the "clandestine acquisition of firearms by juveniles and minors," which it found posed "a most serious problem facing law enforcement and the citizens of this country." S. Rep. No. 90-1097, at 79.

Congress "designed" the Challenged Laws "to meet this problem and to substantially curtail it." *Id.* But Congress did not intend to enact a whole cloth ban on minors owning handguns: "[A] minor or juvenile would not be restricted from owning, or learning the proper usage of [a] firearm, since any firearm which his parent or guardian desired him to have could be obtained for the minor or juvenile by the parent or guardian." S. Rep. No. 89-1866, at 58-59. Minors, therefore, could possess handguns if their parents deemed them responsible enough to do so. "At the most," the Challenged Laws "cause minor inconveniences

to certain youngsters who are mature, law abiding, and responsible, by requiring that a parent or guardian over 21 years of age make a handgun purchase for any person under 21." 114 Cong. Rec. 12279, 12309 (1968) (statement of Sen. Thomas J. Dodd, Chairman, Sen. Subcomm. on Juvenile Delinquency).

History of Age-Based Firearms Regulations

Legislatures enacted age-based restrictions on firearm purchases, use, and possession before the Challenged Laws, however. Over the course of the nineteenth and early twentieth century, many states enacted restrictions on gun ownership and use by certain categories of people for public safety reasons—including those under a certain age. By the 1920s, roughly half of the states had set 21 as the minimum age for the use and possession certain firearms. *See* ECF No. 16-2 (collecting statutes). "Like the federal legislation that followed, state regulations sometimes reflected concerns that juveniles lacked the judgment necessary to safely possess deadly weapons, and that juvenile access to such weapons would increase crime." *United States v. Rene E.*, 583 F.3d 8, 14 (1st Cir. 2009). Indeed, "a number of states enacted similar statutes prohibiting. the transfer of deadly weapons—often expressly handguns—to juveniles." *Id.*

Courts of the time upheld these types of laws. See, *e.g., Parman v. Lemmon*, 119 Kan. 323, 244 P. 227, 228 (Kan. 1925) (observing that "many of the states" had laws similar to that making it a misdemeanor to "sell, trade, give, loan or otherwise furnish any pistol, revolver or toy

pistol . . . to any minor" as "protective laws enacted to prevent occurrences" like the accidental shooting in that case); *State v. Quail*, 28 Del. 310, 5 Boyce 310, 92 A. 859, 859 (Del. Gen. Sess. 1914) (refusing to dismiss indictment based on statute criminalizing "knowingly selling] a deadly weapon to a minor other than an ordinary pocket knife"); *State v. Allen*, 94 Ind. 441, 442 (1884) (reversing dismissal of indictment for "unlawfully barter[ing] and trad[ing] to . . . a minor under the age of twenty-one years, a certain deadly and dangerous weapon, to wit: a pistol, commonly called a revolver"); *Tankersly v. Commonwealth*, 9 S.W. 702, 702, 10 Ky. L. Rptr. 367 (Ky. 1888) (indictment for selling a deadly weapon to a minor); *State v. Callicutt*, 69 Tenn. 714, 716-17 (1878) (affirming that "the acts to prevent the sale, gift, or loan of a pistol or other like dangerous weapon to a minor," were "not only constitutional as tending to prevent crime but wise and salutary in all its provisions," and denying that "the right 'to keep and bear arms' . . . necessarily implies the right to buy or otherwise acquire [arms], and the right in others to give, sell, or loan to him"); *Coleman v. State*, 32 Ala. 581, 582-83 (1858) (affirming conviction under statute "mak[ing] it a misdemeanor to 'sell, or give, or lend, to any male minor,' a pistol").

Similarly, legal scholars of the time accepted that "the State may prohibit the sale of arms to minors." Thomas M. Cooley, *Treatise on Constitutional Limitations* 740 n.4 (5th ed. 1883); *see also District of Columbia v. Heller*, 554 U.S. 570, 616-18, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008) (describing Professor Cooley's work as "massively popular" and citing it as persuasive authority on Founding-

era attitudes on the Second Amendment). Professor Cooley also recognized that "the want of capacity in infants" could justify "a regulation . . . restricting their rights [and] privileges" as a class. Cooley, *supra*, at 486. And evidence suggests that full adulthood, at the time of the Founding, was not reached until age 21. William Blackstone, 1 *Commentaries On The Laws Of England* 463 (1st ed. 1765) ("So that full age in male or female, is twenty one years . . . who till that time is an infant, and so styled in law."); *Infant*, *Black's Law Dictionary* 847 (11th ed. 2019) (legal infancy lasts until age 21) (citing sources from 1878, 1899, and 1974).

Standards of Review

Rule 12(b)(6) permits a party to move for dismissal of a complaint for failure to state a claim upon which relief can be granted. "For purposes of Rule 12(b)(6), the legislative history of an ordinance is not a matter beyond the pleadings but is an adjunct to the ordinance which may be considered by the court as a matter of law." *Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305, 1312 (4th Cir. 1995), *vacated on other grounds*, 517 U.S. 1206, 116 S. Ct. 1821, 134 L. Ed. 2d 927 (1996), *readopted*, 101 F.3d 325 (4th Cir.1996), *cert. denied*, 520 U.S. 1204, 117 S. Ct. 1569, 137 L. Ed. 2d 714 (1997). "In addition, a court may take judicial notice of matters of public record in considering a motion to dismiss." *Lewis v. Newton*, 616 F. App'x 106, 106 (4th Cir. 2015).

Summary judgment should be granted only if the moving party has shown that there is no genuine issue

of material fact and that the moving party is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

Discussion

I. The Challenged Laws Do Not Violate the Second Amendment

The Second Amendment provides that: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. In *District of Columbia v. Heller*, the Supreme Court determined that the Second Amendment protects an individual "right of law-abiding, *responsible* citizens to use arms in defense of hearth and home." 554 U.S. at 635 (emphasis added). The Court held that the District of Columbia's ban on possession of handguns in the home and its requirement that all firearms in the home be stored in a manner that rendered them inoperable for immediate self-defense were unconstitutional. *Id.* The Supreme Court noted, however, that "[l]ike most rights, the right secured by the Second Amendment is not unlimited." *Id.* at 626. The Court provided a non-"exhaustive" list of "presumptively lawful regulatory measures," including "longstanding prohibitions" on firearm possession by certain groups of people, and "laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626-27 & n.26. The Court "made it clear in *Heller* that [its] holding did not cast doubt" on such measures and "repeat[ed] those assurances" in *McDonald v. City of Chicago*, 561 U.S. 742, 786, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010) (plurality).

Appendix B

The United States Court of Appeals for the Fourth Circuit applies a two-part test in Second Amendment claims. "The first question is whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee." *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010) (quotation marks omitted). "This historical inquiry seeks to determine whether the conduct at issue was understood to be within the scope of the right at the time of ratification. If it was not, then the challenged law is val*Id.*" *Id.* (citations omitted). If the Second Amendment applies, courts apply "an appropriate form of means-end scrutiny." *Id.* "*Heller* left open the issue of the standard of review, rejecting only rational-basis review. Accordingly, unless the conduct at issue is not protected by the Second Amendment at all, the Government bears the burden of justifying the constitutional validity of the law." *Id.*

While the Fourth Circuit has unfailingly applied a scrutiny analysis, courts "are at liberty to" avoid ruling on the first prong of the *Chester* test, and "assume that a challenged statute burdens conduct protected by the Second Amendment and focus instead on whether the burden is constitutionally justifiable." *United States v. Hosford*, 843 F.3d 161, 167 (4th Cir. 2016). Indeed, the Fourth Circuit has found it "prudent" to not rest on the first prong's historical inquiry. *Id.* (finding it "prudent in this case to assume, without holding, that the federal prohibition against unlicensed firearm dealing burdens conduct protected by the Second Amendment"); *Woollard v. Gallagher*, 712 F.3d 865, 875 (4th Cir. 2013) ("[W]e are not obliged to impart a definitive ruling at the first step

of the *Chester* inquiry. And indeed, we and other courts of appeals have sometimes deemed it prudent to instead resolve post-Heller challenges to firearm prohibitions at the second step."); *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011) (assuming that the Second Amendment was implicated by a statute prohibiting possession of firearms in national parks and applying intermediate scrutiny).

The Prospective Buyers would have the court ignore binding Fourth Circuit precedent and apply a test focused on "text, history, and tradition" in analyzing Second Amendment claims, rather than strict or intermediate scrutiny. ECF No. 32 at 21-24. The Government, more obliquely perhaps, would have the court avoid discussion of any scrutiny analysis, as evidenced by its briefing. But the Government does not explain why the court should not be bound by the Fourth Circuit's two-part test, and in fact, does not appear to mention it in any of its briefing.

As urged only by the Amici Parties, but bound by precedent, the court follows the Fourth Circuit's two-step framework for analyzing Second Amendment claims. Indeed, the court must do so regardless of whether the parties invoke the standard, and irrespective of the parties' views on whether it was correctly decided. *See 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. . . . [I]t is well established that [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.") (quoting *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99, 111 S. Ct. 1711, 114 L. Ed. 2d 152 (1991)). It bears noting that ten other circuit courts of appeals have applied the same methodology, making the parties' arguments for a change in the law unpersuasive, even if the court were not bound by the Fourth Circuit. *See Kolbe v. Hogan*, 849 F.3d 114, 132-33 (4th Cir. 2017), cert. denied, 138 S. Ct. 469, 199 L. Ed. 2d 374 (2017) (collecting cases and confirming that "[l]ike most of our sister courts of appeals" the Fourth Circuit applies a two-part analysis); *Gould v. Morgan*, 907 F.3d 659, 669 (1st Cir. 2018).

a. The Challenged Laws Are Facially Valid

"Under the well recognized standard for assessing a facial challenge to the constitutionality of a statute, the Supreme Court has long declared that a statute cannot be held unconstitutional if it has constitutional application." *United States v. Moore*, 666 F.3d 313, 318 (4th Cir. 2012). Thus, to succeed in a facial constitutional challenge, a movant "must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987). Because of this stringent standard, a facial challenge is "the most difficult challenge to mount successfully." *Id.* Courts may dismiss a facial challenge "by reference to the challenged regulation and its legislative history." *Educ. Media Co. at Virginia Tech v. Swecker*, 602 F.3d 583, 588 (4th Cir. 2010). "And while courts

generally engage in *[Chester's]* two-pronged analysis for facial Second Amendment challenges, [Fourth Circuit] precedent simplifies that analysis for prohibitions deemed 'presumptively lawful' in *Heller*." *Hosford*, 843 F.3d at 165.

Applying *Heller*, the Fourth Circuit has upheld similar age-based restrictions on the sale of firearms. The Fourth Circuit ruled in *Hosford* that "the prohibition against unlicensed firearm dealing" established by 18 U.S.C. § 922(a)(1)(A) was "a longstanding condition or qualification on the commercial sale of firearms and [] thus facially constitutional." 843 F.3d at 166. "First," the Fourth Circuit explained, "the regulation covers only the commercial sale of firearms." *Id.* In other words, "[i]t affect[ed] only those who regularly sell firearms" and "explicitly exclude[d] the vast majority of noncommercial sales." *Id.* "Second, the regulation imposes a mere condition or qualification," and does not prohibit the activity altogether. One of these conditions was age—dealers must "be at least twenty-one years old." *Id.* Finally, the Fourth Circuit examined whether the regulation was "longstanding," concluding it was because similar regulations were in place at least by 1938. *Id.* at 166-67. On these grounds, the Fourth Circuit concluded that the facial Second Amendment challenge failed. *Id.* at 167.

Like the provisions at issue in *Hosford*, the Challenged Laws are facially valid. First, the Challenged Laws concern "only the commercial sale of firearms." *Id.* at 166. The Challenged Laws only affect purchases from commercial sellers: FFLs. Second, they "impose[] a mere condition or qualification" on handgun sales. *Id.* The

Challenged Laws also do not prevent handgun purchases from non-FFL parties, and alternatively, 18-to-20-year-olds are permitted to receive handguns from their parents. *BATFE*, 700 F.3d at 190 (citing legislative history); ECF No. 16-1 at 3 (ATF opinion letter stating that "Federal law was not intended to preclude a parent or guardian from purchasing a firearm and placing it in the possession of a minor child or ward.").[3] Moreover, the Challenged Laws do not restrict a buyer once she turns 21. Thus, like the provisions in *Hosford*, the Challenged Laws are not "so prohibitive as to turn this condition or qualification into a functional prohibition" on the ownership of firearms. 843 F.3d at 166. Applying the final prong of analysis under *Hosford*, the Challenged Laws reflect "longstanding" prohibitions on the use or possession of handguns by those under a given age. Similar restrictions have been in place and upheld by courts since the nineteenth century. *See supra* at 5-6 (discussing state statutes and court decisions); BATFE, 700 F.3d at 203 (Restricting "the ability of 18-to-20-year-olds to purchase handguns from FFLs . . . is consistent with a longstanding tradition of targeting select groups' ability to access and to use arms for the sake of public safety."). Thus, the Challenged Laws are among the "longstanding prohibitions" and "conditions

3. The court does not intend to call into question the general ban on so-called "straw purchases" of firearms. *See generally Abramski v. United States*, 573 U.S. 169, 134 S. Ct. 2259, 189 L. Ed. 2d 262 (2014). Moreover, the court finds no conflict between the ban on straw purchases and this parental exception: both are equally supported by the legislative history of the Challenged Laws. *See id.* at 181-87 (discussing text and legislative history of Gun Control Act of 1968, and noting that Congress did not prohibit giving firearms as gifts).

and qualifications on the commercial sale of arms," which the Supreme Court in *Heller* did not "cast doubt" on. 554 U.S. at 626-27.

b. The Challenged Laws Are Valid as Applied to the Prospective Buyers

Yet the Fourth Circuit has recognized that even if a statute is facially constitutional, "the phrase '*presumptively* lawful regulatory measures' suggests the possibility that one or more of these 'longstanding' regulations' could be unconstitutional in the face of an as-applied challenge." *Chester*, 628 F.3d at 679 (quoting *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010)) (emphasis in *Chester).* The court, therefore, also analyzes the Prospective Buyers' claims on an as-applied basis.

i. The Challenged Laws Are Outside the Scope of the Second Amendment

First, the court examines whether the Challenged Laws are outside the scope of the Second Amendment. The court looks to historical understanding to determine the scope of the Second Amendment. *See Heller*, 554 U.S. at 577-628 (interpreting Second Amendment based on historical traditions); *Masciandaro*, 638 F.3d at 470 ("[H]istorical meaning enjoys a privileged interpretive role in the Second Amendment context."). The Fifth Circuit in *BATFE* analyzed this issue, recounting much the same history as the parties in this case, and ruled that the Challenged Laws do not impact Second Amendment

rights. *BATFE*, 700 F.3d at 203-04. First, "[t]he historical record shows that gun safety regulation was commonplace in the colonies, and around the time of the founding, a variety of gun safety regulations were on the books; these included . . . laws disarming certain groups and restricting sales to certain groups." *Id.* at 200. "Noteworthy among these revolutionary and founding-era gun regulations are those that targeted particular groups for public safety reasons." *Id.* "In the view of at least some members of the founding generation, disarming select groups for the sake of public safety was compatible with the right to arms specifically and with the idea of liberty generally." *Id.* Ultimately, the Fifth Circuit found that "the ability of 18-20-year-olds to purchase handguns from FFLs . . . falls outside the Second Amendment's protection," based on an examination of the historical record. *Id.* at 203; *see also Rene E.*, 583 F.3d at 16 ("[T]he founding generation would have regarded" laws prohibiting the possession of handguns by those under 18 with certain exceptions, "as consistent with the right to keep and bear arms."). The court concludes that based on the reasoning in *BATFE*, the historical record of legislation, court decisions, and scholarship summarized above, the Challenged Laws do not implicate Second Amendment rights.

ii. The Challenged Laws Survive Intermediate Scrutiny

The Fifth Circuit proceeded, however, to the second step of its analysis, "in an abundance of caution" given the "institutional challenges" of a definitive historical review. *Id.* at 204; *see also Hosford*, 843 F.3d 161, 167 (finding

it "prudent" to proceed to scrutiny analysis). The court follows the Fifth Circuit here. Thus, the court analyzes whether the Challenged Laws survive the "appropriate form of means-end scrutiny." *Chester*, 628 F.3d at 680.

First, the court holds that intermediate scrutiny applies to the Challenged Laws: even if they affect rights in the scope of the Second Amendment, they do not burden a "core" Second Amendment right. For claims brought under the Second Amendment, the appropriate "level of scrutiny . . . depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right." *Id.* at 682-83. In *Masciandaro*, the Fourth Circuit held that laws burdening "core" Second Amendment conduct receive strict scrutiny, while less severe burdens receive only intermediate scrutiny. 638 F.3d at 471. The Fourth Circuit noted that core Second Amendment conduct includes the "fundamental right to *possess* firearms for self-defense within the home. But a considerable degree of uncertainty remains as to the scope of that right beyond the home. . . ." *Id.* at 467 (emphasis added). "[A]s we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self defense." *Id.* at 470 (The "longstanding out-of-the-home/in-the-home distinction bears directly on the level of scrutiny applicable."). Thus, "less severe burdens on the right, laws that merely regulate rather than restrict, and laws that do not implicate the central self-defense concern of the Second Amendment, may be more easily justified." *Id.* (quoting *Chester*, 628 F.3d at 682).

Appendix B

Prohibiting adults between the ages of 18 and 20 from buying handguns from an FFL does not implicate a core Second Amendment right. Unlike the statutes at issue in Heller, the Challenged Laws do not "amount[] to a prohibition" of the possession "of an entire class of 'arms.'" Heller, 554 U.S. at 628. Indeed, the Prospective Buyers are not prohibited from *possessing* handguns. *BATFE*, 700 F.3d at 207. And like those laws in *Hosford*, the Challenged Laws only implicate commercial transactions: "conduct occurring outside the home." 843 F.3d at 168 (applying intermediate scrutiny to prohibition against unlicensed firearm dealing).

While the Prospective Buyers argue that they are prevented from purchasing "new" handguns (ECF No. 32 at 26), they cite no decision finding a meaningful distinction between new and used handguns, or factory-new and new-in-box handguns, for purposes of determining a Second Amendment right. *Cf.* Heller, 554 U.S. at 627 (The Second Amendment right is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."). Nor do the Prospective Buyers rebut the Government's claims that the Prospective Buyers could receive similar handguns from their parents or in sales by non-FFL parties. Ultimately, the Prospective Buyers concede issues showing that the Challenged Laws impose a narrow and limited burden. The Challenged Laws only (1) prevent the Prospective Buyers from *purchasing* (but not possessing) one type of firearm, factory-new handguns; (2) from one type of firearms seller, FFLs; and (3) for a limited period of time, from ages 18 to 20. Accordingly, the Challenged Laws are limited enough to avoid strict

scrutiny. *BATFE*, 700 F.3d at 205 ("Unquestionably, the challenged federal laws trigger nothing more than 'intermediate' scrutiny . . . The narrow ambit of the ban's target militates against strict scrutiny.").

Intermediate scrutiny requires the Government to show "that there is a reasonable fit between the challenged regulation and a substantial governmental objective." *Chester*, 628 F.3d at 683 (internal quotation marks omitted). Intermediate scrutiny does not demand that the challenged law "be the least intrusive means of achieving the relevant government objective, or that there be no burden whatsoever on the individual right in question." *See Masciandaro*, 638 F.3d at 474. Rather, there must be "a fit that is 'reasonable, not perfect.'" *See Woollard*, 712 F.3d at 878 (quoting *United States v. Carter*, 669 F.3d 411, 417 (4th Cir. 2012)).

To begin, Congress has an "interest in the protection of its citizenry and the public safety is not only substantial, but compelling." *Kolbe*, 849 F.3d at 139; *Masciandaro*, 638 F.3d at 473 ("Although the government's interest need not be 'compelling' under intermediate scrutiny, cases have sometimes described the government's interest in public safety in that fashion.") (collecting cases).

The court agrees there is a "reasonable fit" between the Challenged Laws and Congress's interest in the protection of its citizenry and the public safety. The Fifth Circuit's rationale in *BATFE* is persuasive. The text of the statute and legislative history make clear that "Congress designed its scheme to solve a particular problem: violent

crime associated with the trafficking of handguns from FFLs to young adults." *BATFE*, 700 F.3d at 207-11 (collecting and discussing legislative history); *supra* at 3-5 (recounting legislative history and government findings). The restriction imposed by the Challenged Laws is also sufficiently narrow. The Prospective Buyers have free reign to buy a handgun once they are 21. In the meantime, the Challenged Laws permit young people, via their parents, to possess handguns. *BATFE*, 700 F.3d at 209 (describing the Challenged Laws as "a calibrated, compromise approach"). "At the most," the Challenged Laws "cause minor inconveniences to certain youngsters who are mature, law abiding, and responsible, by requiring that a parent or guardian over 21 years of age make a handgun purchase for any person under 21." 114 Cong. Rec. 12279, 12309 (1968) (Sen. Dodd). *Cf. Heller*, 554 U.S. at 635 (strongest Second Amendment right applies to "law-abiding, *responsible* citizens") (emphasis added).

In sum, the parties persuasively argue that the Challenged Laws survive intermediate scrutiny. While the Prospective Buyers offer policy disagreements with Congress's conclusions and reasoning, ECF No. 32, that is not for courts to decide. Rather it is "precisely the type of judgment that legislatures are allowed to make without second-guessing by a court." *Kolbe*, 849 F.3d at 140 (upholding state ban on assault weapons and high-capacity magazines in spite of arguments against legislative rationale). Indeed, the Fourth Circuit has urged courts to approach Second Amendment claims with particular caution, giving due respect to the limits of their Article III powers. *Masciandaro*, 638 F.3d at 475 ("To the degree

that we push the right beyond what the Supreme Court in *Heller* declared to be its origin, we circumscribe the scope of popular governance, move the action into court, and encourage litigation in contexts we cannot foresee. This is serious business. 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.").

II. The Prospective Buyers' Due Process Claims Fail

The Prospective Buyers also argue that the Challenged Laws violate their right to equal protection of the laws guaranteed under the Due Process Clause of the Fifth Amendment to the United States Constitution. Compl. ¶ 43; Count II.

Rational basis applies to the Challenged Laws' age classification. "[E]qual protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312, 96 S. Ct. 2562, 49 L. Ed. 2d 520 (1976) (footnotes omitted). As held above, the Challenged Laws do not impermissibly interfere with Second Amendment rights, and "age is not a suspect classification." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83, 120 S. Ct. 631, 145 L. Ed. 2d 522 (2000); *BATFE*, 700 F.3d at 211-12 (applying rational basis to equal protection claim regarding the Challenged Laws): The Prospective Buyers argue that youth should be a suspect class, but

have not convinced this court that it should be the first to hold as much. *See, e.g., Am. Entertainers, L.L.C. v. City of Rocky Mount*, 888 F.3d 707, 723 (4th Cir. 2018) (no suspect classification in limiting 18-to-20-year-olds' ownership of adult businesses).

"[B]ecause an age classification is presumptively rational, the individual challenging its constitutionality bears the burden of proving that the facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Kimel*, 528 U.S. at 83-84 (internal quotation marks omitted). Accordingly, "the government may 'discriminate on the basis of age without offending' the constitutional guarantee of equal protection 'if the age classification in question is rationally related to a legitimate state interest.'" *BATFE*, 700 F.3d at 212 (quoting *Kimel*, 528 U.S. at 83-84).

The Prospective Buyers' Equal Protection claim fails as a matter of law. The court holds that Congress had a rational basis for regulating adults over 21 differently from adults under 21 for the same reasons the Challenged Laws survive intermediate review. *BATFE*, 700 F.3d at 212 (holding that age restrictions in the Challenged Laws satisfy rational basis review); *Am. Entertainers, L.L.C.*, 888 F.3d at 723 (local ordinance barring 18-to-20-year-olds from owning adult businesses was rationally related to prevention of underage drinking "given alcohol's availability at most such venues"). Further, the Amici parties highlight substantial evidence supporting Congress's decision to draw the line at age 21. ECF Nos.

28 (neurological and social science research), 38 (similar). Congress's fact-finding, thus, could "reasonably be conceived to be true." *Kimel*, 528 U.S. at 83-84.

The Prospective Buyers allege—and the court has no reason to doubt—that they are law-abiding, responsible, and capable adults, rendering the Challenged Laws over-inclusive. But that does not mean that the Challenged Laws violate the Prospective Buyers' rights to Equal Protection. *Kimel*, 528 U.S. at 83 ("The rationality commanded by the Equal Protection Clause does not require . . . razorlike precision . . . Under the Fourteenth Amendment, a State may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests . . . That age proves to be an inaccurate proxy in any individual case is irrelevant.").

Conclusion

For the reasons stated, the court grants the Government's motion to dismiss (ECF No. 15) and denies the Prospective Buyers' motion for summary judgment (ECF No. 31). The Clerk is directed to send copies of this memorandum opinion and the accompanying order to all counsel of record.

DATED: This 4th day of October, 2019

/s/ Glen E. Conrad
Senior United States District Judge

APPENDIX C — ORDER DENYING REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED NOVEMBER 19, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-2250
(3:18-cv-00103-GEC)

TANNER HIRSCHFELD; NATALIA MARSHALL,

Plaintiffs-Appellants,

v.

BUREAU OF ALCOHOL, FIREARMS, TOBACCO & EXPLOSIVES; MARVIN RICHARDSON, ACTING DIRECTOR OF THE BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES; MERRICK B. GARLAND, ATTORNEY GENERAL,

Defendants-Appellees.

———————————————

BRADY; GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE; EVERYTOWN FOR GUN SAFETY SUPPORT FUND,

Amici Supporting Appellee,

Appendix C

ILLINOIS; CALIFORNIA; CONNECTICUT; DELAWARE; THE DISTRICT OF COLUMBIA; HAWAII; MASSACHUSETTS; MICHIGAN; MINNESOTA; NEW JERSEY; NEW MEXICO; NEW YORK; NORTH CAROLINA; OREGON; PENNSYLVANIA; RHODE ISLAND; VERMONT; WASHINGTON; COMMONWEALTH OF VIRGINIA; STATE OF MARYLAND; MARCH FOR OUR LIVES ACTION FUND,

Amici Supporting Rehearing Petition.

ORDER

The court denies the petition for rehearing.

Entered at the direction of the panel: Judge Agee, Judge Wynn, and Judge Richardson.

For the Court
/s/ Patricia S. Connor, Clerk