APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15-10311

FREDRIC RUSSELL MANCE, JR.; TRACEY AMBEAU HANSON; ANDREW HANSON; CITIZENS COMMITTEE FOR THE RIGHT TO KEEP AND BEAR ARMS,

Plaintiffs - Appellees,

v.

JEFFERSON B. SESSIONS, III, U. S. ATTORNEY GENERAL; THOMAS E. BRANDON, Acting Director, Bureau of Alcohol, Tobacco, Firearms and Explosives,

Defendants - Appellants.

Appeal from the United States District Court for the Northern District of Texas.

(Filed Jul. 20, 2018)

Before: OWEN and HAYNES, Circuit Judges.*

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* Judge Edward Prado, a member of the original panel in this case, retired from the court on April 2, 2018, and therefore did not participate in the revised opinion. The new opinion is issued by a quorum. *See* 28 U.S.C. § 46(d).

PER CURIAM:

The petition for rehearing en banc has been denied. We withdraw the prior opinion that issued January 19, 2018, and substitute the following opinion.

Federal laws that include 18 U.S.C. §§ 922(a)(3) and 922(b)(3), and 27 C.F.R. § 478.99(a), generally prohibit the direct sale of a handgun by a federally licensed firearms dealer (FFL) to a person who is not a resident of the state in which the FFL is located. In a suit brought by Fredric Russell Mance, Jr. and others, the federal district court enjoined the enforcement of these laws, concluding that they violate the Second Amendment and the Due Process Clause of the Fifth Amendment.[1] We reverse the district court's judgment and vacate the injunction.

I

Andrew and Tracy Hanson, who are residents of the District of Columbia and members of the Citizens Committee for the Right to Keep and Bear Arms (the Committee), travelled to Texas desiring to purchase two handguns from Mance, an FFL in Arlington, Texas, who is also a member of the Committee. It is undisputed that the Hansons would be eligible under the laws of Texas and the District of Columbia to own and possess the handguns that they selected from Mance's inventory. However, federal law prevents Mance from

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[1] *Mance v. Holder*, 74 F. Supp. 3d 795, 813-14 (N.D. Tex. 2015).

selling a handgun directly to the Hansons since they are not residents of Texas. Federal law would have permitted Mance to transfer the handguns to the FFL in the District of Columbia so that the Hanson's [sic] could purchase the firearms from that FFL. The federal laws do not impose or even allude to a fee if such a transfer occurs, but the FFL in the District of Columbia would have charged the Hansons a transfer fee of $125 for each handgun, above and beyond the purchase price. The Hansons declined to pursue this method of obtaining the firearms because they objected to the additional fees and to shipping charges. They could not purchase the handguns of their choosing from the sole FFL in the District of Columbia because that dealer has no inventory and only sells firearms transferred from FFLs outside of the District.

Mance, the Hansons, and the Committee initiated suit in Texas challenging the federal laws that restrict the sale of handguns by an FFL to residents of the state in which the FFL is located, asserting that the federal laws contravene the Second and Fifth Amendments. The plaintiffs sought an injunction prohibiting the enforcement of these laws. The district court denied the Government's Motion to Dismiss for Lack of Standing, granted the plaintiffs' motion for summary judgment, and denied the Government's competing motion for summary judgment. The district court enjoined the enforcement of the challenged laws, concluding that they violated both the Second Amendment and the equal protection component of the Fifth

Amendment's Due Process Clause. The Government has appealed.

II

Because the Hansons are not Texas residents, Mance, a Texas FFL, cannot lawfully sell handguns to them. Such a transaction is prohibited by 18 U.S.C. § 922(a)(3) and (b)(3), which provide:

> (a) It shall be unlawful—. . .
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> (3) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector to transport into or receive in the State where he resides (or if the person is a corporation or other business entity, the State where it maintains a place of business) any firearm purchased or otherwise obtained by such person outside that State, except that this paragraph (A) shall not preclude any person who lawfully acquires a firearm by bequest or intestate succession in a State other than his State of residence from transporting the firearm into or receiving it in that State, if it is lawful for such person to purchase or possess such firearm in that State, (B) shall not apply to the transportation or receipt of a firearm obtained in conformity with subsection (b)(3) of this section, and (C) shall not apply to the transportation of any firearm acquired in any State prior to the effective date of this chapter. . . .

* * *

> (b) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver—
> . . .
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> (3) any firearm to any person who the licensee knows or has reasonable cause to believe does not reside in (or if the person is a corporation or other business entity, does not maintain a place of business in) the State in which the licensee's place of business is located, except that this paragraph (A) shall not apply to the sale or delivery of any rifle or shotgun to a resident of a State other than a State in which the licensee's place of business is located if the transferee meets in person with the transferor to accomplish the transfer, and the sale, delivery, and receipt fully comply with the legal conditions of sale in both such States (and any licensed manufacturer, importer or dealer shall be presumed, for purposes of this subparagraph, in the absence of evidence to the contrary, to have had actual knowledge of the State laws and published ordinances of both States), and (B) shall not apply to the loan or rental of a firearm to any person for temporary use for lawful sporting purposes. . . . [2]

Regulations promulgated to implement these prohibitions are set forth in 27 C.F.R. § 478.99(a), which provides:

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[2] 18 U.S.C. § 922(a)(3), (b)(3).

> (a) Interstate sales or deliveries. A licensed importer, licensed manufacturer, licensed dealer, or licensed collector shall not sell or deliver any firearm to any person not licensed under this part and who the licensee knows or has reasonable cause to believe does not reside in (or if a corporation or other business entity, does not maintain a place of business in) the State in which the licensee's place of business or activity is located: *Provided*, That the foregoing provisions of this paragraph (1) shall not apply to the sale or delivery of a rifle or shotgun (curio or relic, in the case of a licensed collector) to a resident of a State other than the State in which the licensee's place of business or collection premises is located if the requirements of § 478.96(c) are fully met, and (2) shall not apply to the loan or rental of a firearm to any person for temporary use for lawful sporting purposes (see § 478.97).[3]

The question is whether these federal laws violate the Second Amendment.

III

The Second Amendment provides: "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."[4] The United States Supreme Court held in *District of Columbia v. Heller* that the

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[3] 27 C.F.R. § 478.99.

[4] U.S. CONST. amend. II.

Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation."[5]

After extensive analysis of the historical context of the Second Amendment, the Court concluded in *Heller* "that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right" to keep and bear arms[6] and concluded in *McDonald v. City of Chicago, Ill.* that "the right to keep and bear arms [is] among those fundamental rights necessary to our system of ordered liberty."[7] The Court reasoned in *Heller* "that self-defense . . . was the *central component* of the right itself."[8] With regard to handguns, the Court observed that, "the American people have considered the handgun to be the quintessential self-defense weapon."[9] In contemplating why a citizen might prefer a handgun over long guns for home defense, the Court held, "[w]hatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid."[10]

The Supreme Court has recognized, however, that "[l]ike most rights, the right secured by the Second

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[5] 554 U.S. 570, 592 (2008).

[6] *Id.* (emphasis in original).

[7] 561 U.S. 742, 778 (2010) (plurality opinion).

[8] *Heller*, 554 U.S. at 599 (emphasis in original).

[9] *Id.* at 629.

[10] *Id.*

Amendment is not unlimited."[11] The Court explained in *Heller* that:

> [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.[12]

The Court added: "We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive."[13]

In *National Rifle Association of America, Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, our court was called upon to apply *Heller* in determining whether federal statutes[14] that prohibit FFLs from selling handguns to a person under the age of 21 were constitutional in light of the Second Amendment.[15] We first canvased the analytical frameworks that other

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[11] *Id.* at 626.

[12] *Id.* at 626-27; *see also McDonald*, 561 U.S. at 786 ("We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill,' 'laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.' We repeat those assurances here." (citation omitted)).

[13] *Heller*, 554 U.S. at 627 n.26.

[14] 18 U.S.C. § 922(b)(1) and (c)(1).

[15] 700 F.3d 185, 192 (5th Cir. 2012).

Circuit Courts of Appeals had utilized in Second Amendment cases, identified "[a] two-step inquiry" employed by some of those courts, and "adopt[ed] a version of this two-step approach."[16] We concluded "that the first inquiry is whether the conduct at issue falls within the scope of the Second Amendment right."[17] That undertaking, we said, entails "look[ing] to whether the law harmonizes with the historical traditions associated with the Second Amendment guarantee."[18]

The district court in the present case undertook such an analysis and determined that "the earliest known state residency restrictions on the purchase or possession of firearms" occurred in 1909.[19] The district court concluded that "these early twentieth century state residency restrictions do not date back quite far enough to be considered longstanding."[20] Because we conclude that the laws and regulations at issue withstand strict scrutiny, we will assume, without deciding, that they are not "longstanding regulatory measures"[21]

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[16] *Id.* at 194 (citing *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Heller v. District of Columbia*, 670 F.3d 1244, 1252 (D.C. Cir. 2011); *Ezell v. City of Chicago*, 651 F.3d 684, 701-04 (7th Cir.2011); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010)).

[17] *Nat'l Rifle Assoc. of Am.*, 700 F.3d at 194.

[18] *Id.*

[19] *Mance v. Holder*, 74 F. Supp. 3d 795, 805 (N.D. Tex. 2015).

[20] *Id.*

[21] *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (plurality opinion).

and are not "presumptively lawful regulatory measures."[22] We will also assume, without deciding, that the strict, rather than intermediate, standard of scrutiny is applicable.

Mance, who is a Texas FFL, and FFLs who are members of the Committee seek to sell handguns directly to residents in every state, provided that the purchaser is qualified under the laws of the state of residence to purchase and possess the handgun that would be sold. The FFLs concede that the federal laws at issue are constitutional when applied to preclude, for example, juveniles, individuals convicted of certain crimes, and the mentally ill from purchasing a handgun from an out-of-state seller, but the extent to which the FFLs have asserted a facial challenge to these laws is not entirely clear from their briefing in this court. We assume for purposes of our analysis, without deciding, that a facial challenge is presented.[23]

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[22] *District of Columbia v. Heller*, 554 U.S. 570, 627 n.26 (2008).

[23] *See generally City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2451 (2015) (explaining that "for facial challenges, a plaintiff must establish that a 'law is unconstitutional in all of its applications' "; that "when assessing whether a statute meets this standard, the Court has considered only applications of the statute in which it actually authorizes or prohibits conduct"; and that " '[l]egislation is measured for consistency with the Constitution by its impact on those whose conduct it affects. . . . The proper focus of the constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.' " (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) and *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 894 (1992)); *United States v. Salerno*, 481 U.S. 739, 745

Mance and the Hansons additionally challenge the federal laws, as applied to the Hansons and similarly situated residents of the District of Columbia. We consider those contentions to be as-applied challenges.

IV

The Supreme Court has said in the First Amendment context that strict scrutiny "requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.' "[24] When strict scrutiny is applicable, the Government "must specifically identify an 'actual problem' in need of solving,' " and the "curtailment of [the constitutional right] must be actually necessary to the solution."[25] Though this is "a demanding standard," and "'[i]t is rare that a regulation restricting speech because of its content will ever be permissible,' "[26] the Supreme Court has observed that "those cases do arise"[27] and has said that "we wish to dispel the notion

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(1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.").

[24] *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010) (quoting *Fed. Election Comm'n v. Wis. Right to Life Inc.*, 551 U.S. 449, 464 (2007)).

[25] *Brown v. Entm't Merchs. Ass'n.*, 564 U.S. 786, 799 (2011) (quoting *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 822 (2000)).

[26] *Id.* (quoting *Playboy*, 529 U.S. at 818).

[27] *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1666 (2015).

that strict scrutiny is 'strict in theory, but fatal in fact.' "[28]

The district court accepted that when Congress enacted the Omnibus Crime Control and Safe Streets Act of 1968[29] (Crime Control Act) and the Gun Control Act of 1968[30] there was an actual problem in need of solving.[31] The findings and declarations set forth in the Crime Control Act reflect that Congress was of the view that "the existing Federal controls over [widespread traffic in firearms] do not adequately enable the States to control this traffic within their own borders through the exercise of their police power."[32] Congress had concluded that there was a "serious problem of individuals going across State lines to procure firearms which they could not lawfully obtain or possess in their own State," and these interstate purchases were accomplished "without the knowledge of . . . local authorities."[33] Congress found that individuals circumventing the laws of the state in which they resided included "large numbers of criminals and juveniles."[34]

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[28] *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (MARSHALL, J., concurring in the judgment)).

[29] Pub. L. No. 90-351, 82 Stat. 197 (1968).

[30] Pub. L. No. 90-618, 82 Stat. 1213 (1968).

[31] *See Mance v. Holder*, 74 F. Supp. 3d 795, 808-09 (N.D. Tex. 2015). ("First, the Court agrees the Government's interest in preventing handgun crime is a compelling interest.").

[32] Crime Control Act § 901(a)(1), 82 Stat. at 225 (1968).

[33] S. REP. NO. 89-1866 (1966), at 19.

[34] S. REP. NO. 90-1097 (1968), at 80; *see also* Crime Control Act § 901(a)(2), 82 Stat. at 225 (1968) ("The Congress hereby finds

Congress had additionally concluded "that the acquisition on a mail-order basis of firearms other than a rifle or shotgun by nonlicensed individuals, from a place other than their State of residence, has materially tended to thwart the effectiveness of State laws and regulations, and local ordinances. . . ."[35] Similarly, Congress found:

> that the sale or other disposition of concealable weapons by importers, manufacturers, and dealers holding Federal licenses, to nonresidents of the State in which the licensees' places of business are located, has tended to make ineffective the laws, regulations, and ordinances in the several States and local jurisdictions regarding such firearms. . . . [36]

The solution Congress crafted included the in-state sales requirement.

However, current burdens on constitutional rights "must be justified by current needs."[37] The overarching

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and declares . . . that the ease with which any person can acquire firearms other than a rifle or shotgun (including criminals, juveniles without the knowledge or consent of their parents or guardians, narcotics addicts, mental defectives, armed groups who would supplant the functions of duly constituted public authorities, and others whose possession of such weapons is similarly contrary to the public interest) is a significant factor in the prevalence of lawlessness and violent crime in the United States. . . .").

[35] Crime Control Act § 901(a)(4), 82 Stat. at 225 (1968).

[36] *Id.* § 901(a)(5), 82 Stat. at 225 (1968).

[37] *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2619 (2013) (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)).

question in a strict-scrutiny analysis of the laws and regulations at issue, it seems to us, is whether an in-state sales requirement remains justified by a compelling government interest and is narrowly tailored to serve that interest after the Gun Control Act was amended by the Brady Act[38] and in light of federal regulations promulgated after the in-state sales requirement was enacted.[39] Presently, before an FFL may sell a handgun to a person who is not also an FFL, the FFL must contact the national instant criminal background check system (NICS) before proceeding with the transaction.[40] An exception to this requirement is that if the law of a state provides that a permit to buy a handgun "is to be issued only after an authorized government official has verified that the information available to such official does not indicate that possession of a firearm by such other person [*i.e.*, the potential buyer] would be in violation of law," then an FFL may rely on that state's permit in making the sale.[41] States that have such laws are called point-of-contact states. FFLs that are located within a point-of-contact state contact an agency or person designated by that state directly and do not contact the NICS to obtain background checks.

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[38] Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993).

[39] *See* 27 C.F.R. § 478.24.

[40] 18 U.S.C. § 922(t).

[41] *Id.* § 922(t)(3).

All parties to this suit concede that there is a compelling government interest in preventing circumvention of the handgun laws of various states. The plaintiffs recognize that current federal laws, including the Brady Act, do not require all information regarding compliance with the various state and local gun control laws to be included in the databases accessed when FFLs contact NICS requesting a background check. The states voluntarily provide records for use in the databases accessed by NICS. It is undisputed that, for various reasons, some records are not timely provided, or are not provided at all. The plaintiffs maintain, however, that the in-state sales requirement is not narrowly tailored because the states could be compelled by federal law to provide all necessary information. We conclude that the Government has demonstrated that the in-state sales requirement is narrowly tailored, notwithstanding the information that is available to all FFLs under federal laws and regulations.

There are more than 123,000 FFLs nationwide.[42] It is unrealistic to expect that each of them can become, and remain, knowledgeable about the handgun laws of the 50 states and the District of Columbia, and the local laws within the 50 states and the District. The

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[42] U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL EVALUATION AND INSPECTIONS DIVISION, REVIEW OF ATF's FEDERAL FIREARMS LICENSEE INSPECTION PROGRAM at i (2013), *available at* https://oig.justice.gov/reports/2013/e1305.pdf.

district court relied on 27 C.F.R. § 478.24[43] to support the conclusion that FFLs can "ensure that their firearms transactions comport with state and local law."[44] But the compilation of state gun laws by the Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives is more than 500 pages long, and it provides the full text of those laws.[45] FFLs are not engaged in the

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[43] The text of 27 C.F.R. § 478.24 provides:

> (a) The Director shall annually revise and furnish Federal firearms licensees with a compilation of State laws and published ordinances which are relevant to the enforcement of this part. The Director annually revises the compilation and publishes it as "State Laws and Published Ordinances—Firearms" which is furnished free of charge to licensees under this part. Where the compilation has previously been furnished to licensees, the Director need only furnish amendments of the relevant laws and ordinances to such licensees.
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> (b) "State Laws and Published Ordinances—Firearms" is incorporated by reference in this part. It is ATF Publication 5300.5, revised yearly. The current edition is available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402. It is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030, or go to: http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html. This incorporation by reference was approved by the Director of the Federal Register.

[44] *Mance v. Holder*, 74 F. Supp. 3d 795, 810 n.11 (N.D. Tex. 2015).

[45] *See generally State Laws and Published Ordinances—Firearms* (32nd Edition), BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES (Nov. 22, 2017), https://www.atf. gov/firearms/

practice of law, and we do not expect even an attorney in one state to master the laws of 49 other states in a particular area. Additionally, the compilation on which the district court relied is only updated annually.[46]

The laws of the various states differ as to who may lawfully possess a firearm. All but one state (Vermont) prohibits possession of a firearm by a felon, but the definitions of "felony" differ. Restrictions based on mental illness vary among the states. Some states prohibit the purchase of a firearm by drug abusers,[47] and some restrict purchases by those who have abused alcohol.[48]

It is reasonable, however, for the federal government to expect that an FFL located in a state, and subject to state and local laws, can master and remain current on the firearm laws of that state. The in-state sales requirement is narrowly tailored to assure that an FFL who actually delivers a handgun to a buyer can reasonably be expected to know and comply with the laws of the state in which the delivery occurs.

The plaintiffs assert that federal law could require all FFLs to comply with the guns laws of the state in which a buyer of a handgun resides, just as federal law requires FFLs to comply with state and local laws

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state-laws-and-published-ordinances-firearms-32nd-edition [https://perma.cc/KNU2-FYHS] (last visited Nov. 29, 2017).

[46] *See* 27 C.F.R. § 478.24(a).

[47] *See, e.g.*, MD. CODE ANN., PUB. SAFETY § 5-133(b)(5); MO. REV. STAT. § 571.070.

[48] *See, e.g.*, MD. CODE ANN., PUB. SAFETY § 5-133(b)(4); TENN. CODE ANN. § 39-17-1316.

throughout the United States when selling long arms.[49] They assert, "[i]f Mance can follow an out-of-state rifle law, he can follow an out-of-state handgun law."

However, at least some states have regulated the sale of handguns more extensively than they have regulated the sale of long guns. For example, the Government has identified state laws that require a mandatory waiting period for the purchase of handguns, but not for long guns,[50] and state laws that limit the number of handgun purchases, but not long gun purchases, to one per month.[51]

But there is another reason that the plaintiffs' reliance on the disparate treatment federal law accords handguns and long guns does not carry the day. In the

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[49] *See* 18 U.S.C. § 922(b)(3)(A) (providing that an FFL may sell or deliver "any rifle or shotgun to a resident of a State other than a State in which the licensee's place of business is located if the transferee meets in person with the transferor to accomplish the transfer, and the sale, delivery, and receipt fully comply with the legal conditions of sale in both such States (and any licensed manufacturer, importer or dealer shall be presumed, for purposes of this subparagraph, in the absence of evidence to the contrary, to have had actual knowledge of the State laws and published ordinances of both States) . . . ").

[50] *See, e.g.*, FLA. CONST. art. I, § 8(b); FLA. STAT. § 790.0655; MD. CODE ANN., PUB. SAFETY §§ 5-101(p), (r), 5-123.

[51] *See, e.g.*, CAL. PENAL CODE §§ 27535, 27540(f); MD. CODE ANN., PUB. SAFETY §§ 5-128(b), 5-129; N.J. STAT. ANN. §§ 2C:58-2(a)(7), 2C:58-3(i), 2C:58-3.4. *But see Heller v. District of Columbia*, 801 F.3d 264, 280 (D.C. Cir. 2015) (holding that law prohibiting registration of "more than one pistol" during any 30-day period violated the Second Amendment).

First Amendment context, the Supreme Court has recognized in response to an "underinclusivity" argument that "[a] State need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns."[52] The Court observed, "[w]e have accordingly upheld laws—even under strict scrutiny—that conceivably could have restricted even greater amounts of speech in service of their stated interests."[53] In *Williams-Yulee v. Florida Bar*, the Court held that a Florida statute prohibiting judges and judicial candidates from personally soliciting campaign funds[54] survived strict scrutiny even though Florida law permitted "a judge's campaign committee to solicit money, which arguably reduces public confidence in the integrity of the judiciary just as much as a judge's personal solicitation."[55]

The plaintiffs contend that the federal laws are not narrowly tailored because they could be drawn to permit a person to obtain a handgun from an out-of-state FFL if the purchaser is qualified under the laws of the state in which he or she lives to purchase and possess the desired make and model, and states could be compelled to inform the out-of-state FFL whether the purchaser was qualified. The federal government cannot compel state law enforcement officials to provide, and timely update, information as to whether a

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[52] *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1668 (2015).

[53] *Id.*

[54] *Id.* at 1663.

[55] *Id.* at 1668.

particular person is authorized under state and local laws to purchase and possess a particular handgun.[56]

The challenged federal gun laws allow ample access to handguns by those who are permitted to possess and purchase them under state and local laws. A qualified person in any state may purchase a handgun from an FFL in his or her state of residence, or may purchase the handgun from an out-of-state FFL as long as the weapon is lawfully transferred to an in-state FFL. The restrictions applicable to interstate transfers of handguns are the least restrictive means of insuring that the handgun laws of states are not circumvented.

The delay incurred if a handgun is purchased out of state and transferred to an in-state FFL is de minimis. In addition, even were a person permitted to purchase a handgun directly from an out-of-state FFL under federal law, some states' laws would result in delay. A few states prohibit a non-resident from

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[56] *See Printz v. United States*, 521 U.S. 898, 933-34 (1997) (holding that "the central obligation imposed upon [chief law enforcement officers] by the interim provisions of the Brady Act—the obligation to 'make a reasonable effort to ascertain within 5 business days whether receipt or possession [of a handgun] would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General,' 18 U.S.C. § 922(s)(2)—is unconstitutional. Extinguished with it, of course, is the duty implicit in the background-check requirement that the [chief law enforcement officer] accept notice of the contents of, and a copy of, the completed Brady 934 Form, which the firearms dealer is required to provide to him, §§ 922(s)(1)(A)(i) (III) and (IV).").

possessing a handgun at all,[57] and others require a permit before possession of a handgun is lawful.[58] Unless

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[57] *See, e.g.*, CAL. PENAL CODE § 26845(a) ("No handgun may be delivered unless the purchaser . . . presents documentation indicating that the person is a California resident."); IOWA CODE ANN. § 724.15 (prohibiting the purchase of a pistol or revolver, subject to enumerated exceptions applicable to some non-residents, until the purchaser has obtained a permit, which shall issue only "to any resident of this state"); MASS. GEN. LAWS ANN. ch. 140, § 129C (prohibiting the possession of a firearm, subject to enumerated exceptions inapplicable to non-residents regarding handguns, until the possessor has obtained an identification card, which under § 129B is only obtainable by residents); MD. CODE ANN., PUB. SAFETY § 5-117.1 (requiring handgun qualification license for purchase of a handgun and limiting the issue of such licenses to state residents who meet certain qualifications); NEB. REV. STAT. ANN. § 69-2403 (prohibiting the purchase of a handgun, subject to enumerated exceptions, until the purchaser has obtained a certificate, which under § 69-2404 is only obtainable from the "sheriff of the applicant's place of residence").

[58] *See, e.g.*, CONN. GEN. STAT. § 29-28 (prohibiting FFLs from making retail sales of handguns to anyone without a state-issued permit to purchase, which cannot be acquired without a state-issued eligibility certificate or carry permit and documentation of compliance with local zoning requirements); D.C. CODE § 7-2502.06 ("An application for a registration certificate shall be . . . issued[ ] prior to taking possession of a firearm."); HAW. REV. STAT. § 134-2 ("No person shall acquire the ownership of a firearm . . . until the person has first procured . . . a permit to acquire the ownership of a firearm."); 430 ILL. COMP. STAT. 65/2 (requiring all persons to obtain an identification card from state police before acquiring or possessing any firearm with some exceptions, including non-residents who are licensed in their home state or keep their firearms unloaded and enclosed in a case); MICH. COMP. LAWS ANN. § 28.422 (requiring a license to possess, purchase, transfer or carry a handgun, with exceptions for non-residents who are licensed to purchase, carry or transport a handgun in their state of residence); N.J. STAT. ANN. § 2C:39-5(b)(1) ("Any person who knowingly has in his possession any handgun . . . without

a non-resident acquired the required permit before seeking to purchase a handgun in those states, some delay would most likely occur before delivery of a handgun would be permitted. Accordingly, in a number of states, an out-of-state purchaser could not take delivery of a handgun from an FFL immediately, if at all.

The plaintiffs assert that, at a minimum, the in-state sales requirement cannot be applied to transactions like the one proposed between Mance and the Hansons. They contend that the District of Columbia requires police pre-approval of any handgun transfer, citing D.C. Code § 7-2502.06(a), so that an FFL in another state would not have to become acquainted with District of Columbia laws because it could rely on a permit issued by police in the District of Columbia. One obvious flaw in this argument is that an FFL outside the District of Columbia would have to ascertain that all that was required under the laws of the District was such a permit. Nor is there evidence that a means exists by which an out-of-state FFL can confirm

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first having obtained a permit to carry the same . . . is guilty of a crime."); N.Y. PENAL LAW §§ 265.01, 265.20(a)(3), (13) (prohibiting the possession of a firearm subject to many exceptions including the issuance of a state license and non-resident travel to and from conventions and similar events); N.C. GEN. STAT. ANN. § 14-402 (prohibiting the purchase of a pistol unless either a license or permit is obtained under § 14-404—which is only available for non-residents if the "purpose of the permit is for collecting"—or a resident has a valid North Carolina concealed handgun permit); 11 R.I. GEN. LAWS § 11-47-35 (limiting sale of pistols and revolvers to persons who present a state-issued safety certificate, which requires approval by state police and completion of a state-approved safety course).

in the District of Columbia that a handgun permit has in fact been issued by the Chief of Police of the District.

In the present case, the Hansons only completed a form promulgated by the Chief of Police of the District when they were in Texas, in the presence of Mance. There is no evidence that the Hansons or Mance submitted that form to the Chief of Police in the District, as required under the laws of the District, or that the Hansons were ever actually approved by the Chief of Police to purchase the handguns they had selected. They have not alleged or offered evidence that they presented an approved permit to Mance. In any event, permitting an out-of-state FFL to assume that a permit presented by a purchaser is what it purports to be, with no means of confirming the validity of the permit, would allow handguns to be purchased upon presentation of a forged or fraudulent permit.

The laws of the District of Columbia provide that no seller of a firearm in the District may deliver a firearm to a purchaser until ten days after the purchase.[59] Permitting an out-of-state FFL to consummate a sale to a resident of the District based solely on the presentation of a permit from the Chief of Police of the District would allow that resident to circumvent the ten-day waiting period.

The laws of the District expressly provide that sales of handguns to its residents may occur through transfers from out-of-District FFLs to an FFL within

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[59] D.C. CODE § 22-4508.

the District.[60] The evidence in the record reflects that the sole FFL authorized to sell handguns to the public in the District does not in fact sell handguns directly to purchasers but instead only facilitates sales through the transfer of handguns from out-of-state FFLs. The plaintiffs have contended that this is a consequence of laws or regulations promulgated by the District. In assessing the impact of the *federal* restrictions upon the Hansons and Mance, it must be recognized that it is the District's restrictions that have led the lone FFL in the District to sell only handguns that are transferred from an out-of-District FFL. The fact that no handguns are available for direct purchase in the District is not a result of the in-state sales requirement or any other federal law or regulation.

We conclude that the in-state sales requirement is not unconstitutional as applied to Mance and the Hansons. The Hansons are not prohibited by the federal laws from purchasing and possessing handguns, and the requirement that a handgun purchased from an FFL outside of the District be transferred to an FFL in the District to consummate the purchase is the least restrictive means of assuring that the Hansons and those similarly situated are authorized under the District's laws to purchase and possess the particular firearms that they seek to buy.

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[60] *See* D.C. Mun. Regs. Tit. 24, § 2320.3(b), (c), (d), (e), (f).

V

The district court held that the in-state sales requirement violated the equal protection guarantee in the Due Process Clause of the Fifth Amendment. The court reasoned that "the federal law not only creates a discriminatory regime based on residency, but it also involves access to the constitutional guarantee to keep and bear arms."[61]

To succeed on an equal protection claim under the Due Process Clause of the Fifth Amendment, a plaintiff is required to "show that two or more classifications of similarly situated persons [are] treated differently."[62] If we determine that the classification "impermissibly interferes with the exercise of a fundamental right or operates to the peculiar advantage of a suspect class," we subject the classification to strict scrutiny.[63] Otherwise, we will uphold the classification if it is "rationally related to a legitimate state interest."[64]

The in-state sales requirement does not discriminate based on residency. So we do not subject it to any scrutiny—strict or otherwise—under the equal protection component of the Due Process Clause. The cases

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[61] *Mance v. Holder*, 74 F. Supp. 3d 795, 814 (N.D. Tex. 2015) (emphasis omitted).

[62] *Gallegos-Hernandez v. United States*, 688 F.3d 190, 195 (5th Cir. 2012) (per curiam).

[63] *Nat'l Rifle Assoc. of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 211-212 (5th Cir. 2012) (quoting *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976) (per curiam)).

[64] *Id.* at 212.

on which the district court relied in concluding that the federal laws at issue "impinge[] on residency"[65] involved *state* laws that granted benefits to state residents.[66] The in-state sales requirement does not favor or disfavor residents of any particular state. Rather, it imposes the same restrictions on sellers and purchasers of firearms in each state and the District of Columbia.

* * *

We REVERSE the district court's judgment and VACATE the order granting injunctive relief.

PRISCILLA R. OWEN, Circuit Judge, concurring:

The concurring opinion issued January 19, 2018, is withdrawn and the following is substituted.

As an initial matter, the Second Amendment right is a fundamental one. The Supreme Court recognized in *McDonald v. City of Chicago*, citing its decision in *District of Columbia v. Heller*, that "[t]he right to keep and bear arms was considered . . . fundamental by those who drafted and ratified the Bill of Rights," explaining that "[d]uring the 1788 ratification debates, the fear that the federal government would disarm the

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[65] *Mance*, 74 F. Supp. 3d at 814.

[66] *See id.* (citing *Att'y Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 899 (1986) (holding unconstitutional a preference in state civil service employment opportunities for veterans who were residents when they entered military service); *Mem'l Hosp. v. Maricopa Cty.*, 415 U.S. 250, 254-64 (1974) (holding unconstitutional a state law establishing in-state residency of a fixed duration as a prerequisite to receiving free, non-emergency medical care)).

people in order to impose rule through a standing army or select militia was pervasive in Antifederalist rhetoric."[1] The *Heller* opinion recounts that "[i]t was understood across the political spectrum that the right [to keep and bear arms] helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down."[2] It was "therefore entirely sensible that the Second Amendment's prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia."[3]

However, "[t]he prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting."[4] "But the threat that the new Federal Government would destroy the citizens' militia by taking away their arms was the reason that right—unlike some other English rights—was codified in a written Constitution."[5] In *McDonald*, the Court explained that "[b]y the 1850's, the perceived threat that had prompted the inclusion of the Second Amendment in the Bill of Rights—the fear that the National Government would disarm the universal militia—had largely faded as a popular concern, but the right to keep and

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[1] 561 U.S. 742, 768 (2010) (quoting 554 U.S. 570, 598 (2008)).

[2] *Heller*, 554 U.S. at 599.

[3] *Id*

[4] *Id*.

[5] *Id*.

bear arms was highly valued for purposes of self-defense."[6] The question is whether the federal laws at issue violate this fundamental right.

I

Our court is not the first to hold that the Second Amendment does not require us to strike down the federal laws governing the interstate sales of handguns. The Second Circuit held that 18 U.S.C. § 922(a)(3) did not violate the Second Amendment rights of a person convicted for transporting into his state of residence a firearm acquired in another state in violation of § 922(a)(3).[7] That court reasoned that "[b]ecause § 922(a)(3) only minimally affects the ability to acquire a firearm, it is not subject to any form of heightened scrutiny."[8] The Second Circuit reasoned that a "law that regulates the availability of firearms is not a substantial burden on the right to keep and bear arms if adequate alternatives remain for law-abiding citizens to acquire a firearm for self-defense."[9] Adequate alternative means remain, the court concluded, because the

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[6] *McDonald*, 561 U.S. at 770.

[7] *United States v. Decastro*, 682 F.3d 160, 161 (2d Cir. 2012).

[8] *Id.* at 164; *see also id.* at 168 (citing *Nordyke v. King*, 644 F.3d 776, 786 (9th Cir. 2011), *aff'd* 681 F.3d 1041 (9th Cir. 2012) (en banc); *Heller v. District of Columbia*, 670 F.3d 1244, 1253 (D.C. Cir. 2011); *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011); *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011); *United States v. Marzzarella*, 614 F.3d 85, 94-95 (3d Cir. 2010)).

[9] *Id.* at 168.

law "does nothing to keep someone from purchasing a firearm in her home state, which is presumptively the most convenient place to buy anything," and the law "does not bar purchases from an out-of-state supplier if the gun is first transferred to a licensed gun dealer in the purchaser's home state."[10] The Eleventh Circuit has held that § 922(a)(5), which prohibits the transfer of a firearm by an unlicensed person to another unlicensed person who resides in a different state, "qualifies as the kind of 'presumptively lawful regulatory measure[ ]' described in *Heller*."[11]

II

The Government contends that the laws and regulations under consideration are "presumptively lawful" because they are "longstanding prohibitions" that impose "conditions and qualifications on the commercial sale of arms," within the contemplation of the Supreme Court's decision in *District of Columbia v. Heller*.[12] This argument is not well-taken.

The Government asserts that between 1909 and 1939, at least fifteen states had enacted laws restricting the acquisition, or carrying of one or more types of firearms to state residents.[13] The Government

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[10] *Id.*

[11] *United States v. Focia*, 869 F.3d 1269, 1286 (11th Cir. 2017) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 627 & n.26 (2008)).

[12] *See* 554 U.S. at 626-27, 627 n.26.

[13] *See infra* note 26.

contends that evidence of "founding-era thinking" is not required. This court said in *National Rifle Association of America, Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives* (*NRA*), that "a regulation can be deemed 'longstanding' even if it cannot boast a precise founding-era analogue."[14] In that case, our court nevertheless extensively considered founding-era "[a]ttitudes" regarding gun laws and regulations.[15] This court observed in *NRA* that "[s]cholars have proposed that at the time of the founding," there was an implication that only "the virtuous citizen" had the right to possess and use arms and that criminals, children and the mentally ill were "deemed incapable of virtue,"[16] which was relevant to whether the federal law at issue in that case, prohibiting the sale of a handgun to someone under the age of 21, was constitutional.

More importantly, in *Heller*, the Supreme Court exhaustively canvassed laws extant at the time of, and predating, the Bill of Rights in determining the meaning of the Second Amendment,[17] though it also considered pre-Civil War commentators and case law,[18] post-Civil War legislation,[19] post-Civil War commentators,[20]

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[14] 700 F.3d 185, 196 (5th Cir. 2012).

[15] *Id.* at 200-02.

[16] *Id.* at 201 (quoting Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations and Criminological Considerations*, 60 HASTINGS L.J. 1339, 1359-60 (2009)).

[17] *Heller*, 554 U.S. at 580-605.

[18] *Id.* at 605-14.

[19] *Id.* at 614-16.

[20] *Id.* at 616-19.

and engaged in a limited analysis of some of the restrictions recognized in an era spanning from "Blackstone through the 19th Century."[21] The Government asserts that in *Heller*, the Supreme Court described "prohibitions on the possession of firearms by felons" as "longstanding prohibitions" that are "presumptively lawful,"[22] though the D.C. Circuit subsequently concluded that "states did not start to enact [prohibitions on the possession of firearms by felons to which the Supreme Court referred in *Heller*] until the early 20th century."[23] But, as this court recognized in *NRA*, there are indications that in the founding era, it was generally thought that felons and the mentally ill should and could be prohibited from bearing arms.[24]

In the present case, the Government has offered no evidence that an in-state sales requirement has a founding-era analogue or was historically understood to be within the ambit of the permissible regulation of commercial sales of firearms at the time the Bill of Rights was ratified. However, even if it is appropriate to consider only 20th century laws, an in-state sales requirement was not a "historical tradition"[25] or

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[21] *Id.* at 626-28; *see also id.* at 626 (citing THE AMERICAN STUDENTS' BLACKSTONE 84 n. 11 (G. Chase ed. 1884)).

[22] *Id.* at 626-27, 627 n.26.

[23] *Heller v. District of Columbia*, 670 F.3d 1244, 1253 (D.C. Cir. 2011).

[24] *Nat'l Rifle Assoc. of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 200-202 (5th Cir. 2012).

[25] *Heller*, 554 U.S. at 627.

commonly found in the laws of the United States in that era.

The Government has identified sixteen statutes in fifteen states dating from the early 20th century regarding the licensing or permitting of firearms or the carrying of concealed firearms.[26] But none of these laws prohibited a citizen of a state from purchasing a firearm, or a specific type of firearm, in another state. The only state law cited by the Government that addresses the purchase of a firearm in another state is a 1918 Montana statute that prohibits the purchase, borrowing, or other acquisition of a firearm outside of that state without first obtaining a permit in the county of

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[26] Act of Apr. 6, 1936, No. 82, §§ 1, 5, 7, 1936 ALA. LAWS 51, 51-52, *amended by* Act of Mar. 2, 1937, No. 190, § 1, 1937 ALA. LAWS 223, 223 (Alabama in 1937); Act of March 19, 1923 §§ 1, 3, 1923 ARK. ACTS 379, 379-80 (Arkansas in 1923); Act of Aug. 12, 1910, No. 432, 1910 GA. LAWS 134 (Georgia in 1910); Act of July 11, 1919, § 4, 1919 ILL. LAWS 431, 432 (Illinois in 1919); Act of Feb. 21, 1935, ch. 63, §§ 1, 3, 5, 1935 IND. LAWS 159, 159-61 (Indiana in 1935); Act of Feb. 25, 1939, ch. 14, 1939 ME. ACTS 53 (Maine in 1939); Act of May 29, 1922, ch. 485, § 9, 1922 MASS. ACTS 560, 563 (Massachusetts in 1922); Act of June 2, 1927, ch. 372, §§ 2, 6, 1927 MICH. ACTS 887, 887-89 (Michigan in 1927); Act of April 7, 1921, § 2, 1921 MO. LAWS 692 (Missouri in 1921); Act of Feb. 20, 1918, ch. 2, §§ 1-3, 8, 1918 MONT. LAWS 6, 6-9 (Montana in 1918); Act of March 3, 1919, ch. 74, § 5, 1919 MONT. ACTS 147, 148 (Montana in 1919); Act of March 11, 1924, ch. 137, §§ 1-2, 1924 N.J. ACTS 305, 305-06 (New Jersey in 1924); Act of May 21, 1913, ch. 608, § 1, 1913 N.Y. LAWS 1627, 1628-29 (New York in 1913); Act of March 10, 1919, ch. 197, §§ 1-2, 1919 N.C. LAWS 397, 397-98 (North Carolina in 1919); Act of Feb. 26, 1913, ch. 256, § 1, 1913 OR. LAWS 497 (Oregon in 1913); Act of May 2, 1910, ch. 591, § 1, 1910 R.I. ACTS 156, 156-57 (Rhode Island in 1910); Act of Feb. 16, 1909, ch. 51, 1909 W. VA. ACTS 394, 395-96 (West Virginia in 1909).

the purchaser's or acquirer's residence.[27] Even that state law permitted a resident to purchase a firearm, including a handgun, in another state.

We acknowledged in *NRA* that courts "may rely on a wide array of interpretive materials to conduct a historical analysis,"[28] but in the present case, the Government has offered no evidence from interpretive materials that an in-state sales requirement was considered lawful under the Second Amendment as that amendment has historically been understood. In the absence of such authority, the in-state sales requirement is not among the "longstanding . . . laws imposing conditions and qualifications on the commercial sale of arms"[29] that presumptively do not violate the Second Amendment.

III

There is binding precedent in our circuit regarding the analysis to be undertaken in Second Amendment cases. In *NRA*, our court identified "[a] two-step inquiry" employed by other courts and "adopt[ed] a version of this two-step approach."[30] We concluded "that

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[27] *See* Act of Feb. 20, 1918, ch. 2, § 3, 1918 MONT. LAWS at 6-9.

[28] *Nat'l Rifle Assoc. of Am.*, 700 F.3d at 194.

[29] *Heller*, 554 U.S. at 626-27.

[30] 700 F.3d at 194 (citing *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Heller v. District of Columbia*, 670 F.3d 1244, 1252 (D.C. Cir. 2011); *Ezell v. City of Chicago*, 651 F.3d 684, 701-04 (7th Cir. 2011); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *United States v. Reese*, 627 F.3d 792, 800-01 (10th

the first inquiry is whether the conduct at issue falls within the scope of the Second Amendment right."[31] "If the law burdens conduct that falls within the Second Amendment's scope, we then proceed to apply the appropriate level of means-ends scrutiny."[32] Some have expressed the view, however, that the latter inquiry is contrary to the Supreme Court's decisions in *Heller*[33] and *McDonald*,[34] reasoning that a balancing test is inappropriate.[35] We have applied our court's precedent.

I submit that whether the in-state sales requirement has a rational basis is not the correct standard

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Cir. 2010) *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010)).

[31] *Nat'l Rifle Assoc. of Am.*, 700 F.3d at 194.

[32] *Id.* at 195.

[33] 554 U.S. 570 (2008).

[34] 561 U.S. 742 (2010).

[35] *See, e.g.*, *Heller*, 670 F.3d at 1271 (KAVANAUGH, J., dissenting) ("In my view, *Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny. To be sure, the Court never said something as succinct as 'Courts should not apply strict or intermediate scrutiny but should instead look to text, history, and tradition to define the scope of the right and assess gun bans and regulations.' But that is the clear message I take away from the Court's holdings and reasoning in the two cases."); *Nat'l Rifle Assoc., Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 714 F.3d 334, 339 (5th Cir. 2013) (JONES, J., dissenting from denial of reh'g en banc) ("[A]s *Heller* requires, we should presuppose that the fundamental right to keep and bear arms is not itself subject to interest balancing. The right categorically exists, subject to such limitations as were present at the time of the Amendment's ratification.").

by which to measure its constitutionality. The Supreme Court made clear in *Heller* that rational-basis scrutiny is inappropriate when evaluating the constitutionality of laws that impose conditions or qualifications on the right to keep and bear arms.[36] The Court reasoned that "rational-basis scrutiny is a mode of analysis we have used when evaluating laws under constitutional commands that are themselves prohibitions on irrational laws."[37] The Court concluded that "[i]f all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect."[38] The *Heller* decision recognized that the regulation at issue was a "handgun ban [that] amounts to a prohibition of an entire class of 'arms,'"[39] and that the law "fail[ed] constitutional muster" under both the strict and intermediate standards of scrutiny.[40]

The Government contends that intermediate scrutiny, rather than strict scrutiny, applies in analyzing the in-state sales requirement because, unlike the regulation at issue in *Heller*, it is not a "ban" on the sale

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[36] *Heller*, 554 U.S. at 628 n.27.

[37] *Id.*

[38] *Id.*

[39] *Id.* at 628.

[40] *Id.* at 628-29 ("Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home 'the most preferred firearm in the nation to "keep" and use for protection of one's home and family' . . . would fail constitutional muster." (quoting *Parker v. District of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007))).

of handguns.[41] In *NRA*, we "reject[ed] the contention that every regulation impinging upon the Second Amendment right must trigger strict scrutiny" and held that the "properly tuned level of scrutiny . . . is [that which is] proportionate to the severity of the burden."[42] We also suggested that "a regulation that does not encroach on the core of the Second Amendment" may be subject only to intermediate scrutiny.[43] Conceivably, a restriction on the commercial sale of a handgun could impinge on the right to possess and bear arms to such an extent that, though not an absolute "ban" on the possession or use of a handgun, strict scrutiny would be applicable. The Government is correct that the in-state sales requirement is not a total prohibition on handgun possession and use. The in-state sales requirement does not prohibit residents of the District of Columbia from purchasing a handgun in the District or a resident of a state from buying a handgun in that state.

In assessing the impact of the federal restrictions upon the Hansons and Mance, it must be recognized that it is the *District's* restrictions that have led the lone FFL in the District to sell only handguns that are transferred from an FFL in one of the states. The fact that no handguns are available for direct purchase in the District is not a result of the in-state sales requirement or any other federal law or regulation. Nor do the

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[41] *Id.* at 628.

[42] *Nat'l Rifle Assoc. of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 198 (5th Cir. 2012).

[43] *Id.* at 195.

federal laws set or require the imposition of a transfer fee by an FFL.

The in-state sales requirement does not prevent a resident of a state or the District of Columbia from using a handgun "in defense of hearth and home."[44] Once lawfully acquired, a handgun may be used and possessed as a defensive weapon where the owner of the handgun resides.

Nevertheless, because the Supreme Court held that the law at issue in *Heller* was unconstitutional under both strict and intermediate scrutiny, it is prudent first to apply strict scrutiny to the in-state sales requirement. Since the quorum concludes that the in-state sales requirement satisfies that heightened standard, it is unnecessary to resolve whether strict scrutiny is *required.*

IV

The plaintiffs assert that the in-state sales requirement is not narrowly tailored because an exception could readily be made for those states that elect to become a point of contact for background checks. Presently, in a point-of-contact state, a state actor or agency conducts the background check at the request of an in-state FFL, and the FFL is not required to contact the NICS.[45] At least twelve states have elected to become

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[44] *Heller*, 554 U.S. at 635.

[45] 28 C.F.R. § 25.6(d).

point of contact states.[46] The FFLs contend that if a potential buyer lives in a point-of-contact state and wishes to purchase a handgun from an out-of-state FFL, that FFL should be permitted under federal law to request a background check through the point-of-contact state, and consummate the sale if the point-of-contact state of residence approves the buyer. However, this would not necessarily prevent circumvention of a point-of-contact state's firearms laws. It would not alleviate the need for the out-of-state FFL to master the laws of each point-of-contact-state into which it desired to sell handguns and to comply with them.

For example, California is a point-of-contact state, and the point of contact for background checks is the California Department of Justice (DOJ).[47] If a Texas FFL desired to sell a handgun to a California resident, and the California DOJ issued a handgun permit to that resident, then the Texas FFL would still have to ascertain and comply with other California laws. These include laws that: prohibit delivery of a handgun unless the purchaser presents documentation indicating that he or she is a California resident (the documentation includes "a utility bill from within the last three months, a residential lease, a property deed, or military permanent duty station orders indicating

[46] *See* CAL. PENAL CODE § 28220; COLO. REV. STAT. § 24-33.5-424(2); CONN. GEN. STAT. § 29-361(d)(1); HAW. REV. STAT. § 134-2; 430 ILL. COMP. STAT. 65/3.1; NEV. REV. STAT. ANN. § 202.254(3)(a); N.J. ADMIN. CODE §§ 13:54-3.12, 13:54-3.13(a)(6); OR. REV. STAT. §§ 166.412(2)(d), 166.432(1); 18 PA. CONS. STAT. ANN. §§ 6111, 6111.1; TENN. CODE ANN. §§ 38-6-109, 39-17-1316; UTAH CODE ANN. § 76-10-526(3)(a); VA. CODE ANN. § 18.2-308.2:2.

[47] CAL. PENAL CODE § 28205.

assignment within" California);[48] prohibit delivery of a handgun until a 10-day waiting period has expired;[49] require the handgun to be unloaded and securely wrapped or in a locked container at the time of delivery;[50] prohibit delivery unless a handgun safety certificate is presented;[51] and impose specific record-keeping requirements.[52] California law prohibits a dealer from delivering a handgun "unless the recipient performs a safe handling demonstration with that handgun,"[53] and the dealer must give instruction as to "how to render that handgun safe in the event of a jam."[54] The specific safe-handling demonstrations required are set forth by law; they differ, depending on the type of handgun;[55] and the firearms dealer must sign and date an

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[48] *Id.* § 26845.

[49] *Id.* §§ 26815(a); 27540(a).

[50] *Id.* §§ 26815(b); 27540(b).

[51] *Id.* §§ 26840(a); 27540(e).

[52] *Id.* § 26840 (requiring a firearms dealer to retain a photocopy of the unexpired handgun safety certificate presented by the buyer); § 26845(c) (requiring retention of a photocopy of the documentation presented as proof of compliance with the California residency requirement); § 26900 (making certain records available for inspection); § 28215 (requiring the firearms dealer to: have the purchaser and salesperson sign the record of electronic or telephonic transfer; retain the original of each such record in consecutive order; retain each such record for at least three years; permit inspection of the permanent record of the transaction by specified regulators; transmit the record of application, on the date of the application to purchase, to the California DOJ).

[53] *Id.* § 26850(a).

[54] *Id.* § 26850(c).

[55] *See id.* § 26850; § 26853 (semiautomatic pistol); § 26856 (double-action revolver); § 26859 (single-action revolver).

affidavit stating that the requirements have been satisfied and obtain the purchaser's signature on the affidavit.[56] A firearms licensee is required by California law to "post conspicuously within the licensed premises a detailed list" of fees and charges required by government agencies for processing firearms transfers and license charges.[57] Effective January 1, 2018, California law directs firearms dealers to require agents and employees who handle, sell, or deliver firearms to obtain a certificate of eligibility from the California DOJ that he or she is not prohibited by state or federal law from possessing a firearm.[58]

V

The district court's reasoning is thoughtful, and it is correct in many respects. The district court correctly recognized that "[t]he principal purpose in enacting the 1968 Gun Control Act was to curb crime by keeping 'firearms out of the hands of those not legally entitled to possess them,' "[59] and that "Congress intended to accomplish this" by precluding the crossing of a state line to purchase a handgun.[60] The district court recognized that in 1968, "an instant electronic background check system did not exist," but that the Gun Control Act was

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[56] *Id.* § 26850(d).

[57] *Id.* § 26875.

[58] *Id.* § 26915.

[59] *Mance v. Holder*, 74 F. Supp. 3d 795, 809 (N.D. Tex. 2015) (quoting *Huddleston v. United States*, 415 U.S. 814, 824 (1974)).

[60] *Id.*

subsequently amended by the Brady Act.[61] The district court found that as a result, "before an FFL may sell or deliver a firearm to a non-FFL, he must complete a criminal background check through the National Instant Criminal Background Check System ('NICS') to ensure the purchaser is legally entitled to obtain and possess the firearm"[62] and that "States may also create a Point of Contact ('POC'), who acts as a liaison to NICS, to run the background check and receive notice of anticipated firearms purchases by its citizens."[63]

The district court concluded that this system "ensures potential purchasers can legally acquire and possess a firearm under state and federal law, and those states that desire to receive notice of firearms purchased by its citizens simply establish a POC,"[64] and that these checks "identify both federal and state disabilities" in would-be purchasers.[65] This conclusion is not entirely supported by the record.

The Government presented evidence that the federal background check system does not reflect whether a person seeking to purchase a handgun has satisfied state requirements that may include training and special permits and does not reflect whether a particular type of firearm is legal in a particular state. The Government also noted that states may require additional

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[61] *Id.* (citing Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993)).

[62] *Id.* (citing 18 U.S.C. § 922(t)).

[63] *Id.*

[64] *Id*

[65] *Id.* at 810 (citing 18 U.S.C. § 922(t)).

procedures and a mandatory waiting period before a transaction may occur and that this information regarding a particular individual is not available in the databases.

But not all of the Government's arguments are well-taken. In contending that in-state background checks are superior to those conducted by FFLs in other states because the federal background check database may not include all information available to a state, the Government asserts that "states may face logistical and budgetary constraints in submitting information, and they may have privacy laws that prevent sharing of certain records," such as mental health records, and alcohol and drug use information. The Government has not explained how or why a state would be able to provide information such as mental health information for purposes of a transfer of a handgun by an in-state FFL but could not provide that information to an out-of-state FFL. Nevertheless, for the reasons set forth in the quorum's opinion, the in-state sales requirement withstands strict scrutiny.

VI

The Government adduced evidence that addresses, in part, the disparate treatment of handguns and long guns under federal laws. When Congress enacted the in-state sales requirement in 1968, statistics reflected that "handguns were used in 70 percent of the murders committed with firearms,"[66] and that

[66] S. REP. NO. 89-1866, at 5 (1966).

handguns were used in 78 percent of the firearm-related homicides of police officers killed in the line of duty.[67] The Government also presented evidence that, according to FBI statistics, handguns were the type of weapon involved in at least 70 percent of firearm homicides from 2009 to 2013,[68] and that handguns were used in 73 percent of firearms-related felony homicides of law enforcement officials killed in the line of duty from 2004 to 2013.[69] This reflects that the type of firearm predominantly used in these crimes was a handgun, not a shotgun or rifle, and that the federal government has a compelling interest in addressing the type of weapon most frequently used to commit crimes and in seeking to ensure that state laws regulating the possession and use of that type of weapon are effective.

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[67] *See Fed. Firearms Act: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the S. Comm. On the Judiciary*, 90th Cong. 899 (1968).

[68] *See* CRIM. JUSTICE INFO. SERVS. DIV., FBI, CRIME IN THE UNITED STATES 2013: EXPANDED HOMICIDE DATA, tbl. 8, https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/offenses-known-to-law-enforcement/expanded-homicide/expanded_homicide_data_table_8_murder_victims_by_weapon_2009-2013.xls [https://perma.cc/S7MA-VH8H] (last visited Nov. 29, 2017).

[69] *See* CRIM. JUSTICE INFO. SERVS. DIV., FBI, 2013 LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED, tbl. 27, https://ucr.fbi.gov/leoka/2013/tables/table_27_leos_fk_type_of_weapon_2004-2013.xls [https://perma.cc/8V2C-FPZ7] (last visited Nov. 29, 2017).

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15-10311

FREDRIC RUSSELL MANCE, JR.; TRACEY AMBEAU HANSON; ANDREW HANSON; CITIZENS COMMITTEE FOR THE RIGHT TO KEEP AND BEAR ARMS,

Plaintiffs-Appellees,

v.

JEFFERSON B. SESSIONS, III, U.S. ATTORNEY GENERAL; THOMAS E. BRANDON, Acting Director, Bureau of Alcohol, Tobacco, Firearms and Explosives,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Texas

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(Filed Jan. 19, 2018)

Before PRADO, OWEN, and HAYNES, Circuit Judges.

PRISCILLA R. OWEN, Circuit Judge:

Federal laws that include 18 U.S.C. §§ 922(a)(3) and 922(b)(3), and 27 C.F.R. § 478.99(a), generally prohibit the direct sale of a handgun by a federally

licensed firearms dealer (FFL) to a person who is not a resident of the state in which the FFL is located. In a suit brought by Fredric Russell Mance, Jr. and others, the federal district court enjoined the enforcement of these laws, concluding that they violate the Second Amendment and the Due Process Clause of the Fifth Amendment.[1] We reverse the district court's judgment and vacate the injunction.

I

Andrew and Tracy Hanson, who are residents of the District of Columbia and members of the Citizens Committee for the Right to Keep and Bear Arms (the Committee), travelled to Texas desiring to purchase two handguns from Mance, an FFL in Arlington, Texas, who is also a member of the Committee. It is undisputed that the Hansons would be eligible under the laws of Texas and the District of Columbia to own and possess the handguns that they selected from Mance's inventory. However, federal law prevents Mance from selling a handgun directly to the Hansons since they are not residents of Texas. Federal law would have permitted Mance to transfer the handguns to the FFL in the District of Columbia so that the Hanson's [sic] could purchase the firearms from that FFL. The federal laws do not impose or even allude to a fee if such a transfer occurs, but the FFL in the District of Columbia would have charged the Hansons a transfer fee of

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[1] *Mance v. Holder*, 74 F.Supp.3d 795, 813-14 (N.D. Tex. 2015).

$125 for each handgun, above and beyond the purchase price. The Hansons declined to pursue this method of obtaining the firearms because they objected to the additional fees and to shipping charges. They could not purchase the handguns of their choosing from the sole FFL in the District of Columbia because that dealer has no inventory and only sells firearms transferred from FFLs outside of the District.

Mance, the Hansons, and the Committee initiated suit in Texas challenging the federal laws that restrict the sale of handguns by an FFL to residents of the state in which the FFL is located, asserting that the federal laws contravene the Second and Fifth Amendments. The plaintiffs sought an injunction prohibiting the enforcement of these laws. The district court denied the Government's Motion to Dismiss for Lack of Standing, granted the plaintiffs' motion for summary judgment, and denied the Government's competing motion for summary judgment. The district court enjoined the enforcement of the challenged laws, concluding that they violated both the Second Amendment and the equal protection component of the Fifth Amendment's Due Process Clause. The Government has appealed.

II

Because the Hansons are not Texas residents, Mance, a Texas FFL, cannot lawfully sell handguns to them. Such a transaction is prohibited by 18 U.S.C. § 922(a)(3) and (b)(3), which provides:

(a) It shall be unlawful— . . .

(3) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector to transport into or receive in the State where he resides (or if the person is a corporation or other business entity, the State where it maintains a place of business) any firearm purchased or otherwise obtained by such person outside that State, except that this paragraph (A) shall not preclude any person who lawfully acquires a firearm by bequest or intestate succession in a State other than his State of residence from transporting the firearm into or receiving it in that State, if it is lawful for such person to purchase or possess such firearm in that State, (B) shall not apply to the transportation or receipt of a firearm obtained in conformity with subsection (b)(3) of this section, and (C) shall not apply to the transportation of any firearm acquired in any State prior to the effective date of this chapter. . . .

* * *

(b) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver— . . .

(3) any firearm to any person who the licensee knows or has reasonable cause to believe does not reside in (or if the person is a corporation or other business entity, does not maintain a place of business in) the State in which the licensee's place of business is located,

> except that this paragraph (A) shall not apply to the sale or delivery of any rifle or shotgun to a resident of a State other than a State in which the licensee's place of business is located if the transferee meets in person with the transferor to accomplish the transfer, and the sale, delivery, and receipt fully comply with the legal conditions of sale in both such States (and any licensed manufacturer, importer or dealer shall be presumed, for purposes of this subparagraph, in the absence of evidence to the contrary, to have had actual knowledge of the State laws and published ordinances of both States), and (B) shall not apply to the loan or rental of a firearm to any person for temporary use for lawful sporting purposes. . . .[2]

Regulations promulgated to implement these prohibitions are set forth in 27 C.F.R. § 478.99(a), which provides:

> (a) Interstate sales or deliveries. A licensed importer, licensed manufacturer, licensed dealer, or licensed collector shall not sell or deliver any firearm to any person not licensed under this part and who the licensee knows or has reasonable cause to believe does not reside in (or if a corporation or other business entity, does not maintain a place of business in) the State in which the licensee's place of business or activity is located: *Provided*, That the foregoing provisions of this paragraph (1) shall not apply to the sale or

[2] 18 U.S.C. § 922(a)(3), (b)(3).

> delivery of a rifle or shotgun (curio or relic, in the case of a licensed collector) to a resident of a State other than the State in which the licensee's place of business or collection premises is located if the requirements of § 478.96(c) are fully met, and (2) shall not apply to the loan or rental of a firearm to any person for temporary use for lawful sporting purposes (see § 478.97).[3]

The question is whether these federal laws violate the Second Amendment.

III

The Second Amendment provides: "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."[4] The United States Supreme Court held in *District of Columbia v. Heller* that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation."[5] After extensive analysis of the historical context of the Second Amendment, the Court concluded "that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right" to keep and bear arms.[6] The Court reasoned that "self-defense . . .

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[3] 27 C.F.R. § 478.99.

[4] U.S. CONST. amend. II.

[5] 554 U.S. 570, 592 (2008)

[6] *Id.* (emphasis in original).

was the *central component* of the right itself."[7] With regard to handguns, the Court observed that, "the American people have considered the handgun to be the quintessential self-defense weapon."[8] In contemplating why a citizen might prefer a handgun over long guns for home defense, the Court held, "[w]hatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid."[9]

The Supreme Court has recognized, however, that "[l]ike most rights, the right secured by the Second Amendment is not unlimited."[10] The Court explained in *Heller* that:

> [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.[11]

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[7] *Id.* at 599 (emphasis in original).

[8] *Id.* at 629.

[9] *Id.*

[10] *Id.* at 626.

[11] *Id.* at 626-27; *see also McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (plurality opinion) ("We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill,' 'laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the

The Court added: "We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive."[12]

In *National Rifle Association of America, Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, our court was called upon to apply *Heller* in determining whether federal statutes[13] that prohibit FFLs from selling handguns to a person under the age of 21 were constitutional in light of the Second Amendment.[14] We first canvased the analytical frameworks that other Circuit Courts of Appeals had utilized in Second Amendment cases, identified "[a] two-step inquiry" employed by some of those courts, and "adopt[ed] a version of this two-step approach."[15] We concluded "that the first inquiry is whether the conduct at issue falls within the scope of the Second Amendment right."[16] That undertaking, we said, entails "look[ing] to whether the law harmonizes with the historical traditions associated with the Second Amendment guarantee."[17]

The district court in the present case undertook such an analysis and determined that "the earliest

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commercial sale of arms.' We repeat those assurances here." (citation omitted)).

[12] *Heller*, 554 U.S. at 627 n.26.

[13] 18 U.S.C. § 922(b)(1) and (c)(1).

[14] 700 F.3d 185, 192 (5th Cir. 2012).

[15] *Id.* at 194.

[16] *Id.*

[17] *Id.*

known state residency restrictions on the purchase or possession of firearms" occurred in 1909.[18] The district court concluded that "these early twentieth century state residency restrictions do not date back quite far enough to be considered longstanding."[19] Because we conclude that the laws and regulations at issue withstand strict scrutiny, we will assume, without deciding, that they are not "longstanding regulatory measures"[20] and are not "presumptively lawful regulatory measures."[21] We will also assume, without deciding, that the strict, rather than intermediate, standard of scrutiny is applicable.

IV

The Supreme Court has said in the First Amendment context that to withstand strict scrutiny, a regulation must be "justified by a compelling government interest" and must be "narrowly drawn to serve that interest."[22] When strict scrutiny is applicable, the Government "must specifically identify an 'actual problem' in need of solving," and the "curtailment of [the constitutional right] must be actually necessary to the solution."[23] Though this is "a demanding standard," and

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[18] *Mance v. Holder*, 74 F.Supp.3d 795, 805 (N.D. Tex. 2015).

[19] *Id.*

[20] *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (plurality opinion).

[21] *Dist. of Columbia v. Heller*, 554 U.S. 570, 627 n.26 (2008).

[22] *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011).

[23] *Id.* (quoting *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 822 (2000)).

"'[i]t is rare that a regulation restricting speech because of its content will ever be permissible,'"[24] the Supreme Court has observed that "those cases do arise,"[25] and has said that "we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'"[26]

The district court accepted that when Congress enacted the Omnibus Crime Control and Safe Streets Act of 1968[27] and the Gun Control Act of 1968,[28] there was an actual problem in need of solving.[29] The findings and declarations set forth in the Crime Control Act reflect that Congress was of the view that "the existing Federal controls over [widespread traffic in firearms] do not adequately enable the States to control this traffic within their own borders through the exercise of their police power."[30] Congress had concluded that there was a "serious problem of individuals going across State lines to procure firearms which they could not lawfully obtain or possess in their own State," and these interstate purchases were accomplished "without the knowledge of . . . local

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[24] *Id.* (quoting *Playboy*, 529 U.S. at 818).

[25] *Williams-Yulee v. Florida Bar*, 135 S.Ct. 1656, 1666 (2015).

[26] *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (MARSHALL, J., concurring in the judgment)).

[27] Pub. L. No. 90-351, 82 Stat. 197 (1968).

[28] Pub. L. No. 90-618, 82 Stat. 1213 (1968).

[29] *See Mance v. Holder*, 74 F.Supp.3d 795, 808-09 (N.D. Tex. 2015). ("First, the Court agrees the Government's interest in preventing handgun crime is a compelling interest.").

[30] Crime Control Act § 901(a)(1), 82 Stat. at 225 (1968).

authorities."[31] Congress found that individuals circumventing the laws of the state in which they resided included "large numbers of criminals and juveniles."[32] Congress had additionally concluded "that the acquisition on a mail-order basis of firearms other than a rifle or shotgun by nonlicensed individuals, from a place other than their State of residence, has materially tended to thwart the effectiveness of State laws and regulations, and local ordinances. . . ."[33] Similarly, Congress found:

> that the sale or other disposition of concealable weapons by importers, manufacturers, and dealers holding Federal licenses, to nonresidents of the State in which the licensees' places of business are located, has tended to make ineffective the laws, regulations, and ordinances in the several States and local jurisdictions regarding such firearms. . . .[34]

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[31] S. REP. NO. 89-1866 (1966), at 19.

[32] S. REP. NO. 90-1097 (1968), at 80; *see also* Crime Control Act § 901(a)(2), 82 Stat. at 225 (1968) ("The Congress hereby finds and declares . . . that the ease with which any person can acquire firearms other than a rifle or shotgun (including criminals, juveniles without the knowledge or consent of their parents or guardians; narcotics addicts, mental defectives, armed groups who would supplant the functions of duly constituted public authorities, and others whose possession of such weapons is similarly contrary to the public interest) is a significant factor in the prevalence of lawlessness and violent crime in the United States. . . .").

[33] Crime Control Act § 901(a)(4), 82 Stat. at 225 (1968).

[34] *Id.* § 901(a)(5), 82 Stat. at 225 (1968).

The solution Congress crafted included the in-state sales requirement.

However, current burdens on constitutional rights "must be justified by current needs."[35] The overarching question in a strict-scrutiny analysis of the laws and regulations at issue, it seems to us, is whether an in-state sales requirement remains justified by a compelling government interest and is narrowly drawn to serve that interest after the Gun Control Act was amended by the Brady Act[36] and in light of federal regulations promulgated after the in-state sales requirement was enacted.[37]

All concede that there is a compelling government interest in preventing circumvention of the handgun laws of various states. The plaintiffs recognize that current federal laws, including the Brady Act, do not require all information regarding compliance with the various state and local gun control laws to be included in databases accessible by FFLs nationwide. The plaintiffs maintain, however, that the in-state sales requirement is not narrowly tailored because the states could be compelled by federal law to provide all necessary information. We conclude that the Government has demonstrated that the in-state sales requirement is narrowly tailored, notwithstanding the information

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[35] *Shelby Cty. v. Holder*, 133 S.Ct. 2612, 2619 (2013) (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)).

[36] Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993).

[37] *See* 27 C.F.R. § 478.24.

that is available or could, at least theoretically be made available, to all FFLs under federal laws and regulations.

There are more than 123,000 FFLs nationwide.[38] It is unrealistic to expect that each of them can become, and remain, knowledgeable about the handgun laws of the 50 states and the District of Columbia, and the local laws within the 50 states. The district court relied on 27 C.F.R. § 478.24[39] to support the conclusion that

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[38] U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL EVALUATION AND INSPECTIONS DIVISION, REVIEW OF ATF'S FEDERAL FIREARMS LICENSEE INSPECTION PROGRAM at i (2013), *available at* https://oig.justice.gov/reports/2013/e1305.pdf.

[39] The text of 27 C.F.R. § 478.24 provides:

> (a) The Director shall annually revise and furnish Federal firearms licensees with a compilation of State laws and published ordinances which are relevant to the enforcement of this part. The Director annually revises the compilation and publishes it as "State Laws and Published Ordinances—Firearms" which is furnished free of charge to licensees under this part. Where the compilation has previously been furnished to licensees, the Director need only furnish amendments of the relevant laws and ordinances to such licensees.
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> (b) "State Laws and Published Ordinances—Firearms" is incorporated by reference in this part. It is ATF Publication 5300.5, revised yearly. The current edition is available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402. It is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030, or go to: http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_

FFLs can "ensure that their firearms transactions comport with state and local law."[40] But the compilation of state gun laws by the Director of the Bureau of Alcohol, Tobacco, Firearms, and Explosives is more than 500 pages long, and it provides the full text of those laws.[41] FFLs are not engaged in the practice of law, and we do not expect even an attorney in one state to master of [sic] the laws of 49 other states in a particular area. Additionally, the compilation on which the district court relied is only updated annually.[42]

The laws of the various states differ as to who may lawfully possess a firearm. All but one state (Vermont) prohibits possession of a firearm by a felon, but the definitions of "felony" differ. Similarly, restrictions based on mental illness vary. Some states prohibit the purchase of a firearm by drug abusers,[43] and some restrict purchases by those who have abused alcohol.[44]

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locations.html. This incorporation by reference was approved by the Director of the Federal Register.

[40] *Mance v. Holder*, 74 F.Supp.3d 795, 810 n.11 (N.D. Tex. 2015).

[41] *See generally State Laws and Published Ordinances—Firearms* (32nd Edition), BUREAU OF ALCOHOL, TOBACCO, FIREARMS, & EXPLOSIVES (Nov. 22, 2017), https://www.atf.gov/firearms/state-laws-and-published-ordinances-firearms-32nd-edition [https://perma.cc/KNU2-FYHS] (last visited Nov. 29, 2017).

[42] *See* 27 C.F.R. § 478.24(a).

[43] *See*, *e.g.*, MD. CODE ANN., Pub. Safety §§ 5-133(b)(5); MO. REV. STAT. § 571.010.

[44] *See*, *e.g.*, MD. CODE ANN., Pub. Safety §§ 5-133(b)(4); TENN. CODE § 39-17-1316.

It is reasonable, however, for the federal government to expect that an FFL located in a state can master and remain current on the firearm laws of that state. The in-state sales requirement is narrowly tailored to assure that an FFL who actually makes a sale of a handgun to someone other than another FFL can reasonably be expected to know and comply with the laws of the state in which the sale occurs.

The plaintiffs recognize that the Government has an interest in preventing circumvention of the states' varying firearms laws, but they assert that federal law could require all FFLs to comply with the guns laws of the state in which a buyer of a handgun resides, just as federal law requires FFLs to comply with state and local laws throughout the United States when selling long arms.[45] They assert, "[i]f Mance can follow an out-of-state rifle law, he can follow an out-of-state handgun law."

However, at least some states have regulated the sale of handguns more extensively than they have regulated the sale of long guns. For example, the Government has identified state laws that require a

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[45] *See* 18 U.S.C. § 922(b)(3)(A) (providing that an FFL may sell or deliver "any rifle or shotgun to a resident of a State other than a State in which the licensee's place of business is located if the transferee meets in person with the transferor to accomplish the transfer, and the sale, delivery, and receipt fully comply with the legal conditions of sale in both such States (and any licensed manufacturer, importer or dealer shall be presumed, for purposes of this subparagraph, in the absence of evidence to the contrary, to have had actual knowledge of the State laws and published ordinances of both States) . . . ").

mandatory waiting period for the purchase of handguns, but not for long guns,[46] and state laws that limit the number of handgun purchases, but not long gun purchases, to one per month.[47]

But there is another reason that the plaintiffs' reliance on the disparate treatment federal law accords handguns and long guns does not carry the day. In the First Amendment context, the Supreme Court has recognized in response to an "underinclusivity" argument that "[a] State need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns."[48] The Court observed, "[w]e have accordingly upheld laws—even under strict scrutiny—that conceivably could have restricted even greater amounts of speech in service of their stated interests."[49] In *Williams-Yulee v. Florida Bar*, the Court held that a Florida statute prohibiting judges and judicial candidates from personally soliciting campaign funds[50] survived strict scrutiny even though Florida law permitted "a judge's campaign committee to solicit money, which arguably reduces public confidence in

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[46] *See*, *e.g.*, FLA. CONST. art. I, § 8(b); FLA. STAT. § 790.0655(1); MD. CODE ANN., Pub. Safety §§ 5-101(p), 5-123; WIS. STAT. § 175.35(2)(d).

[47] *See*, *e.g.*, CAL. PENAL CODE §§ 27535, 27540(f); MD. CODE ANN., Pub. Safety §§ 5-128(b), 5-129; N.J. STAT. ANN. §§ 2C:58-2(a)(7), 2C:58-3(i), 2C:58-3.4.

[48] *Williams-Yulee v. Florida Bar*, 135 S.Ct. 1656, 1668 (2015).

[49] *Id.*

[50] *Id.* at 1663.

the integrity of the judiciary just as much as a judge's personal solicitation."[51]

With regard to the contention that the in-state sales requirement is unconstitutional as applied to Mance and the Hansons, the plaintiffs assert that the District of Columbia requires police pre-approval of any handgun transfer, citing D.C. Code § 7-2502.06(a), so that an FFL in another state would not have to become acquainted with District of Columbia laws because it could rely on a permit issued by police in the District of Columbia. The obvious flaw in this argument is that an FFL in a state would have to ascertain that all that was required under the laws of the District of Columbia was such a permit. There is no logical basis for requiring FFLs across the country to know the gun laws of the District of Columbia but not the laws of the 50 States.

In resolving an as-applied challenge, we consider only whether the rule advances government interests in the aggregate and not whether the rule advances government interests in the individual case before us.[52]

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[51] *Id.* at 1668.

[52] *See*, *e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 801 (1989) (holding that the validity of a provision challenged on an as-applied basis "depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case"); *United States v. Edge Broad. Co.*, 509 U.S. 418, 431, (1993) (noting that the as-applied inquiry focuses on the "general circumstances" of a litigant's acts and does not require proof that "the state interests supporting the rule actually were advanced by applying the rule" in the litigant's case); *see also Ohralik v.*

The "overall problem the government seeks to correct" with the in-state sales requirement is the circumvention of the laws of a state in which a person desiring to obtain a handgun resides that impose restrictions more stringent than those of some other states.[53] We cannot look only to Texas or District of Columbia law; we must ask whether the federal regulation advances the Government's interests in the aggregate. It does. The in-state sales requirement is not unconstitutional as applied to Mance and the Hansons.

V

The district court held that the in-state sales requirement violated the equal protection guarantee in the Due Process clause of the Fifth Amendment. The court reasoned that "the federal law not only creates a discriminatory regime based on residency, but it also involves access to the constitutional guarantee to keep and bear arms."[54]

Ohio State Bar Ass'n, 436 U.S. 447, 463-64 (1978) (rejecting an as-applied challenge to a state law regulating solicitation by attorneys and rejecting the argument that "nothing less than actual proved harm to the solicited individual would be a sufficiently important state interest to justify disciplining the attorney who solicits employment in person for pecuniary gain").

[53] *See* Crime Control Act § 901(a)(5), 82 Stat. at 225 (1968) ("The Congress hereby finds and declares . . . that the sale or other disposition of concealable weapons . . . to nonresidents . . . has tended to make ineffective the laws, regulations, and ordinances in the several States and local jurisdictions.").

[54] *Mance v. Holder*, 74 F.Supp.3d 795, 814 (N.D. Tex. 2015) (emphasis omitted).

To succeed on an equal protection claim under the Due Process Clause of the Fifth Amendment, a plaintiff is required to "show that two or more classifications of similarly situated persons [are] treated differently."[55] If we determine that the classification "impermissibly interferes with the exercise of a fundamental right or operates to the peculiar advantage of a suspect class," we subject the classification to strict scrutiny.[56] Otherwise, we will uphold the classification if it is "rationally related to a legitimate state interest."[57]

The in-state sales requirement does not discriminate based on residency. So we do not subject it to any scrutiny—strict or otherwise—under the equal protection component of the Due Process Clause. The cases on which the district court relied in concluding that the federal laws at issue "impinge[] on residency"[58] involved *state* laws that granted benefits to state residents.[59] The in-state sales requirement does not favor or disfavor residents of any particular state.

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[55] *Gallegos-Hernandez v. United States*, 688 F.3d 190, 195 (5th Cir. 2012) (per curiam).

[56] *NRA v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 211-212 (5th Cir. 2012) (quoting *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976) (per curiam)).

[57] *Id.* at 212.

[58] *Mance*, 74 F.Supp.3d at 814.

[59] *See id.* (citing *Attorney Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 899 (1986) (holding unconstitutional a preference in state civil service employment opportunities for veterans who were residents when they entered military service); *Mem'l Hosp. v. Maricopa Cty.*, 415 U.S. 250, 254-64 (1974) (holding unconstitutional a state law establishing in-state residency of a fixed duration as a prerequisite to receiving free, non-emergency medical care)).

Rather, it imposes the same restrictions on sellers and purchasers of firearms in each state and the District of Columbia.

* * *

We REVERSE the district court's judgment and VACATE the order granting injunctive relief.

PRISCILLA R. OWEN, Circuit Judge, concurring:

I write separately to provide additional context and explication.

I

The Government contends that the laws and regulations under consideration are "presumptively lawful" because they are "longstanding prohibitions" that impose "conditions and qualifications on the commercial sale of arms," within the contemplation of the Supreme Court's decision in *District of Columbia v. Heller*.[1] This argument is not well-taken.

The Government asserts that between 1909 and 1939, at least fifteen states had enacted laws restricting the acquisition, or carrying of one or more types of firearms to state residents.[2] The Government contends that evidence of "founding-era thinking" is not required. This court said in *National Rifle Association*

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[1] 554 U.S. 570, 626-27, 627 n.26 (2008).

[2] *See infra* note 15.

of America, Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives (*NRA*), that "a regulation can be deemed 'longstanding' even if it cannot boast a precise founding-era analogue."[3] In that case, our court nevertheless extensively considered founding-era "[a]ttitudes" regarding gun laws and regulations.[4] This court observed in *NRA* that "[s]cholars have proposed that at the time of the founding," there was an implication that only "'the virtuous citizen'" had the right to possess and use arms and that criminals, children and the mentally ill were "'deemed incapable of virtue,'"[5] which was relevant to whether the federal law at issue in that case, prohibiting the sale of a handgun to someone under the age of 21, was constitutional.

More importantly, in *Heller*, the Supreme Court exhaustively canvassed laws extant at the time of, and predating, the Bill of Rights in determining the meaning of the Second Amendment,[6] though it also considered pre-Civil War commentators and case law,[7] post-Civil War legislation,[8] post-Civil War commentators,[9] and a limited analysis of some of the restrictions recognized in an era spanning from "Blackstone

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[3] 700 F.3d 185, 196 (5th Cir. 2012).

[4] *Id.* at 200-202.

[5] *Id.* at 201 (quoting Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations and Criminological Considerations*, 60 HASTINGS L.J. 1339, 1359-60 (2009)).

[6] *Dist. of Columbia v. Heller*, 554 U.S. 570, 580-605 (2008).

[7] *Id.* at 605-614.

[8] *Id.* at 614-616.

[9] *Id.* at 616-619.

through the 19th Century."[10] The Government asserts that in *Heller*, the Supreme Court described "prohibitions on the possession of firearms by felons" as "longstanding prohibitions" that are "presumptively lawful,"[11] though the District of Columbia Circuit subsequently concluded that "states did not start to enact [prohibitions on the possession of firearms by felons to which the Supreme Court referred in *Heller*] until the early 20th century."[12] But, as this court recognized in *NRA*, there are indications that in the founding era, it was generally thought that felons and the mentally ill should and could be prohibited from bearing arms.[13]

In the present case, the Government has offered no evidence that an in-state sales requirement has a founding-era analogue or was historically understood to be within the ambit of the permissible regulation of commercial sales of firearms at the time the Bill of Rights was ratified. However, even if it is appropriate to consider only 20th century laws, an in-state sales requirement was not a "historical tradition"[14] or commonly found in the laws of the United States in that era.

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[10] *Id.* at 626-628; *see also id.* at 626 (citing THE AMERICAN STUDENTS' BLACKSTONE 84 n. 11 (G. Chase ed. 1884)).

[11] *Id.* at 626-27, 627 n.26.

[12] *Heller v. Dist. of Columbia*, 670 F.3d 1244, 1253 (D.C. Cir. 2011).

[13] *Nat'l Rifle Assoc. of Amer., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 200-202 (5th Cir. 2012).

[14] *Heller*, 554 U.S. at 627.

The Government has identified sixteen statutes in fifteen states dating from the early 20th century regarding the licensing or permitting of firearms or the carrying of concealed firearms.[15] But none of these laws prohibited a citizen of a state from purchasing a firearm, or a specific type of firearm, in another state. The only state law cited by the Government that addresses the purchase of a firearm in another state is a 1918 Montana statute that prohibits the purchase, borrowing, or other acquisition of a firearm outside of that state without first obtaining a permit in the county of the purchaser's or acquirer's residence.[16] Even that

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[15] Act of Apr. 6, 1936, No. 82, §§ 1, 5, 7, 1936 ALA. LAWS 51, 51-52, *amended by* Act of Mar. 2, 1937, No. 190, § 1, 1937 ALA. LAWS 223, 223 (Alabama in 1937); Act of March 19, 1923 §§ 1, 3, 1923 ARK. ACTS 379, 379-80 (Arkansas in 1923); Act of Aug. 12, 1910, No. 432, 1910 GA. LAWS 134 (Georgia in 1910); Act of July 11, 1919, § 4, 1919 ILL. LAWS 431, 432 (Illinois in 1919); Act of Feb. 21, 1935, ch. 63, §§ 1, 3, 5, 1935 IND. LAWS 159, 159-61 (Indiana in 1935); Act of Feb. 25, 1939, ch. 14, 1939 ME. ACTS 53 (Maine in 1939); Act of May 29, 1922, ch. 485, § 9, 1922 MASS. ACTS 560, 563 (Massachusetts in 1922); Act of June 2, 1927, ch. 372, §§ 2, 6, 1927 MICH. ACTS 887, 887-89 (Michigan in 1927); Act of April 7, 1921, § 2, 1921 MO. LAWS 692 (Missouri in 1921); Act of Feb. 20, 1918, ch. 2, §§ 1-3, 8, 1918 MONT. LAWS 6, 6-9 (Montana in 1918); Act of March 3, 1919, ch. 74, § 5, 1919 MONT. ACTS 147, 148 (Montana in 1919); Act of March 11, 1924, ch. 137, §§ 1-2, 1924 N.J. ACTS 305, 305-06 (New Jersey in 1924); Act of May 21, 1913, ch. 608, § 1, 1913 N.Y. LAWS 1627, 1628-29 (New York in 1913); Act of March 10, 1919, ch. 197, §§ 1-2, 1919 N.C. LAWS 397, 397-98 (North Carolina in 1919); Act of Feb. 26, 1913, ch. 256, § 1, 1913 OR. LAWS 497 (Oregon in 1913); Act of May 2, 1910, ch. 591, § 1, 1910 R.I. ACTS 156, 156-57 (Rhode Island in 1910); Act of Feb. 16, 1909, ch. 51, 1909 W. VA. ACTS 394, 395-96 (West Virginia in 1909).

[16] *See* Act of Feb. 20, 1918, ch. 2, § 3, 1918 MONT. LAWS at 6-9.

state law permitted a resident to purchase a firearm, including a handgun, in another state.

We acknowledged in *NRA* that courts "may rely on a wide array of interpretive materials to conduct a historical analysis,"[17] but in the present case, the Government has offered no evidence from interpretive materials that an in-state sales requirement was considered lawful under the Second Amendment as that amendment has historically been understood. In the absence of such authority, the in-state sales requirement is not among the "longstanding . . . laws imposing conditions and qualifications on the commercial sale of arms"[18] that presumptively do not violate the Second Amendment.

II

Whether the in-state sales requirement has a rational basis is not the correct standard by which to measure its constitutionality. The Supreme Court made clear in *Heller* that rational basis scrutiny is inappropriate when evaluating the constitutionality of laws that impose conditions or qualifications on the right to keep and bear arms.[19] The Court reasoned that "rational-basis scrutiny is a mode of analysis we have used when evaluating laws under constitutional commands that are themselves prohibitions on irrational

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[17] *NRA*, 700 F.3d at 194.

[18] *Heller*, 554 U.S. at 626-27.

[19] *Id.* at 628 n.27.

laws."[20] The Court concluded that "[i]f all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect."[21] The *Heller* decision recognized that the regulation at issue was as a "handgun ban [that] amounts to a prohibition of an entire class of 'arms,' "[22] and that the law "fail[ed] constitutional muster" under both the strict and intermediate standards of scrutiny.[23]

The Government contends that intermediate scrutiny, rather than strict scrutiny, applies in analyzing the in-state sales requirement because, unlike the regulation at issue in *Heller*, it is not a "ban" on the sale of handguns.[24] In *NRA*, we "reject[ed] the contention that every regulation impinging upon the Second Amendment right must trigger strict scrutiny" and held that the "properly tuned level of scrutiny . . . is [that which is] proportionate to the severity of the burden."[25] We also suggested that "a regulation that does

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[20] *Id.*

[21] *Id.*

[22] *Id.* at 628.

[23] *Id.* at 628-29 ("Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home 'the most preferred firearm in the nation to "keep" and use for protection of one's home and family' . . . would fail constitutional muster." (quoting *Parker v. Dist. of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007))).

[24] *Id.* at 628.

[25] *Nat'l Rifle Assoc. of Amer., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 198 (5th Cir. 2012).

not encroach on the core of the Second Amendment" may be subject only to intermediate scrutiny.[26] Conceivably, a restriction on the commercial sale of a handgun could impinge on the right to possess and bear arms to such an extent that, though not an absolute "ban" on the possession or use of a handgun, strict scrutiny would be applicable. The Government is correct that the in-state sales requirement is not a total prohibition on handgun possession and use. The in-state sales requirement does not prohibit residents of the District of Columbia from purchasing a handgun in the District or a resident of a state from buying a handgun in that state.

In assessing the impact of the federal restrictions upon the Hansons and Mance, it must be recognized that it is the *District's* restrictions that have led the lone FFL in the District to sell only handguns that are transferred from an FFL in one of the states. The fact that no handguns are available for direct purchase in the District is not a result of the in-state sales requirement or any other federal law or regulation. Nor do the federal laws set or require the imposition of a transfer fee by an FFL.

The in-state sales requirement does not prevent a resident of a state or the District of Columbia from using a handgun "in defense of hearth and home."[27] Once lawfully acquired, a handgun may be used and

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[26] *Id.* at 195.

[27] *Heller*, 554 U.S. at 635.

possessed as a defensive weapon where the owner of the handgun resides.

Nevertheless, because the Supreme Court held that the law at issue in *Heller* was unconstitutional under both strict and intermediate scrutiny, it is prudent first to apply strict scrutiny to the in-state sales requirement. Since the panel concludes that the in-state sales requirement satisfies that heightened standard, it is unnecessary to resolve whether strict scrutiny is *required*.

III

The district court's reasoning is thoughtful, and it is correct in many respects. The district court correctly recognized that "[t]he principal purpose in enacting the 1968 Gun Control Act was to curb crime by keeping 'firearms out of the hands of those not legally entitled to possess them,' "[28] and that "Congress intended to accomplish this" by precluding the crossing of a state line to purchase a handgun.[29] The district court recognized that in 1968, "an instant electronic background check system did not exist," but that the Gun Control Act was subsequently amended by the Brady Act.[30] The district court found that as a result, "before an FFL may sell or deliver a firearm to a non-FFL, he must complete a

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[28] *Mance v. Holder*, 74 F.Supp.3d 795, 809 (N.D. Tex. 2015) (quoting *Huddleston v. United States*, 415 U.S. 814, 824 (1974)).

[29] *Id.*

[30] *Id.* (citing Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993)).

criminal background check through the National Instant Criminal Background Check System ('NICS') to ensure the purchaser is legally entitled to obtain and possess the firearm"[31] and that "States may also create a Point of Contact ('POC'), who acts as a liaison to NICS, to run the background check and receive notice of anticipated firearms purchases by its citizens."[32]

The district court concluded that this system "ensures potential purchasers can legally acquire and possess a firearm under state and federal law, and those states that desire to receive notice of firearms purchased by its citizens simply establish a POC,"[33] and that these checks "identify both federal and state disabilities" in would-be purchasers.[34] This conclusion is not entirely supported by the record.

The Government presented evidence that the federal background check system does not reflect whether a person seeking to purchase a handgun has satisfied state requirements that may include training and special permits and does not reflect whether a particular type of firearm is legal in a particular state. The Government also noted that states may require additional procedures and a mandatory waiting period before a transaction may occur and that this

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[31] *Id.* (citing 18 U.S.C. § 922(t)).

[32] *Id.*

[33] *Id.*

[34] *Id.* at 810 (citing 18 U.S.C. § 922(t)).

information regarding a particular individual is not available in the databases.

But not all of the Government's arguments are well-taken. In contending that in-state background checks are superior to those conducted by FFLs in other states because the federal background check database may not include all information available to a state, the Government asserts that "states may face logistical and budgetary constraints in submitting information, and they may have privacy laws that prevent sharing of certain records," such as mental health records, and alcohol and drug use information. The Government has not explained how or why a state would be able to provide information such as mental health information for purposes of a transfer of a handgun by an in-state FFL but could not provide that information to an out-of-state FFL. Nevertheless, for the reasons set forth in the panel's majority opinion, the in-state sales requirement withstands strict scrutiny.

IV

The Government adduced evidence that addresses, in part, the disparate treatment of handguns and long guns under federal laws. When Congress enacted the in-state sales requirement in 1968, statistics reflected that "handguns were used in 70 percent of murders committed with firearms,"[35] and that handguns were

[35] S. REP. NO. 89-1866 (1966), at 5.

used in 78 percent of the firearm-related homicides of police officers killed in the line of duty.[36] The Government also presented evidence that, according to FBI statistics, handguns were the type of weapon involved in at least 70 percent of firearm homicides from 2009 to 2013,[37] and that handguns were used in 73 percent of firearms-related felony homicides of law enforcement officials killed in the line of duty from 2004 to 2013.[38] This reflects that the type of firearm predominantly used in these crimes was a handgun, not a shotgun or rifle, and that the federal government has a compelling interest in addressing the type of weapon most frequently used to commit crimes and in seeking to ensure that state laws regulating the possession and use of that type of weapon are effective.

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[36] *See Fed. Firearms Act: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the S. Comm. On the Judiciary*, 90th Cong. 899 (1968).

[37] *See* CRIM. JUSTICE INFO. SERVS. DIV., FBI, CRIME IN THE UNITED STATES 2013: EXPANDED HOMICIDE DATA, tbl. 8, https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/offenses-known-to-law-enforcement/expanded-homicide/expanded_homicide_data_table_8_murder_victims_by_weapon_2009-2013.xls [https://perma.cc/S7MA-VH8H] (last visited Nov. 29, 2017).

[38] *See* CRIM. JUSTICE INFO. SERVS. DIV., FBI, 2013 LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED, tbl. 27, https://ucr.fbi.gov/leoka/2013/tables/table_27_leos_a_type_of_weapon_2004-2013.xls [https://perma.cc/8V2C-FPZ7] (last visited Nov. 29, 2017).

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS FORT WORTH DIVISION

FREDRIC RUSSELL MANCE, JR. et al.,	§	
Plaintiffs,	§	
v.	§	**Civil Action No. 4:14-cv-539-O**
ERIC H. HOLDER, JR. and B. TODD JONES,	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

(Filed Feb. 11, 2015)

Before the Court are Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment and their Brief and Appendix in Support (ECF Nos. 15-17), filed September 23, 2014; and Plaintiffs' Response (ECF No. 24), filed October 17, 2014. Also before the Court are Plaintiffs' Motion for Summary Judgment and their Memorandum and Appendix in Support (ECF Nos. 21-23), filed October 17, 2014; Defendants' combined Response and Reply and their Brief and Appendix in Support (ECF No. 27), filed November 7, 2014; and Plaintiffs' Reply (ECF No. 31), filed November 24, 2014. The Court held a hearing on these motions on January 20, 2015. Having considered the motions, the briefing, the record, and the applicable law, the Court finds that Defendants' Motion to

Dismiss should be and is hereby **DENIED**. For the reasons that follow, Plaintiffs' Motion for Summary Judgment is **GRANTED**, and Defendants' Motion for Summary Judgment is **DENIED**.

I. BACKGROUND

Plaintiffs Fredric Russell Mance, Jr. ("Mance"), Andrew Hanson ("Andrew Hanson"), Tracey Ambeau Hanson ("Tracey Hanson"), and the Committee for the Right to Keep and Bear Arms ("the Committee") (collectively, "Plaintiffs") brought this action to challenge the federal regulatory regime as it relates to the buying, selling, and transporting of handguns over state lines under 18 U.S.C. §§ 922(a)(3) and 922(b)(3). *See* 2d Am. Compl., ECF No. 33. Specifically, Plaintiffs allege that "the federal interstate handgun [transfer] ban limits their choices as consumers, harms competition in the market, and raises prices," and the ban infringes on a fundamental right guaranteed by the Constitution. *Id.* at ¶¶ 22, 35.

At issue are several federal statutes, as well as laws of the state of Texas and the District of Columbia. Texas law does not forbid the sale of handguns to individuals residing outside the state. The District of Columbia does not prohibit the importation of firearms, but it does require that all firearms be registered. *See* D.C. Code § 7-2502.01(a) (2014). Pursuant to provisions enacted as part of the Gun Control Act of 1968, 18 U.S.C. §§ 921-31, subsections 922(a)(3) and 922(a)(5) forbid individuals from transporting into or

receiving in their state of residency any firearm acquired outside of that state, except for firearms acquired by bequest or intestate succession or pursuant to a transfer from a federally licensed dealer under 18 U.S.C. § 922(b)(3). 18 U.S.C. § 922(a). Section 922(b)(3) and 27 C.F.R. § 478.99(a) bar a federal firearms licensee from transferring[1] firearms to individuals who do not reside in the state in which the dealer's place of business is located. 18 U.S.C. § 922(b)(3); 27 C.F.R. § 478.99(a). This restriction does not apply to the transfer of shotguns or rifles. *See* 18 U.S.C. § 922(b)(3); 27 C.F.R. § 478.96(c)(1). The Court refers to these statutes and regulations, collectively, as the federal interstate handgun transfer ban.[2]

The undisputed facts are as follows. Mance, a Texas resident, is a federal firearms licensee ("FFL") who retails firearms from his business in Arlington, Texas. Andrew and Tracey Hanson, a husband and wife, are residents of the District of Columbia and are legally eligible to purchase and possess firearms. On

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[1] Specifically, § 922(b)(3) makes it unlawful for a federal firearms licensee to "sell or deliver" a firearm to a non-federal firearms licensee. 18 U.S.C. § 922(b)(3).

[2] Although "federal interstate handgun transfer ban" may be a bit of a misnomer because these restrictions do not completely bar interstate transfers of handguns, it sufficiently captures the prohibition related to transfers to non-federal firearms licensees. Federal firearms licensees are necessary to complete interstate transactions because a citizen without a federal firearms license is barred from acquiring a handgun directly from a federal firearms licensee in another state. *See* 18 U.S.C. § 922(b) ("Paragraphs (1), (2), (3), and (4) of this subsection shall not apply to transactions between [federal firearms licensees].").

June 21, 2014, the Hansons met with Mance to purchase two handguns. Mance could not sell and deliver the handguns directly to the Hansons because it was illegal to do so under 18 U.S.C. § 922(b)(3) and 27 C.F.R. § 478.99(a). Instead, the only option available to the Hansons and Mance was to transfer the handguns to the only FFL in the District of Columbia, Charles Sykes ("Sykes"), who would then complete the sale. The transfer to Sykes would require a $125-fee per transfer as well as shipping costs. Sykes does not carry his own inventory of firearms. In summary, the Hansons would pay Mance for the firearms in Texas, pay the costs associated with Mance shipping the firearms to Sykes in the District of Columbia, and then retrieve the firearms from Sykes after paying him a $125 transfer fee per firearm. Because the Hansons could not immediately take possession, they declined to complete the transaction with Mance. Tracey Hanson, Andrew Hanson, and Mance are members of the Committee, a nonprofit organization dedicated to promoting Second Amendment rights. In response to these restrictions, Plaintiffs filed this action on July 14, 2014. They seek injunctive and declaratory relief, costs, and attorney's fees. The instant motions have been fully briefed and are ripe for adjudication.

II. LEGAL STANDARDS

Defendants Eric H. Holder, Jr. and B. Todd Jones ("Defendants")[3] move to dismiss Plaintiffs' claims pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), or, in the alternative, to enter summary judgment for Defendants pursuant to Rule 56. Defs.' Mot. Dismiss, ECF No. 15. Because the Court considers evidence beyond the pleadings that has been attached to Defendants' motions as well as attached to Plaintiffs' cross-motion for summary judgment, the motion to dismiss under Rule 12(b)(6) is subsumed by the summary judgment motions. *See Exxon Corp. v. Md. Cas. Co.*, 599 F.2d 659, 661 (5th Cir. 1979).

A. Dismissal Under Federal Rule 12(b)(1) for Lack of Standing

"Every party that comes before a federal court must establish that it has standing to pursue its claims." *Cibolo Waste, Inc. v. City of San Antonio*, 718 F.3d 469, 473 (5th Cir. 2013); *see also Barrett Computer Servs., Inc. v. PDA, Inc.*, 884 F.2d 214, 218 (5th Cir. 1989). In claims for declaratory or injunctive relief, standing may be satisfied by the presence of "at least one individual plaintiff who has demonstrated standing to assert the[] [contested] rights as his own." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 & n.9 (1977); *see also Horne v. Flores*, 557 U.S.

[3] Eric H. Holder is the Attorney General for the United States. B. Todd Jones is the Director of the Bureau of Alcohol, Tobacco, Firearms, and Explosives.

433, 446-47 (2009). "The doctrine of standing asks 'whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.'" *Cibolo Waste*, 718 F.3d at 473 (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004)). Constitutional standing requires a plaintiff to establish that she has suffered an injury in fact traceable to the defendant's actions that will be redressed by a favorable ruling. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

For an association to have standing to bring suit on behalf of its members, the association must show that "[1] its members would otherwise have standing to sue in their own right; [2] the interests it seeks to protect are germane to the organization's purpose; and [3] neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Ass'n of Am. Physicians & Surgeons, Inc. v. Tex. Med. Bd.*, 627 F.3d 547, 550 (5th Cir. 2010) (citation omitted). "The first prong requires that at least one member of the association have standing to sue in his or her own right." *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 191 (5th Cir. 2012) [hereinafter *NRA*] (citing *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 587-88 (5th Cir. 2006)).

B. Summary Judgment

Summary judgment is proper when the pleadings and evidence on file show "that there is no genuine

dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[T]he substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The movant makes a showing that there is no genuine issue of material fact by informing the court of the basis of its motion and by identifying the portions of the record which reveal there are no genuine material fact issues. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); Fed. R. Civ. P. 56(c).

When reviewing the evidence on a motion for summary judgment, the court must decide all reasonable doubts and inferences in the light most favorable to the non-movant. *See Walker v. Sears, Roebuck & Co.*, 853 F.2d 355, 358 (5th Cir. 1988). The court cannot make a credibility determination in light of conflicting evidence or competing inferences. *Anderson*, 477 U.S. at 255. As long as there appears to be some support for the disputed allegations such that "reasonable minds could differ as to the import of the evidence," the motion for summary judgment must be denied. *Id.* at 250.

III. ANALYSIS

A. Defendants' Motion to Dismiss for Lack of Standing

As a threshold issue, the Court must address Defendants' claim that Plaintiffs lack standing to bring

the instant action. Defendants argue that the Court should dismiss Plaintiffs' claims for lack of subject-matter jurisdiction for four reasons: (1) the Hansons' alleged injury-in-fact is not traceable to Defendants; (2) the Hansons have not shown redressability; (3) Mance has not suffered an injury-in-fact traceable to the challenged laws; and (4) the Committee has not shown associational standing. *See* Defs.' Br. Supp. Mot. Dismiss, ECF No. 16. While the Court need only establish standing by the presence of at least one individual plaintiff who can assert the contested rights as his own, out of an abundance of caution the Court will address the standing of all parties. *See Vill. of Arlington Heights*, 429 U.S. at 264. The Court first focuses its analysis on the Hansons' claims.

Defendants contend that the Hansons' claimed injury is the $125 transfer fee that Sykes requires to import out-of-state handguns, making the injury traceable only to Sykes and not the challenged statutes. Defs.' Br. Supp. Mot. Dismiss 9-10, ECF No. 16. Defendants rely on the Fourth Circuit's decision in *Lane v. Holder*, 703 F.3d 668 (4th Cir. 2012), in which the Fourth Circuit noted that section 922(b)(3) was directed at FFLs, not the plaintiffs as potential purchasers, and that the injury alleged was not traceable to the ban, but rather to the FFLs who chose to charge transfer fees. *Lane*, 703 F.3d at 673-74. The *Lane* court also held that the plaintiffs would not suffer an absolute deprivation in that they could obtain handguns even though they face additional costs and logistical hurdles. *Id.* at 673.

The Fifth Circuit, however, has found standing under comparable circumstances when potential individual purchasers challenged an age restriction on firearms purchases. *See NRA*, 700 F.3d at 191. Even though the age restriction did not bar 18-to-20-year-olds from possessing or using handguns, "prohibiting FFLs from selling handguns to 18-to-20-year-olds . . . cause[d] those persons a concrete, particularized injury—i.e., the injury of not being able to purchase handguns from FFLs." *Id.* at 191-92 (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 750-57 (1976)). Unlike *Lane*, the Fifth Circuit found potential individual purchasers had standing, even though the law directly applies to FFLs and even though they did not suffer an absolute deprivation of their Second Amendment rights. *See id.* As the law caused their deprivation and a favorable ruling would relieve them of this injury, the plaintiffs in *NRA* had standing. *Id.*

Here, as in *NRA*, the Hansons are not faced with an absolute deprivation of their rights, but they are still faced with a present injury—their inability to purchase and take possession of handguns directly from an FFL at the time they desire due to their residence. *See Ezell v. City of Chicago*, 651 F.3d 684, 701-04 (7th Cir. 2011) (noting that it is "a profoundly mistaken assumption" to assume "that the harm to a constitutional right is measured by the extent to which it can be exercised in another jurisdiction"). Defendants conceded that this might amount to an injury. *See* Tr. Oral Arg. at 23 ("Well, they may have an injury in that they can't

get the handgun exactly there. But that's not traceable to the law because the law would allow them to get the handgun as long as they got it from a dealer in their home state."). Although *Lane* held that the plaintiffs' injuries, if any, were caused by the unnamed FFLs and not the law at issue, this Court declines to apply similar reasoning. The sole reason that the Hansons must go through Sykes to complete their desired transaction with Mance is because the federal interstate handgun transfer ban requires them to do so. But for the federal interstate handgun transfer ban, Mance and the Hansons would have been able to complete their desired transaction. In other words, the Court's favorable ruling for Plaintiffs would redress Plaintiffs' injury. The Court finds that the Hansons have suffered a cognizable injury that is traceable to Defendants' enforcement of the federal interstate handgun transfer ban that would be redressed by the Court's favorable ruling. Accordingly, the Hansons have standing to bring the instant action. *See Lujan*, 504 U.S. at 560-61.

Next, Defendants argue that the Committee lacks standing because it cannot show that any of its members possess standing. Defs.' Br. Supp. Mot. Dismiss 17, ECF No. 16. As previously discussed, the Hansons are members of the Committee. Furthermore, the Court finds that the interests the Committee seeks to protect are germane to its purpose, and neither the claims asserted nor the relief requested requires the participation of individual members in the lawsuit. *See* Pls.' App. Supp. Mot. Summ. J. (Versnel Decl.), App. at 10-11, ECF No. 23. Thus, the Committee has associational

standing to bring this action on behalf of its members. *See Ass'n of Am. Physicians & Surgeons*, 627 F.3d at 550.

Finally, the Court addresses Mance's standing. Defendants argue Mance has suffered no injury in fact. As stated above, Mance was unable to consummate the sale of handguns to the Hansons because of § 922(b)(3). The loss of a sale is clearly an injury to Mance in his own right, and a distributor such as Mance also has standing to assert the rights of third parties seeking access to his goods. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 682-83 (1977); *see also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (holding that lost sales and damage to business reputation provide standing).

Further, Defendants' reliance on *Lane* in opposition to the Hansons' standing undermines their argument in opposition to Mance's standing. In *Lane*, the Fourth Circuit noted the individual firearms purchasers lacked standing because the federal interstate handgun transfer ban did "not apply to them but rather to the FFLs from whom they would buy handguns." 703 F.3d at 672. The *Lane* court concluded that the plaintiffs' reliance on the Supreme Court's decision in *Carey* was inapposite because the Supreme Court in *Carey* had before it a *distributor* of contraceptives, not individual purchasers, and concluded a distributor had standing to challenge restrictions placed on the sale of contraceptives. *Id.* The Fourth Circuit in *Lane* therefore concluded *Carey* did not apply because there were no FFLs, i.e. distributors, in the lawsuit. *Id.* Regardless

of the Fourth Circuit's reasoning about the applicability of *Carey* on the standing of individual purchasers, it clearly indicated an FFL plaintiff who is "directly affected" by § 922(b)(3) would have standing. *Id.*

The facts in this case indisputably demonstrate Mance suffered an injury, in the form of losing specific business with the Hansons, that is traceable to the federal interstate handgun transfer ban, and a favorable ruling from this Court would provide redress. Thus, according to *Lane, Carey*, and general standing principles, Mance has standing. *See Lujan*, 504 U.S. at 560-61. Having established the standing of each of the plaintiffs, the Court now proceeds to the merits of the claim.[4]

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[4] Defendants initially argued Mance lacked standing because he faced no imminent threat of prosecution. Defs.' Br. Supp. Mot. Summ. J. 16, ECF No. 16. However, Defendants later acknowledged that Mance would have a reasonable fear of prosecution if he were to sell handguns directly to the Hansons. Tr. Oral Arg. at 43-44 ("If he were to sell directly to the Hansons, yes, that would certainly implicate (b)(3). . . . We no longer contend that the law would not apply to Mr. Mance or that he doesn't have sufficient fear of prosecution."). "[I]t is not necessary that [a party] first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974); *see also Int'l Soc'y for Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809, 818 (5th Cir. 1979) (A justiciable controversy exists when "the plaintiff is seriously interested in disobeying, and the defendant seriously intent on enforcing, the challenged measure."). Thus, Defendants have abandoned this argument.

B. Cross Motions for Summary Judgment

Neither party asserts there are genuine issues of material fact, therefore the Court focuses its analysis on the legal arguments presented by the parties. Here, Plaintiffs challenge the constitutionality of the federal interstate handgun transfer ban under the Second Amendment and the Due Process Clause of the Fifth Amendment. The Court analyzes the ban against both amendments in turn, beginning with the Second Amendment.

1. Second Amendment

Plaintiffs challenge the federal interstate handgun transfer ban on its face, as applied in the context of handgun sales that do not violate any state or local laws, and as applied in the context of handgun sales where state or local laws require a license, preregistration, or other form of approval to proceed with the sale. 2d Am. Compl. ¶ 36, ECF No. 33. "[F]acial and as-applied challenges have different substantive requirements." *Catholic Leadership Coal. of Tex. v. Reisman*, 764 F.3d 409, 425 (5th Cir. 2014) (citing *Doe v. Reed*, 561 U.S. 186, 194 (2010)). The Court will first address the facial challenge to the federal interstate handgun transfer ban. To prevail on a facial challenge, Plaintiffs must show that either no set of circumstances exists under which the law would be valid or that the statute lacks any plainly legitimate sweep. *United States v. Stevens*, 559 U.S. 460, 473 (2010); *Catholic Leadership Coal.*, 764 F.3d at 426.

The Second Amendment provides: "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. The Supreme Court has recognized that the Second Amendment confers an individual right to keep and bear arms. *See District of Columbia v. Heller*, 554 U.S. 570, 595 (2008). This right is not unlimited, however, and the Supreme Court acknowledged that some conditions may still be constitutional, such as "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626-27. In fact, the Supreme Court noted that this incomplete list of regulatory measures is "presumptively lawful." *Id.* at 627 n.26.

The Supreme Court has not set out an analytical framework for determining whether other firearms regulations comport with the Second Amendment. *See NRA*, 700 F.3d at 194 ("*Heller* did not set forth an analytical framework with which to evaluate firearms regulations in future cases."). To analyze challenges under the Second Amendment, the Fifth Circuit, along with its sister circuits, employs a two-step inquiry:

> the first step is to determine whether the challenged law impinges upon a right protected by the Second Amendment—that is, whether the law regulates conduct that falls within the scope of the Second Amendment's

> guarantee; the second step is to determine whether to apply intermediate or strict scrutiny to the law, and then to determine whether the law survives the proper level of scrutiny.

Id.; *see also United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Heller v. District of Columbia*, 670 F.3d 1244, 1252 (D.C. Cir. 2011) (*Heller II*); *Ezell*, 651 F.3d at 701-04; *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010); *but see United States v. Skoien*, 614 F.3d 638, 641-42 (7th Cir. 2010) (en banc) (forgoing the two-step framework to avoid the "levels of scrutiny quagmire," but applying intermediate scrutiny to a categorical restriction). In the first step, courts must look to whether the law "harmonizes with the historical traditions associated with the Second Amendment guarantee." *NRA*, 700 F.3d at 194. In essence, if the alleged burden at issue is consistent with longstanding, historic traditions of firearms restrictions, it "falls outside the Second Amendment's scope" and "passes constitutional muster." *See id.* at 195. Conversely, should the Court determine that the law burdens conduct that falls within the Second Amendment's scope, the Court must then apply the appropriate level of means-ends scrutiny. *Id.*

a. Whether the Law Falls Within the Scope of the Second Amendment

For the first step, the Court looks for any evidence of founding-era thinking that contemplated that

interstate, geography-based, or residency-based firearm restrictions would be acceptable. *See Ezell*, 651 F.3d at 701-02 ("The answer [to the 'scope' question] requires a textual and historical inquiry into original meaning."); *see also McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010). For example, in *NRA*, the Fifth Circuit found historic traditions of age restrictions for the possession of firearms dating back to the Revolution. *See* 700 F.3d at 204 n.17. The Fifth Circuit stated that "[t]he important point is that there is considerable historical evidence of age- and safety-based restrictions on the ability to access arms." *Id.* at 201-02. Likewise, in *Heller*, the Supreme Court illustrated examples of historical limitations on the right protected by the Second Amendment by noting that "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." 554 U.S. at 626 (citations omitted); *see also Heller II*, 670 F.3d at 1252.

Defendants list the earliest known state residency restrictions on the purchase or possession of firearms, with the earliest of these restrictions occurring in 1909.[5] *See* Defs.' App. Supp. Mot. Summ. J. Ex. 2, App. at 103, ECF No. 17-1. Defendants have not presented, and the Court cannot find, any earlier evidence of longstanding interstate, geography-based, or

[5] In 1909, West Virginia amended its code to require a state license for the possession of firearms and other dangerous weapons. *See* Defs.' App. Supp. Mot. Summ. J. Ex. 2, App. at 103, ECF No. 17-1 (citing 1909 W. Va. Acts 394, 395-96).

residency-based firearm restrictions. The Court need not require "a precise founding-era analogue," but these early twentieth century state residency restrictions do not date back quite far enough to be considered longstanding. *See NRA*, 700 F.3d at 196. While two-hundred years from now, restrictions from 1909 may seem longstanding, looking back only to 1909, today, omits more than half of America's history and belies the purpose of the inquiry. *See Heller*, 554 U.S. at 634-35 ("Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad."); *Peruta v. Cnty. of San Diego*, 742 F.3d 1144, 1175 n.21 (9th Cir. 2014) (*Heller* and *McDonald* made clear "the scope of the Second Amendment right depends not on post-twentieth century developments, but instead on the understanding of the right that predominated from the time of ratification through the nineteenth century."); *Ezell*, 651 F.3d at 702-03 ("[I]f the government can establish that a challenged firearms law regulates activity falling outside the scope of the Second Amendment right as it was understood at the relevant historical moment—[here, 1791]—then the analysis can stop there."). In the absence of any evidence of founding-era thinking that contemplated that interstate, geography-based, or residency-based firearm restrictions would be acceptable, the Court finds that the federal interstate handgun transfer ban burdens conduct that falls within the scope of the Second Amendment. Having found that the conduct at issue falls within the

scope of the Second Amendment, the Court moves to step two.

b. Whether to Apply Strict or Intermediate Scrutiny

The Court must now determine the appropriate level of scrutiny to apply. Defendants argue that the federal interstate handgun transfer ban imposes only minimal burdens, so heightened scrutiny is not warranted. Defs.' Br. Supp. Mot. Summ. J. 27-28, ECF No. 16. Plaintiffs contend that because the ban targets all citizens, every handgun consumer is severely impacted by a restriction on the most preferred firearm in the nation for use in self-defense. *See Heller*, 554 U.S. at 628-29 (noting District of Columbia ban on handguns banned "the most preferred firearm in the nation to keep and use for protection of one's home and family."). They argue that the "trade in an article to which people have an enumerated, fundamental right cannot be the subject of reduced scrutiny." Pls.' Mem. Supp. Mot. Summ. J. 28, ECF No. 22.

In *NRA*, although the Fifth Circuit determined that age restrictions were a longstanding, historic tradition, it moved to the second step "in an abundance of caution" and applied intermediate scrutiny. 700 F.3d at 204. The court reasoned that only intermediate scrutiny applied for three reasons: (1) an age qualification on commercial firearm sales was significantly different from a total prohibition on handgun possession; (2) the age restriction did not strike at the core of the Second

Amendment by preventing 18-to-20-year-olds from possessing and using handguns for home defense because it was not a historical outlier; and (3) the restriction only had temporary effect because the targeted group would eventually age out of the restriction's reach. *Id.* at 205-07.

Here, Defendants contend that the Court need not engage in heightened scrutiny because any burden created by the federal interstate handgun transfer ban is "de minimis." Defs.' Br. Supp. Mot. Summ. J. 27-30, ECF No. 16. Defendants rely on the Second Circuit's opinion in *United States v. Decastro*, 682 F.3d 160, 166-67 (2d Cir. 2012), which held that heightened scrutiny is reserved for regulations that "substantially" burden the Second Amendment right. Defs.' Br. Supp. Mot. Summ. J. 27-30, ECF No. 16; *see also* Tr. Oral Arg. at 46. Under this standard, a plaintiff may rebut the presumption that a longstanding regulation is presumptively lawful by showing that the regulation has more than a de minimis effect upon his right; "[a] requirement of newer vintage is not, however, presumed to be valid." *Heller II*, 670 F.3d at 1253. As discussed above, the federal interstate handgun transfer ban is not longstanding, making the de minimis standard inapplicable.[6] *See supra* Part III.B.1.a.

"A law that burdens the core of the Second Amendment guarantee—for example, 'the right of law-abiding,

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[6] In addition, Defendants were unable to articulate precisely when to apply the de minimis standard within the Fifth Circuit. *See* Tr. Oral Arg. at 51-58.

responsible citizens to use arms in defense of hearth and home'—would trigger strict scrutiny." *NRA*, 700 F.3d at 205 (quoting *Heller*, 554 U.S. at 635) (internal citation omitted). At its core, the Second Amendment protects *law-abiding, responsible* citizens. *Id.* at 206. Instead of limiting the federal interstate handgun transfer ban to a discrete class of people, it prevents all legally responsible and qualified individuals from directly acquiring handguns from FFLs in every state other than their state of residency and the District of Columbia.[7] *See Ezell*, 651 F.3d at 708 ("Here . . . the plaintiffs are the 'law abiding, responsible citizens' whose Second Amendment rights are entitled to full solicitude under *Heller.*"). To obtain a handgun from an out-of-state FFL retailer, the federal interstate handgun transfer ban imposes substantial additional time and expense to those who desire to purchase one. Restricting the distribution channels of legal goods protected by the Constitution to a small fraction of the total number of possible retail outlets requires a compelling interest that is narrowly tailored. *See Carey*,

[7] While it is technically true that individuals outside of the District of Columbia are also unable to directly purchase and take possession of handguns from a District of Columbia FFL, there appears to be only one FFL in the District of Columbia, and he does not possess inventory and only remains in business to receive firearms for District of Columbia residents who purchase firearms from FFLs out-side of the District of Columbia in compliance with §§ 922(a)(3) and 922(b)(3). *See Lane*, 703 F.3d at 670-71. As a practical matter then, no one outside of the District of Columbia is deprived of the right to purchase a handgun from a District of Columbia retail FFL at this time. Post *Heller* however, should a District of Columbia FFL open for business, only District of Columbia residents could purchase and take delivery from him.

431 U.S. at 689; *Marzzarella*, 614 F.3d at 94 ("[I]nfringements on protected rights can be, depending on the facts, as constitutionally suspect as outright bans."). The Court, therefore, applies strict scrutiny—that is, the law must be narrowly tailored to be the least restrictive means of achieving a compelling government interest. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010).

c. Strict Scrutiny Analysis

Defendants contend that the Government's interest in restricting out-of-state handgun purchases is to protect "public safety and permit[ ] States to regulate firearms traffic within their own borders." Defs.' Br. Supp. Mot. Summ. J. 32, ECF No. 16. They argue the federal interstate handgun transfer ban combats 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." Defs.' App. Supp. Mot. Summ. J. Ex. 1 (S.Rep. No. 89-1866 (1966)), App. at 19, ECF No. 17-1. Under the law, FFLs may transfer rifles and shotguns to nonresidents so long as the FFL and recipient meet in person and the transfer fully complies with the legal requirements of both states. 18 U.S.C. § 922(b)(3)(A). The prohibition on directly transferring firearms to nonresidents applies only to handguns. *See id.* § 922(b)(3). Defendants argue that Congress focused on handguns, as opposed to rifles and shotguns, because "[t]he evidence before [Congress] overwhelmingly demonstrated that the

handgun is the type of firearm that is principally used in the commission of serious crime." Defs.' Mot. at 7. Finally, Defendants proffer that Congress required interstate handgun transfers to take place through in-state FFLs as an attempt to limit circumvention of state handgun laws "by ensuring that transfers are made only by dealers who are well-acquainted with and required to follow a State's handgun laws, allowing States to monitor more effectively the enforcement of State gun laws by focusing on dealer compliance."[8] Defs.' Br. Supp. Mot. Summ. J. 37, ECF No. 16.

First, the Court agrees the Government's interest in preventing handgun crime is a compelling interest. *See United States v. Salerno*, 481 U.S. 739, 754 (1987); *NRA*, 700 F.3d at 208-09. The parties' dispute centers around whether regulating the interstate market is appropriately limited in this fashion. *See* Defs.' Br. Supp. Mot. Summ. J. 32-37, ECF No. 16; Pls.' Mem. Supp. Mot. Summ. J. 27-33, ECF No. 22. Defendants

[8] Defendants also advanced the argument that the Second Amendment does not protect the right of individuals to *sell* firearms. *See* Defs.' Br. Supp. Mot. Summ. J. 25, ECF No. 16. Though *Heller* endorsed laws that imposed conditions and qualifications on the commercial sale of firearms, a court must necessarily examine the nature and extent of an imposed condition to analyze its constitutionality. *Marzzarella*, 614 F.3d at 92 n.8. "If there were somehow a categorical exception for these restrictions, it would follow that there would be no constitutional defect in *prohibiting* the commercial sale of firearms. Such a result would be untenable under *Heller*." *Id.* (emphasis added). Accordingly, the Court finds that operating a business that provides Second Amendment services is generally protected by the Second Amendment, and prohibitions on firearms sales are subject to similar scrutiny.

contend that these provisions were appropriately "designed to prevent the avoidance of State and local laws controlling firearms by the simple expediency of crossing a State line to purchase one." Defs.' Br. Supp. Mot. Summ. J. 34, ECF No. 16 (quoting H.R.Rep. No. 90-1577 (1968)). As discussed above, it is Defendants' burden to prove in this case that the federal interstate handgun transfer ban is narrowly tailored to achieve this goal. In essence, Defendants must prove that requiring the participation of an additional FFL in out-of-state handgun purchases is narrowly tailored to the stated goals of reducing violent handgun crime, preventing those unable to lawfully possess handguns from obtaining them, and providing states notice of handgun sales to state residents. *See Citizens United*, 558 U.S. at 340.

To prove this restriction is necessary, Defendants point to the statistics identified by Congress when it enacted the 1968 Gun Control Act. *See* Defs.' Br. Supp. Mot. Summ. J. 3-6, 34-35, ECF No. 16. In targeting the handgun for heightened restrictions, Congress found that 70% of murders were committed using a handgun, and 78% of firearm-related homicides of police officers were committed with a handgun. *Id.* at 34. Defendants have provided updated figures that largely mirror these statistics. *See id.* at 35 n.14. It is undisputed that these numbers supported, and perhaps continue to support, taking steps to address the use of handguns by the irresponsible.[9] These statistics, however, do not

[9] Although the law creates a distinction between the transfer of handguns and the transfer of rifles and shotguns, Congress did

speak to the need for, and the reasonableness of, requiring the participation of an additional in-state FFL in all transactions involving out-of-state handguns.

Defendants appear to rely on the information provided by the Senate Report to the 1968 Gun Control Act to support the current need for the federal interstate handgun transfer ban. *See generally id.* As stated above, Congress determined that prohibited individuals easily evaded local firearms restrictions by simply crossing state lines. In support, the Senate Judiciary Committee investigation provided that in suburban Maryland, 58% of one firearms dealer's handgun sales were to District of Columbia residents and that subsequent criminal record checks determined that 40% of those purchasers had criminal records. *Id.* at 4. The investigation also revealed that a separate dealer made 40% of his handgun sales to District of Columbia residents and 23% of those sales were to purchasers with criminal records. *Id.*

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consider statistics showing significant harm caused by rifles and shotguns, in addition to that of handguns. In fact, distinguishing between handguns and long guns was one of the controversial aspects of the statute. S. Rep. No. 89-1866 (1966), App. at 62, ECF No. 17-1. Congress saw evidence of "a substantial misuse of rifles and shotguns," including "that of the total number of firearms murders each year, some 30 percent [were] perpetrated by persons armed with rifles and shotguns." *Id.* at 63, 54. In spite of these statistics, Congress decided not to disturb transfers of rifles and shotguns to the same extent as handguns. *See* 18 U.S.C. § 922(b)(3); 27 C.F.R. § 478.96(c)(1). These types of conclusions regarding conflicting evidence are generally left to Congress. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 199 (1997).

These statistics notwithstanding, Defendants fail to provide reasonably *current* figures to show the federal interstate handgun sale ban is narrowly tailored. Strict scrutiny is a demanding standard that requires Defendants to show the governmental interest to be compelling and the associated regulation narrowly tailored to serve that interest. *See Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011). To be narrowly tailored, the curtailment of constitutional rights must be actually necessary to the solution. *Id.* The principal purpose in enacting the 1968 Gun Control Act was to curb crime by keeping "firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency." *Huddleston v. United States*, 415 U.S. 814, 824 (1974); *see also Heller*, 554 U.S. at 626-27 (noting Supreme Court was not "cast[ing]doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill."). Congress intended to accomplish this with the federal interstate handgun transfer ban, which would provide states with notice of those who purchased handguns *and* "prevent the avoidance of State and local laws controlling firearms by the simple expediency of crossing a State line to purchase one." Defs.' Br. Supp. Mot. Summ. J. 34, ECF No. 16.

When the federal interstate handgun transfer ban was enacted in 1968, an instant electronic background check system did not exist. In 1993, Congress sought to strengthen the ability of all FFLs to avoid transferring firearms to persons who could not legally possess them under state or federal law by amending the 1968

Gun Control Act with the "Brady Act." *See* Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993). Pursuant to the Brady Act, before an FFL may sell or deliver a firearm to a non-FFL, he must complete a criminal background check through the National Instant Criminal Background Check System ("NICS") to ensure the purchaser is legally entitled to obtain and possess the firearm. 18 U.S.C. § 922(t). States may also create a Point of Contact ("POC"), who acts as a liaison to NICS, to run the background check and receive notice of anticipated firearms purchases by its citizens. *See* 28 C.F.R. §§ 25.1-.2, 25.6(d). In other words, to complete a background check, the FFL contacts either (1) the state POC, if there is one; or (2) NICS, if the state has not designated a POC. *See id.* Current law therefore ensures potential purchasers can legally acquire and possess a firearm under state and federal law, and those states that desire to receive notice of firearms purchased by its citizens simply establish a POC.

Obviously, none of this infrastructure existed in 1968. Yet, in this case, it appears Defendants rely on statistics from the 1968 Senate Report to support the continued need for an in-state FFL in every out-of-state handgun transaction. *See, e.g.*, Tr. Oral Arg. at 50. ("[E]xtensive investigations over several years *before* [Congress] passed the Gun Control Act in 1968 . . . revealed a serious problem of individuals going across state lines to obtain firearms that they could not lawfully obtain or possess in their own state or residence

and without the knowledge of their local authorities.") (emphasis added).

This argument fails to take into account the current version of the 1968 Gun Control Act, nor does it address how simply crossing state lines under the modern regime can circumvent state law. *See Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2619 (2013) (noting current burdens on constitutional rights "must be justified by current needs"); *see also NRA*, 700 F.3d at 209 (Evidence demonstrates that the link "between the ban and its objective has *retained* its reasonableness.") (emphasis added). In *NRA*, the Fifth Circuit found reasonably current data supported the continued reasonable fit between the federal age restriction on the acquisition of handguns and the Government's interest. *NRA*, 700 F.3d at 209 (relying on 1999 statistics). In this case, Defendants provided recent data to support their argument that concealable handguns remain involved in homicides at the same significant rate as occurred in 1968. *See* Defs.' Br. Supp. Mot. Summ. J. 34 n.14, ECF No. 16. It may be that the federal interstate handgun transfer ban remains justified because the Brady Act fails to prevent prohibited individuals from crossing state lines to illegally acquire and possess handguns they otherwise would not obtain, and the Brady Act fails to provide notice to those states who desire it.[10] However, Defendants have failed

[10] The Court notes the findings Congress made in the NICS Improvements Act. *See* NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, § 2, 122 Stat. 2559 (2008). The findings underscore two tragedies that occurred after NICS failed to stop

to carry their burden to show the federal interstate handgun transfer ban is narrowly tailored to achieve the intended objective under current law. *See Shelby Cnty.*, 133 S. Ct. at 2627 (noting formula affecting constitutional rights must be appropriate "in light of current conditions"); *Annex Books, Inc. v. City of Indianapolis*, 581 F.3d 460, 463 (7th Cir. 2009) (stating items specifically protected by the Constitution can be restricted only "by evidence, and not just asserted"); *see also Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) (holding that the government cannot rely on speculation or conjecture to support government interest).

The evidence and the law before the Court indicate FFLs, wherever they may be located, are required to conduct background checks under current law before they sell or deliver any firearm to a non-FFL. *See* 18 U.S.C. § 922(b)(3). These checks identify both federal and state disabilities. *See* 18 U.S.C. § 922(t). While Defendants argue that state handgun laws are far

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certain firearm purchases. *Id.* Congress enacted the NICS Improvement Act to close loopholes in NICS and ensure that those failures did not occur again. *Id.* While two tragedies constitute two too many, they are not enough to conclude that the Brady Act is not working. From its inception on March 1, 1994, through December 31, 2010, approximately 2.1 million attempts-to-purchase firearms were blocked under the Brady Act. *See* Bureau of Justice Statistics, *Background Checks for Firearm Transfers, 2010-Statistical Tables*, U.S. Dep't of Justice 4 (Table 1) (Feb. 2013), http://www.bjs.gov/content/pub/pdf/bcft 10st.pdf. Even if the Brady Act and the NICS Improvements Act are not as effective as they currently appear, Defendants have not met their burden to show the Court that the federal interstate handgun transfer ban is still necessary when enforced in addition to those Acts.

more diverse and complex than state laws relating to rifles and shotguns, they do not provide relevant evidence that the ban is necessary to continue serving the goal of complying with state law, much less evidence that it is narrowly tailored to do so.[11] Nor do Defendants address why the current POC system is insufficient to provide notice to states that desire it. The current law relating to rifles and shotguns provides an example of a narrowly tailored law, especially when it is taken together with instant electronic background checks, face-to-face meeting requirements, state POCs, and published compilations of state and local firearms laws.[12] In short, the current statutory scheme presents

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[11] The Director of the Bureau of Alcohol, Tobacco, Firearms, and Explosives is required to annually furnish FFLs with an updated compilation of state laws and published ordinances, which is necessary for them to ensure that their firearms transactions comport with state and local law. *See* 27 C.F.R. § 478.24.

[12] FFLs must also verify and conform to numerous state firearms laws for rifles and shotguns. For example, Texas has no laws restricting semi-automatic assault weapons, whereas California bans most semiautomatic assault weapons and .50 caliber rifles and prohibits the sale and transfer of large capacity magazines. *See* Cal. Penal Code § 30605 (West 2014). A Texas FFL must ensure that a Sacramento, California resident who purchases a rifle is legally entitled to do so under federal, Texas, California, and Sacramento law. *Compare* Tex. Loc. Gov't Code § 229.001(West 2013) (limiting Texas municipalities' authority to locally regulate firearms) *with* Cal. Const. art. XI, § 7 (allowing local authorities in California, including cities and counties, to regulate firearms). Similarly, a non-Texas FFL must ensure that a Texas resident who purchases a rifle is legally entitled to do so under federal law and the laws of both states. While a California FFL in San Diego might have to research the local handgun restrictions in place for a Sacramento, California resident purchaser, some 500 miles to the north, nothing prevents an out-of-state FFL from Reno,

less restrictive alternatives to achieve the goals that Congress identified in 1968, rendering the federal interstate handgun transfer ban not narrowly tailored.

Finally, Defendants argue that states do not have the ability to prosecute FFLs whose sales are made out of state and violate that state's law. *Id.* at 36-37 (quoting H.R.Rep. No. 99-495 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1327, 1335); *see also* Tr. Oral Arg. at 68. But, "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality" of certain legislation. *See United States v. Morrison*, 529 U.S. 598, 614 (2000) (holding that simply because Congress concluded that a particular activity substantially affected interstate commerce did not necessarily make it so). There already exists a federal statute that imposes criminal liability on FFLs who sell illegal firearms in another state under 18 U.S.C. § 922(b)(3), and Defendants do not explain why a *state* could not prosecute that out-of-state FFL if he violates state law as well. It appears that Defendants rely on the fact that Congress *believed* that states would be unable to prosecute an out-of-state FFL who sold to one of their residents in violation of state law; thus, requiring the participation of the in-state FFL would allow states to prosecute such illegal firearms sales. The Court agrees that

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Nevada, from conducting the same research to ensure that a handgun transaction with a Sacramento resident, some 100 miles away, comports with federal, Nevada, California, and Sacramento restrictions. Under current law, an FFL is not authorized to transfer any firearm to anyone until the state or federal authority confirms the transfer is legally permitted under state and federal law. *See* 18 U.S.C. § 922(t).

states indeed have an interest in prosecuting such crimes but fails to see how a state would be unable to prosecute out-of-state FFLs that illegally sell guns to their citizens. While Congress's findings indicated that states could not prosecute rogue out-of-state FFLs, nothing in the findings, and nothing presented by Defendants here, supports such a conclusion. *See Morrison*, 529 U.S. at 614 (stating that determining whether congressional findings are sufficient to sustain congressional action is a matter for the judiciary).

Based on the foregoing, the Court concludes that Defendants have not shown that the federal interstate handgun transfer ban is narrowly tailored to be the least restrictive means of achieving the Government's goals under current law. The federal interstate handgun transfer ban is therefore unconstitutional on its face.

The Court further finds, in the alternative, the federal interstate handgun transfer ban is unconstitutional when applied to the facts of this case. The essence of an as-applied challenge is the claim that the manner in which a statute was applied to the plaintiff in a particular circumstance violated the Constitution. *See In re Cao*, 619 F.3d 410, 434 (5th Cir. 2010); *Khachaturian v. Fed. Election Comm'n*, 980 F.2d 330, 331 (5th Cir. 1992). Texas law allows the sale of handguns to residents of other states, and the District of Columbia does not prohibit the importation of firearms as long as they are registered. *See* D.C. Code § 7-2502.01(a) (2014). Further, based on the undisputed facts in this case, the Hansons are fully qualified under

federal, District of Columbia, and Texas law to purchase and possess handguns, and the Hansons each identified a handgun in Mance's inventory that is legal for them to possess and bring into the District of Columbia. As discussed above, requiring that the Hansons pay additional costs and fees and wait until they return to the District of Columbia to retrieve their firearms from Sykes amounts to a regime that is not narrowly tailored to achieve the Government's compelling interest. Accordingly, the federal interstate handgun transfer ban is unconstitutional as applied to Plaintiffs.

d. Intermediate Scrutiny Analysis

Even if the federal interstate handgun transfer ban merits only intermediate scrutiny, the ban still fails. To withstand intermediate scrutiny, Defendants must show that the law is substantially related to an important government interest. *See, e.g.*, *Nat'l Rifle Ass'n of Am., Inc. v. McCraw*, 719 F.3d 338, 348-49 (5th Cir. 2013). The law need not employ the least restrictive means to achieve its goal, but the law must be reasonably adapted to its public safety objective to pass constitutional muster. *Id.* at 349. A regulation may not be sustained if it provides only ineffective or remote support for the interest. *Edenfield*, 507 U.S. at 770-71. Instead, "there must be an indication that the regulation will alleviate the asserted harm to a material degree." *Id.*

In *NRA*, the Fifth Circuit applied a means-ends analysis to determine that the federal law prohibiting FFLs from selling handguns to 18-to-20-year-olds survived intermediate scrutiny. 700 F.3d at 208-09. Specifically, the court found that the Government had shown that there was a problem of young persons under 21, who were immature and prone to violence, easily accessing handguns, which facilitate violent crime, primarily by way of FFLs. *Id.* at 208. Therefore, the court found that restricting the ability of young persons under 21 to purchase handguns from FFLs was an appropriate and constitutional response. *Id.* Applying intermediate scrutiny in *McCraw*, the Fifth Circuit found that a Texas law prohibiting 18-to-20-year-olds from publicly carrying handguns was constitutional because (1) it had a similarly "narrow ambit" as the federal law challenged in *NRA;* (2) it targeted the "discrete category" of 18-to-20-year-olds; and (3) the Texas law restricted only the carrying of one type of guns—handguns. *McCraw*, 719 F.3d at 349. Accordingly, the law was appropriately tailored. *Id.*

The federal interstate handgun transfer ban is unique compared to other firearms restrictions because it does not target certain people (such as felons or the mentally ill), conduct (such as carrying firearms into government buildings or schools), or distinctions among certain classes of firearms (such as fully automatic weapons or magazine capacity). Instead, the federal interstate handgun transfer ban targets the entire national market of handgun sales and directly burdens law-abiding, responsible citizens who seek to complete

otherwise lawful transactions for handguns. *See Moore v. Madigan*, 702 F.3d 933, 940 (7th Cir. 2012) (stating government must make a "strong showing" where the challenged restriction curtails "the gun rights of the entire law-abiding adult population"). Again, Defendants have failed to carry their burden to show how the federal interstate handgun transfer ban alleviates, in a material way, the problem of prohibited persons obtaining handguns simply by crossing state lines and depriving states of notice that they have under the amended version of the 1968 Gun Control Act.

It may be that the federal interstate handgun transfer ban provides a reasonable fit to prevent prohibited individuals from crossing state lines to illegally acquire and possess handguns they otherwise would not obtain, even in light of the Brady Act's creation of NICS/POC requirements. In this case, however, Defendants have failed to carry their burden to show the federal interstate handgun transfer ban is a reasonable fit to achieve the intended objective. *See Annex Books*, 581 F.3d at 463; *see also Edenfield*, 507 U.S. at 770-71. Nor have Defendants shown a continued problem with policing out-of-state FFLs. By failing to provide specific information to demonstrate the reasonable fit between this ban and illegal sales and lack of notice in light of the Brady Act amendments to the 1968 Gun Control Act, the ban is not substantially related to address safety concerns. Thus, even under intermediate scrutiny, the federal interstate handgun transfer ban is unconstitutional on its face.

Moreover, the federal interstate handgun transfer ban does not survive intermediate scrutiny when applied to the facts of this case. The undisputed facts indicate that the Hansons would otherwise have been legally permitted to possess the handguns that they selected from Mance and bring them into the District of Columbia. *See* 2d Am. Compl. ¶¶ 26, 28, ECF No. 33. As law-abiding, responsible citizens, the Hansons likely do not pose the threat to public safety that motivated Congress to enact the federal interstate handgun transfer ban. Requiring that the Hansons pay additional costs and fees and wait until they return to the District of Columbia to retrieve their firearms from Sykes amounts to a regime that is not substantially related to the Government's stated goal. *See Shelby Cnty.*, 133 S. Ct. at 2619 ("[C]urrent burdens must be justified by current needs."). Therefore, the federal interstate handgun transfer ban is unconstitutional as applied to Plaintiffs.

2. Due Process Clause of the Fifth Amendment

Plaintiffs contend that, because the laws discriminate based on residence, Defendants' enforcement of the federal interstate handgun transfer ban violates Plaintiffs' right to equal protection of the laws guaranteed by the Fifth Amendment's Due Process Clause. 2d Am. Compl. ¶¶ 39-40, ECF No. 33. The Due Process Clause of the Fifth Amendment provides, in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const.

amend. V. The Supreme Court has consistently held that the Due Process Clause contains an equal protection component, which prohibits the United States from discriminating between individuals or groups. *See, e.g.*, *Washington v. Davis*, 426 U.S. 229, 239 (1976); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

"[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 (1976). Here, the federal interstate handgun transfer ban interferes with the exercise of a fundamental right. The Supreme Court has also held that strict scrutiny is required where the challenged classification impinges on residency. *See Mem'l Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 254-64 (1974) (holding that a challenge to a state durational-residency requirement to receive free, non-emergency medical care merited strict scrutiny, and the requirement was unconstitutional); *see also Att'y Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898 (1986). The Supreme Court applied strict scrutiny in situations where *state* laws discriminated against non-residents, and those cases involved benefits offered by the state, not constitutional rights. *See id.*; *Mem'l Hosp.*, 415 U.S. at 254. Here, the *federal* law not only creates a discriminatory regime based on residency, but it also involves access to the constitutional guarantee to keep and bear arms. Based on the strict scrutiny analysis above, the Court finds that the federal interstate handgun transfer ban also violates the

Due Process Clause of the Fifth Amendment to the United States Constitution. *See supra* Part III.B.1.c.

IV. CONCLUSION

Based on the foregoing, it is **ORDERED** that Defendants' Motion to Dismiss for lack of standing (ECF No. 15) is **DENIED**. It is **FURTHER ORDERED** that Plaintiffs' Motion for Summary Judgment (ECF No. 21) is **GRANTED**, and Defendants' Motion for Summary Judgment (ECF No. 15) is **DENIED**.

Accordingly, the Court **DECLARES** that 18 U.S.C. § 922(a)(3), 18 U.S.C. § 922(b)(3), and 27 C.F.R. § 478.99(a) are **UNCONSTITUTIONAL**, and Defendants are **ENJOINED** from enforcing these provisions. The Court will issue its final judgment separately.

SO ORDERED on this **11th** day of **February, 2015**.

/s/ Reed O'Connor
Reed O'Connor
UNITED STATES
DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-10311

FREDRIC RUSSELL MANCE, JR.; TRACEY AMBEAU HANSON; ANDREW HANSON; CITIZENS COMMITTEE FOR THE RIGHT TO KEEP AND BEAR ARMS,

Plaintiffs - Appellees

v.

JEFFERSON B. SESSIONS, III, U. S. ATTORNEY GENERAL; THOMAS E. BRANDON, Acting Director, Bureau of Alcohol, Tobacco, Firearms and Explosives,

Defendants - Appellants

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING EN BANC

(Filed Jul. 20, 2018)

(Opinion 01/19/18, 880 F.3d 183 (5th Cir. 2018)

Before OWEN, and HAYNES, Circuit Judges.*

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* Judge Prado was a member of the original panel but resigned from the Court on April 2, 2018 and, therefore did not

PER CURIAM:

The court having been polled at the request of one of its members, and a majority of the judges who are in regular active service and not disqualified not having voted in favor (Fed. R. App P. 35 and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

In the en banc poll, seven judges voted in favor of rehearing (Judges Jones, Smith, Elrod, Willett, Ho, Duncan, and Engelhardt) and eight judges voted against rehearing (Chief Judge Stewart and Judges Dennis, Owen, Southwick, Haynes, Graves, Higginson, and Costa).

ENTERED FOR THE COURT:

/s/ *Priscilla R. Owen*
UNITED STATES CIRCUIT JUDGE

STEPHEN A. HIGGINSON, Circuit Judge, concurring in denial of rehearing en banc:

With respect for colleagues who have been thoughtful sharing reasons why they perceive the panel decision warrants full court review, I offer several reasons why I do not.

Unlike the dissentals, I do not read the panel opinion as demoting the Second Amendment to second-class status or "subject[ing it] to an entirely different

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participate in the consideration of the rehearing. This order is being decided by a quorum. 28 U.S.C. §46(d).

body of rules than other Bill of Rights guarantees." *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010). Rather, the panel applied the two-step analytic framework adopted by our circuit and all nine other circuits to have considered the issue. *See NRA v. ATF*, 700 F.3d 185, 194–98 (5th Cir. 2012).[1] Mirroring First Amendment doctrine, this test asks: does the regulated conduct fall within the scope of the right? *Id.* at 194. And if it does, is the challenged law appropriately tailored to serve a sufficiently important purpose? *Id.* Severe burdens on core Second Amendment rights—rights of "law-abiding, responsible citizens to use arms in defense of hearth and home," *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008)—merit strict scrutiny. *NRA,* 700 F.3d at 195. Less onerous laws, or laws that govern conduct outside the Second Amendment's "core," receive intermediate scrutiny. *Id.*

Neither the rehearing petition nor the lengthiest dissental takes umbrage with this two-step framework; neither one disputes Congress's compelling interest in combating crime by assisting the states' public-safety enforcement of their own legitimate

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[1] *See also Kolbe v. Hogan*, 849 F.3d 114, 132 (4th Cir.) (en banc), *cert. denied*, 138 S. Ct. 469 (2017); *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013); *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1261 n.34 (11th Cir. 2012); *United States v. Decastro*, 682 F.3d 160, 163–64 (2d Cir. 2012); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1252 (D.C. Cir. 2011); *Ezell v. City of Chicago*, 651 F.3d 684, 700–04 (7th Cir. 2011); *United States v. Reese*, 627 F.3d 792, 800–01 (10th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010).

handgun regulations; and neither one contests that the laws challenged here directly further that purpose. The petition and the dissental instead challenge only the panel opinion's fact-bound narrow-tailoring analysis.

That issue does not warrant en banc review. This is especially so because, rather than neglect Second Amendment rights, the panel opinion gave petitioners the benefit of the doubt at every step of this analysis. At step one, the panel assumed out of an abundance of caution that federal laws governing the time, place, and manner of interstate gun sales are not among the longstanding "conditions and qualifications on the commercial sale of arms" that the Supreme Court has deemed "presumptively lawful." *Heller*, 554 U.S. at 626–27 & n.26. And at step two, the panel again cautiously assumed that the "burdens" of which petitioners complain—namely, the extra days it takes to ship out-of-state firearms to the District of Columbia, plus the attendant shipping costs and fees—are so onerous, and the right to out-of-state gun purchases so near the Second Amendment's "core," that strict scrutiny is required. In my view, the panel opinion needed not concede either step. *See United States v. Focia*, 869 F.3d 1269, 1286–87 (11th Cir. 2017) (upholding 18 U.S.C. § 922(a)(5) as within *Heller*'s "presumptively lawful" categories); *United States v. Decastro*, 682 F.3d 160, 168 (2d Cir. 2012) (declining to apply heightened scrutiny because § 922(a)(3) "does not substantially burden [the] right to keep and bear arms").

But even were we required to apply strict scrutiny to this interstate commercial obligation—a far cry from the complete handgun ban at issue in *Heller*—the panel opinion did so carefully and correctly.

The laws at issue are not an overbroad prophylactic ban. To be clear: § 922(a) is not a ban on interstate gun transfers. It does not prohibit law-abiding individuals in one state from purchasing a gun from another. It simply conditions that the purchase be made through an in-state, federally licensed dealer. The only prohibitions on gun sales are those imposed by state law. Given the diversity and complexity of those laws, Congress reasonably concluded that relying on dealers in one state to ensure compliance with the laws of all 49 other states, the District of Columbia, and the U.S. territories would perpetuate the same under-enforcement and circumvention of *state* law that § 922(a) was meant to combat.[2] The rejoinder that dealers would be better able to apply the laws of all states and territories if those laws were less complex has no bearing on whether this *federal* law is narrowly tailored. Put simply, Congress has no power to compel states to streamline their gun safety regulations.

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[2] For example, while many states prohibit gun ownership based on mental-health status, "some states report that state privacy laws bar them from providing information to the [National Instant Criminal Background Check System] that would demonstrate a mental health prohibitor for one of its citizens." *The Fix Gun Checks Act: Hearing before the Subcomm. On Crime & Terrorism of the S. Comm. of the Judiciary*, 112th Cong. (2011) (statement of David Cuthbertson, Assistant Director, Criminal Justice Information Services Division, Fed. Bureau of Investigation).

Nor is the law fatally underinclusive. Instead, its focus on handguns highlights how § 922(a) hews closely to its compelling purpose of reducing gun-related crime and violence by preventing circumvention of state law. Contrary to the dissental's assertion, we need not speculate why Congress was less concerned with out-of-state purchases of rifles: it's all there in the congressional record.[3] In any event, underinclusivity is not itself fatal: "A State need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns." *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1668 (2015).

And it should not be surprising that constitutional challenges sometimes fail, even under strict scrutiny. "Like most rights, the right secured by the Second Amendment is not unlimited." *Heller*, 554 U.S. at 626. Nor, contrary to any intimation in the dissentals, is the Second Amendment unique in that regard. *See, e.g.*, *Holder v. Humanitarian Law Project*, 561 U.S. 1, 29–39

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[3] *See* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 901(a)(5), 82 Stat. 197, 225 ("[T]he sale or other disposition of *concealable* weapons . . . to nonresidents . . . has tended to make ineffective the laws, regulations, and ordinances in the several States and local jurisdictions. . . ." (emphasis added)); S. Rep. No. 90-1097, at 80 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2167 ("The provisions of the title which prohibit a licensee from disposing of firearms (other than rifles and shotguns) to persons who are not residents of the State in which he conducts his business is justified by the record, which is replete with testimony documenting the fact that the purchase of such firearms by persons in other than their residence state is a serious contributing factor to crime.").

(2010) (upholding free-speech restriction under strict scrutiny).[4]

Neither do I see a reason for our full court to accept the remaining dissentals' invitation to jettison the uniformly accepted Second Amendment test in favor of a *per se* invalidity rule that no party in this case has pressed[5] and that no federal appellate court has adopted.[6] Each circuit to have considered this proposal has rejected it for what is, in my mind, a sound reason: it is not what the Supreme Court said. *See, e.g., NRA,* 700 F.3d at 197–98 & n.10; *Heller v. District of Columbia (Heller II),* 670 F.3d 1244, 1264–67 (D.C. Cir. 2011). Although the Supreme Court in *Heller* rejected Justice Breyer's "freestanding 'interest-balancing' approach," 554 U.S. at 634, it never suggested that courts should abandon the familiar tiers-of-scrutiny architecture built around analogous provisions like the Equal Protection Clause, Due Process Clauses, and First Amendment. To the contrary, the Court in *Heller* noted that the Second Amendment's doctrinal structure "is no

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[4] I also disagree with the dissental's contention that "reliance on *Williams-Yulee*"—a *First* Amendment case that we have no power to change—"reinforces the concern" that the *Second* Amendment is second-class. Applying the same law in the same way to two rights does not subordinate one to the other, just as upholding a law under strict scrutiny does not demote the burdened right.

[5] *See* Brief for Appellee at 19, 2015 WL 5013572 (observing that courts apply a two-step inquiry and stating "[t]his case appears well-suited to this approach").

[6] *See supra* note 1. Indeed, the dissentals support this argument with only other dissents.

different" from that of the First, *id.* at 635, and explained that the D.C. handgun ban failed "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights," *id.* at 628. Had the Supreme Court meant instead to replace these established standards with a *per se* invalidity rule unrecognized in the law, it would have done so explicitly, not by hiding "elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (Scalia, J.).

A decade has passed since the Supreme Court first discovered in the Second Amendment an individual's right to possess a handgun "in defense of hearth and home." *Heller*, 554 U.S. at 635. The dissentals emphasize that the Court has not recently revisited this area of law, and they suggest that our full court must pick up some perceived doctrinal slack. But *Heller* "was not revolutionary in terms of its immediate real-world effects on American gun regulation." *Heller II*, 670 F.3d at 1270 (Kavanaugh, J., dissenting). "Indeed, *Heller* largely preserved the status quo of gun regulation in the United States." *Id*.[7] After all, the opinion invalidated an absolute home-possession handgun ban matched in severity by "[f]ew laws in the history of our Nation," *Heller*, 554 U.S. at 629, yet it explicitly left

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[7] *See also* Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After* Heller, 67 Duke L.J. 1433, 1507 (2018) (concluding that most Second Amendment claims fail because of limitations on the scope of the right recognized by *Heller* itself). For example, "[f]ully 24 percent" of *post-Heller* Second Amendment challenges have targeted felon-in-possession laws, *id.,* which *Heller* explicitly "presum[ed] lawful," 554 U.S. at 626–27 & n.26.

intact a "variety of tools" constitutionally available for combating the tragedy of criminal gun violence and killing in the United States, *id.* at 636. Whether and how to deploy these tools is the subject of a dynamic debate occurring in statehouses and classrooms across the country. That the Constitution permits these discussions and initiatives is not cause for alarm.

I concur in our court's decision not to take this case en banc.

JENNIFER WALKER ELROD, Circuit Judge, joined by EDITH H. JONES, JERRY E. SMITH, DON R. WILLETT, JAMES C. HO, STUART KYLE DUNCAN, and KURT D. ENGELHARDT, Circuit Judges, dissenting from denial of rehearing en banc:

I concur in Judge Ho's excellent dissent from denial of rehearing en banc and write separately to address the proper Second Amendment test for assessing gun bans and regulations. Simply put, unless the Supreme Court instructs us otherwise, we should apply a test rooted in the Second Amendment's text and history—as required under *Heller* and *McDonald*—rather than a balancing test like strict or intermediate scrutiny.

Many of our sister circuits have recognized that *Heller* and *McDonald* require a textual and historical approach to the Second Amendment's scope. Most

circuits—including our own[1]—have adopted a two-pronged approach, the first prong of which generally asks whether the challenged regulation burdens conduct that falls within the scope of the Second Amendment *as historically understood. See United States v. Rene E.*, 583 F.3d 8, 12 (1st Cir. 2009); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194–95 (5th Cir. 2012); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Ezell v. City of Chi.*, 651 F.3d 684, 702–03 (7th Cir. 2011); *United States v. Reese*, 627 F.3d 792, 800–01 (10th Cir. 2010); *United States v. Focia*, 869 F.3d 1269, 1285 (11th Cir. 2017); *Heller v. D.C.*, 670 F.3d 1244, 1252 (D.C. Cir. 2011) [*Heller II*].

Disagreement abounds, however, on a crucial inquiry: What doctrinal test applies to laws burdening the Second Amendment—strict scrutiny, intermediate scrutiny, or some other evaluative framework altogether? *See Nat'l Rifle Ass'n, Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 714 F.3d 334, 345–46 & n.33 (5th Cir. 2013) (Jones, J., dissenting from denial of rehearing en banc) (stating that "there is currently a debate about how to assess the level of scrutiny courts apply to regulations that infringe on gun ownership" and citing *Heller II*, 670 F.3d 1244; *Ezell*, 651

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[1] Though not without dissent—see generally *National Rifle Ass'n, Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 714 F.3d 334 (5th Cir. 2013) (Jones, J., dissenting from denial of rehearing en banc).

F.3d 684; and *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012)); *see also Ezell*, 651 F.3d at 701 ("The [Supreme] Court resolved the Second Amendment challenge in *Heller* without specifying any doctrinal 'test' for resolving future claims.").

The panel opinion here assumes without deciding that strict scrutiny applies.[2] As I have argued previously, however, "unless and until the Supreme Court says differently, . . . '*Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny.'" *Houston v. City of New Orleans*, 675 F.3d 441, 448 (5th Cir.) (Elrod, J., dissenting) (quoting *Heller II*, 670 F.3d at 1271 (Kavanaugh, J., dissenting)), *opinion withdrawn and superseded on reh'g*, 682 F.3d 361 (5th Cir. 2012); *accord Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 714 F.3d at 338–39 (Jones, J., dissenting from denial of rehearing en banc, joined by Jolly, J.; Smith, J.; Clement, J.; Owen, J.; & Elrod, J.) ("[W]e should presuppose that the fundamental right to keep and bear arms is not itself subject to interest balancing. The right categorically exists, subject to such limitations as were present at the time of the Amendment's ratification.").

"*Heller* and *McDonald* make clear that courts may consider only the text and historical understanding of

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[2] Judge Ho's dissent from denial of rehearing en banc adeptly shows why the panel opinion errs even assuming, *arguendo*, that strict scrutiny applies.

the Second Amendment when delimiting the Amendment's scope." *City of New Orleans*, 675 F.3d at 449 (Elrod, J., dissenting). "The Supreme Court explained in *Heller* that it would require 'an exhaustive historical analysis' to delineate 'the full scope of the Second Amendment.'" *Id.* (quoting 554 U.S. 570, 626 (2008)). "While declining that undertaking, the *Heller* Court identified as permissible several types of 'longstanding' regulatory measures." *Id.* (quoting 554 U.S. at 626–27). "*Heller* then looked to 'historical tradition' alone to reach its conclusion that the government may ban certain classes of 'dangerous and unusual weapons.'" *Id.* (quoting 554 U.S. at 627). Succinctly stated:

> Gun bans and gun regulations that are longstanding—or, put another way, sufficiently rooted in text, history, and tradition—are consistent with the Second Amendment individual right. Gun bans and gun regulations that are not longstanding or sufficiently rooted in text, history, and tradition are not consistent with the Second Amendment individual right.

City of New Orleans, 675 F.3d at 452 (Elrod, J., dissenting) (quoting *Heller II*, 670 F.3d at 1285 (Kavanaugh, J., dissenting)).[3]

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[3] Mance and *amici*, the National Rifle Association and National Shooting Sports Foundation, have argued that the regulations at issue cannot be characterized as longstanding. The panel opinion assumes, without deciding, that the regulations at issue are "not 'longstanding regulatory measures.'" *Mance v. Sessions*, 880 F.3d 183, 188 (5th Cir. 2018) (quoting *McDonald v. City of Chi.*, 561 U.S. 742, 786 (2010) (plurality opinion)). As Judge

I respectfully dissent.

DON R. WILLETT, Circuit Judge, joined by EDITH H. JONES, JERRY E. SMITH, JENNIFER WALKER ELROD, JAMES C. HO, STUART KYLE DUNCAN, and KURT D. ENGELHARDT, Circuit Judges, dissenting from denial of rehearing en banc:

Constitutional scholars have dubbed the Second Amendment "the Rodney Dangerfield of the Bill of Rights."[1] As Judge Ho relates, it is spurned as peripheral, despite being just as fundamental as the First

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Owen's concurring opinion highlights, "the Government has offered no evidence that an in-state sales requirement has a founding-era analogue or was historically understood to be within the ambit of the permissible regulation of commercial sales of firearms at the time the Bill of Rights was ratified." *Id.* at 194 (Owen, J., concurring). Assuming that the regulations at issue are "not longstanding or sufficiently rooted in text, history, and tradition," the need to apply the proper test here is paramount: Crucially, under a proper text-and-history-based approach, such regulations would be inconsistent with the Second Amendment's individual right. *See City of New Orleans*, 675 F.3d at 452 (Elrod, J., dissenting).

[1] Robert J. Cottrol, *Taking Second Amendment Rights Seriously*, 26 HUM. RTS. 5, 5 (Fall 1999) ("[T]he Second Amendment has become the Rodney Dangerfield of the Bill of Rights. . . ."); *see* Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 639 (1986) (noting that, at the time, "the Second Amendment [was] not at the forefront of constitutional discussion" in "scholarly legal publications"). *But see* Glenn Harlan Reynolds, *Foreword: The Third Amendment in the 21st Century*, 82 TENN. L. REV. 491, 491 (2015) ("For many years, the Third Amendment to the Constitution has been the Rodney Dangerfield of the Bill of Rights, getting no respect.").

Amendment. It is snubbed as anachronistic, despite being just as enduring as the Fourth Amendment. It is scorned as fringe, despite being just as enumerated as the other Bill of Rights guarantees.

The Second Amendment is neither second class, nor second rate, nor second tier. The "right of the people to keep and bear Arms"[2] has no need of penumbras or emanations. It's right there, 27 words enshrined for 227 years.

The core issue in this case is undeniably weighty: Does the federal criminalization of interstate handgun sales offend We the People's "inherent right of self-defense?"[3] This merits question turns upon a method question: What level of judicial scrutiny applies to laws burdening the Second Amendment? In other words, when the government abridges your individual gun-ownership rights, how generous is the constitutional strike zone?

My colleagues' dissents today are well written and well taken. And they themselves underscore the need for en banc resolution, not just of the ultimate "*who* wins?" question but of the prefatory "which test?" question.

- The panel assumed, "without deciding, that the strict, rather than intermediate,

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[2] U.S. CONST. amend. II.

[3] *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008).

standard of scrutiny"[4] applies and concluded the ban survives.

- Several colleagues respectfully disagree and believe that, under strict scrutiny, the ban is unconstitutional.
- More fundamentally, though, these colleagues reject the application of strict scrutiny altogether and suggest that, rather than tiers of scrutiny, our constitutional inquiry should assess whether a regulation squares with "text, history, and tradition."

As Judge Jones explained five years ago, "there is currently a debate about how to assess the level of scrutiny courts apply to regulations that infringe on gun ownership."[5] The debate persists. As Justice Thomas recently lamented, "This Court has not definitively resolved the standard for evaluating Second Amendment claims."[6] Given the Supreme Court's disinclination to hear Second Amendment cases, we should settle the matter—definitively—within our circuit. Regardless of the ultimate holding on constitutionality, the scrutiny question itself merits scrutiny.

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[4] *Mance v. Sessions*, 880 F.3d 183, 188 (5th Cir. 2018).

[5] *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 714 F.3d 334, 335 (5th Cir. 2013) (Jones, J., dissenting from denial of rehearing en banc).

[6] *Silvester v. Becerra*, 138 S. Ct. 945, 947 (2018) (Thomas, J., dissenting from denial of certiorari).

In sum, this case hits the en banc bull's-eye, posing "question[s] of exceptional importance."[7] First, this is a constitutional challenge to Congress's ban on interstate handgun sales.[8] Over the past year alone we have devoted our full court's attention to multiple cases raising nettlesome questions about the scope of various constitutional guarantees.[9] Each case cleared the

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[7] FED. R. APP. P. 35(a)(2).

[8] *See* 18 U.S.C. § 922(a)(3) (making it unlawful "for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector to transport into or receive in the State where he resides . . . any firearm purchased or otherwise obtained by such person outside that State"); *id.* § 922(b)(3) (making it unlawful "for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver . . . any firearm to any person who the licensee knows or has reasonable cause to believe does not reside in . . . the State in which the licensee's place of business is located").

[9] In May of last year, we heard en banc a case involving a grant of summary judgment on qualified immunity, in anticipation that the plaintiff *might* have a Fourth Amendment claim. *Melton v. Phillips*, 875 F.3d 256 (5th Cir. 2017) (en banc). Last September, we considered en banc whether the parents of a young boy shot and killed by a border patrol agent *might* have a cause of action to raise Fifth Amendment grievances on behalf of their son. *Hernandez v. Mesa*, 885 F.3d 811 (5th Cir. 2017) (en banc). And just this past January, we sat en banc to consider whether a defendant's Fourteenth Amendment rights under *Brady v. Maryland*, 373 U.S. 83 (1963), *might* be implicated by the withholding of evidence during plea negotiations. *Alvarez v. City of Brownsville*, 874 F.3d 898 (5th Cir. 2017) (granting petition for rehearing en banc). Each of these cases, like this one, "involve[d] a question of exceptional importance." FED. R. APP. P. 35(a)(2).

"exceptional importance" hurdle and warranted our collective consideration. So too this case.[10]

Plus, today's case adds a crucial methodological issue, itself exceptionally important: How should judges

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[10] This seems particularly true given the varying analytical approaches taken by other circuits that have examined this law. *See*, *e.g.*, *Lane v. Holder*, 703 F.3d 668, 673 (4th Cir. 2012) (holding plaintiffs have no standing to challenge 18 U.S.C. § 922(b)(3) because it does "not burden the plaintiffs directly . . . because the plaintiffs are not prevented from acquiring the handguns they desire" and reasoning plaintiffs therefore "do not allege an injury in fact"); *United States v. Decastro*, 682 F.3d 160, 164 (2nd Cir. 2012) ("Because § 922(a)(3) only minimally affects the ability to acquire a firearm, it is not subject to any form of heightened scrutiny.").

For an amendment that is 227 years old, contour-setting litigation over the scope of the individual right to keep and bear arms is of relatively recent vintage. *Heller* was decided barely ten years ago, and as the Court made clear, the right is not unlimited: "It is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 626. So just what is prescribed and what is proscribed? When does a burden become a ban, or a regulation become a prohibition? As Justice Scalia observed *pre-Heller*, "There comes a point . . . at which the regulation of action intimately and unavoidably connected with [a right] is a regulation of [the right] itself." *Hill v. Colorado*, 530 U.S. 703, 745 (2000) (Scalia, J., dissenting); *see also Luis v. United States*, 136 S. Ct. 1083, 1097 (2016) (Thomas, J., concurring) ("Constitutional rights . . . implicitly protect those closely related acts necessary to their exercise."). Mance and the Hansons thus raise a legitimate—and legitimately difficult—question that has been addressed in analogous constitutional contexts. *See*, *e.g.*, *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 812 ("It is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree."). I believe the nation's emergent Second Amendment legal framework would profit from our en banc input.

evaluate laws that burden Americans' Second Amendment rights—tiers of scrutiny vs. "text, history, and tradition"? The Rule of Law is anchored in clear rules consistently applied. Regardless of *what* we decide, *how* we decide matters too.

Such questions en tête deserve answers en banc.

JAMES C. HO, Circuit Judge, joined by EDITH H. JONES, JERRY E. SMITH, JENNIFER WALKER ELROD, DON R. WILLETT, STUART KYLE DUNCAN, and KURT D. ENGELHARDT, Circuit Judges, dissenting from denial of rehearing en banc:

The Second Amendment guarantees the right of the people to keep and bear arms. For decades, the Supreme Court has referred to the Second Amendment as a fundamental civil right, comparable to other provisions of the Bill of Rights. *See, e.g., Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950) (describing the First, Second, Fourth, Fifth, and Sixth Amendments as the "civil-rights Amendments"); *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49–50 n.10 (1961) (comparing "the commands of the First Amendment" to "the equally unqualified command of the Second Amendment"). It has reminded lower courts that fundamental constitutional rights like the Second Amendment "are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *District of Columbia v. Heller*, 554

U.S. 570, 634–35 (2008). And it has rejected attempts to disregard the Second Amendment as "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *McDonald v. City of Chicago,* 561 U.S. 742, 780 (2010).

Yet the Second Amendment continues to be treated as a "second-class" right—as at least three Justices have noted in recent years.[1]

So the district court deserves recognition for standing against the tide. It dutifully applied established constitutional principles and held the federal ban on interstate handgun sales invalid, ruling that the ban is not narrowly tailored to serve the Government's compelling interest in preventing the

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[1] *See*, *e.g.*, *Silvester v. Becerra*, 138 S. Ct. 945, 945 (2018) (Thomas, J., dissenting from denial of certiorari) (bemoaning "lower courts' general failure to afford the Second Amendment the respect due an enumerated constitutional right"); *Peruta v. California*, 137 S. Ct. 1995, 1999 (2017) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari) (lamenting "distressing trend" of "the treatment of the Second Amendment as a disfavored right"); *Friedman v. City of Highland Park*, 136 S. Ct. 447, 447 (2015) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari) (criticizing "noncompliance with our Second Amendment precedents" by "several Courts of Appeals"); *Jackson v. City & Cty. of San Francisco*, 135 S. Ct. 2799, 2799 (2015) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari) ("lower courts, including the ones here, have failed to protect [the Second Amendment right]"); *id*. at 2802 ("A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.' ") (quoting *Heller*, 554 U.S. at 634).

circumvention of state handgun laws. But a panel of this Court reversed.

This case warrants en banc review. It involves a question of exceptional importance—the proper scope of the Second Amendment. In fact, this is the second time in recent memory where a single vote prevented this Court from rehearing a Second Amendment case en banc. *See NRA v. ATF*, 714 F.3d 334, 335 (5th Cir. 2013) (Jones, J., dissenting from denial of rehearing en banc). I respectfully dissent.

I.

Federal law criminalizes all interstate handgun sales, and requires anyone who wants a handgun to obtain it from an in-state dealer. 18 U.S.C. § 922(a)(3), (b)(3). As a result, anyone wishing to purchase a handgun from an out-of-state dealer must first have it transferred to an in-state dealer. *See generally Mance v. Sessions*, 880 F.3d 183, 185 (5th Cir. 2018).

The ban on interstate handgun sales demonstrably burdens the ability of countless law-abiding citizens like the Hansons to obtain a handgun.

To begin with, the ban imposes a *de facto* waiting period on interstate handgun sales. Courts have recognized that waiting periods pose a burden on constitutional rights that must be justified by a sufficient government interest. *See*, *e.g.*, *Silvester*, 138 S. Ct. at 951–52 (Thomas, J., dissenting from denial of certiorari) (comparing 10-day handgun waiting period to

"10-day waiting period for abortions," "10-day waiting period on the publication of racist speech," or "even a 10-minute delay of a traffic stop").[2]

The ban also imposes a *de facto* tax on interstate handgun sales, in the form of shipping costs and transfer fees. For example, in this case, the record establishes that the only dealer with a federal firearms license (FFL) in the District of Columbia imposes a $125 transfer fee. *See*, *e.g.*, *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983) (tax on paper and ink impermissibly burdens freedom of the press).

The Second Circuit discounted these burdens and concluded that the ban on interstate handgun sales "does not substantially burden [the] right to keep and bear arms." *United States v. Decastro*, 682 F.3d 160, 168 (2nd Cir. 2012).

The district court in this case disagreed, however, holding that the ban burdens Second Amendment

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[2] To illustrate his point, Justice Thomas cited, *inter alia*, a Sixth Circuit decision holding invalid "a 24-hour waiting period for abortions," 138 S. Ct. at 951 (citing *Akron Ctr. for Reproductive Health, Inc. v. Akron*, 651 F.2d 1198, 1208 (6th Cir. 1981)), a Ninth Circuit decision holding invalid another "delay" in obtaining an abortion, *id.* (citing *Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 917 (9th Cir. 2014)), and a Ninth Circuit decision holding invalid a "5-day waiting period for nude-dancing licenses." *Id.* (citing *Key, Inc. v. Kitsap Cty.*, 793 F.2d 1053, 1060 (9th Cir. 1986)). By contrast, the Ninth Circuit *upheld* a 10-day waiting period to buy a handgun. *Id.* at 945 (citing *Silvester v. Harris*, 843 F.3d 816, 828 (9th Cir. 2016)). Justice Thomas condemned this "double standard." *Id.* at 951.

rights and is therefore subject to strict scrutiny: "To obtain a handgun from an out-of-state FFL retailer, the federal interstate handgun transfer ban imposes substantial additional time and expense to those who desire to purchase one." 74 F. Supp. 3d 795, 807 (N.D. Tex. 2015). "Restricting the distribution channels of legal goods protected by the Constitution to a small fraction of the total number of possible retail outlets requires a compelling interest that is narrowly tailored." *Id.* The district court ultimately held that the ban violates the Second Amendment. *Id.* at 811–12.

On appeal, a panel of this Court reversed. Notably, the panel did not dispute that the ban demonstrably burdens Second Amendment rights. Instead, the panel assumed that, under Fifth Circuit precedent, the ban on interstate handgun sales is subject to strict scrutiny. *See NRA v. ATF*, 700 F.3d 185, 194–95 (5th Cir. 2012). But it concluded that the ban is narrowly tailored to serve a compelling interest and therefore survives strict scrutiny.[3]

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[3] As Judges Elrod and Willett note in their separate dissents, the Supreme Court in *Heller* and *McDonald* signaled that handgun laws must be tested against "text, history, and tradition," and "not by a balancing test such as strict or intermediate scrutiny." *Heller v. District of Columbia*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). Under this approach, laws not "sufficiently rooted in text, history, or tradition are not consistent with the Second Amendment," and thus *per se* invalid. *Id.* at 1285. *See also Houston v. City of New Orleans*, 675 F.3d 441, 448-52 (5th Cir. 2012) (Elrod, J., dissenting).

On en banc rehearing, we could have considered replacing the strict scrutiny standard that the panel assumed applied under our precedents (*NRA,* 700 F.3d at 194–95) with *per se*

II.

Under strict scrutiny, the Government must establish that the challenged law is narrowly tailored to serve a compelling government interest. *See*, *e.g.*, *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). There are several reasons why the Government cannot carry that heavy burden in this case.

A.

To start off with, the Government does not purport to have an interest in banning all interstate handgun sales. Rather, it asserts a more limited interest—preventing only the fraction of interstate handgun sales that would violate a legitimate state handgun law.

In other words, the federal interstate handgun ban is a prophylactic rule: To prevent interstate sales that would violate state law, Congress has simply prohibited interstate sales altogether.

But prophylactic laws are inherently suspect under strict scrutiny. *See, e.g., FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 479 (2007) (opinion of Roberts, C.J., joined by Alito, J.) ("[A] prophylaxis-upon-prophylaxis

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invalidity (as well as the separate question of what standard to apply to laws rooted in text, history, or tradition, *see Heller*, 670 F.3d at 1274 & n.7, 1278 (Kavanaugh, J., dissenting)).

But the result here is the same either way: Judge Owen acknowledges that the ban on interstate handgun sales is not rooted in text, history, or tradition. 880 F.3d at 194 (Owen, J., concurring). And the ban violates strict scrutiny, for the reasons detailed in this opinion.

approach to regulating expression is not consistent with strict scrutiny."); *Randall v. Sorrell*, 548 U.S. 230, 267 (2006) (Thomas, J., concurring) ("under traditional strict scrutiny, broad prophylactic [laws] . . . are unconstitutional"); *NRA*, 714 F.3d at 347 (Jones, J., dissenting from denial of rehearing en banc) ("Congress has seriously interfered with this age group's constitutional rights because of a class-based determination that applies to, at best, a tiny percentage of the lawbreakers among the class.").[4]

To take a simple example: Imagine that, to help states enforce their anti-obscenity laws, Congress outlawed the interstate sale of books. No court would uphold such a law. After all, laws that impose broad, categorical bans—rather than narrow, precise restrictions—are by definition not narrowly tailored. And that is so whether the Government bans books or handguns. *See*, *e.g.*, *Sable Commc's of Cal., Inc. v. FCC*, 492 U.S. 115, 128 (1989) ("The federal parties . . . argue that the total ban on indecent commercial telephone communications is justified because nothing less could prevent children from gaining access to such messages. We find the argument quite unpersuasive."); *id.* at 131 (describing ban as "another case of 'burn[ing] the house to roast the pig' ") (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)).

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[4] Similarly, a panel of the Sixth Circuit held a federal law unconstitutional under the Second Amendment due to overinclusiveness, and the en banc court reached the same result on different grounds. *See Tyler v. Hillsdale Cty. Sheriffs Dep't*, 775 F.3d 308, 331–32 (6th Cir. 2014), *reh'g en banc*, 837 F.3d 678 (6th Cir. 2016).

So the Government has an uphill battle to defend the prophylactic ban on interstate handgun sales.

B.

To overcome this burden, the Government presents one core argument: A prophylactic ban is necessary, it says, because handgun laws are complex. Under its view, the Government can reasonably expect dealers to learn the laws of their own state—but not the laws of other states. The only way to ensure compliance with all state handgun laws, then, is to forbid all interstate handgun sales, and allow only in-state handgun sales.

Tellingly, however, the Government does not cite a single case in which regulatory complexity justifies a prophylactic rule under strict scrutiny. To the contrary, courts have generally rejected the notion that citizens are incapable of learning the laws of other states—or that such inability would justify otherwise unconstitutional laws. *See*, *e.g.*, *Supreme Court v. Piper*, 470 U.S. 274, 285 & n.19 (1985) ("Nor may we assume that a nonresident lawyer—any more than a resident—would disserve his clients by failing to familiarize himself with the rules. . . . Because it is markedly overinclusive, the residency requirement does not bear a substantial relationship to the State's objective."); *cf. O'Reilly v. Bd. of Appeals*, 942 F.2d 281, 285 (4th Cir. 1991) (rejecting "[u]se of residency . . . to determine familiarity with the geographic area to be served," and noting that "other similar jurisdictions use a written

examination to determine an applicant's familiarity with a specific area").[5]

The same logic readily applies here. To begin with: Even assuming the Government's premise that it is hard to comply with the handgun laws of all 50 states, that does not justify forbidding dealers from complying with the laws of one or more neighboring states—presumably the most likely scenario for an interstate sale. A Texas dealer near the Oklahoma border might very well be eager to master the laws of both Texas and Oklahoma.

The ban nevertheless forbids Texas dealers from serving Oklahomans. And for what reason? The Government does not contend (nor could it) that a dealer is fully capable of complying with the laws of one state, but incapable of complying with the laws of two. This alone demonstrates that a categorical ban on all interstate handgun sales is over-inclusive—it prohibits a significant number of transactions that fully comply with state law.

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[5] More broadly, courts routinely reject the argument that administrative difficulties render less restrictive alternatives infeasible. *See*, *e.g.*, *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003) ("[T]he fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system."); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 508 (1989) ("[T]he interest in avoiding the bureaucratic effort necessary to tailor remedial relief . . . cannot justify a rigid line drawn on the basis of a suspect classification.").

Moreover, this is not the only flaw in the Government's regulatory complexity theory. The Government presents no evidence that gun dealers cannot comply with the laws of multiple states. For example, the panel points to the fact that minimum age requirements vary by state. But that does not justify a categorical ban—the Government could easily provide, and dealers could easily follow, a one-page index of each state's minimum age requirement. To be sure, there are more complex state laws than minimum age requirements—such as state laws defining prohibited purchasers in terms of mental illness or criminal history. But if in-state dealers are capable of complying with their own state's handgun laws, the Government has not explained why out-of-state dealers are incapable of doing so—for example, why Texans are uniquely capable of complying with Texas law, but uniquely incapable of complying with Oklahoma law.

To borrow from Judge Owen's concurrence: "The Government has not explained how or why a state would be able to provide information such as mental health information for purposes of a transfer of a handgun by an instate FFL but could not provide that information to an out-of-state FFL." 880 F.3d at 197 (Owen, J., concurring).

So there are plenty of less restrictive alternatives that further the Government's interest in ensuring compliance with state handgun laws, short of a categorical ban. For example, nothing prevents a state from imposing the same licensing or other

requirements on out-of-state dealers that it already imposes on in-state dealers.[6]

In addition, some states require their residents to obtain a police pre-approval certification before buying a handgun. *See, e.g.,* D.C. Code § 7-2502.06(a); Haw. Rev. Stat. § 134-2(a); Mich. Comp. Laws § 28.422(1), (3); N.C. Gen. Stat. § 14-402(a). If in-state dealers can use police pre-approval to ensure compliance with state law, so can out-of-state dealers.

Similarly, Congress has established the National Instant Criminal Background Check System ("NICS") to ensure that prospective gun buyers are legally eligible. The district court found that NICS is sufficient to ensure compliance with state and federal law, rendering an interstate handgun sales ban unnecessary. 74 F. Supp. 3d at 810–11.

The panel disagreed, noting that "current federal laws . . . do not require all information regarding

[6] Consider, for example, what the Supreme Court has said about state alcohol regulations – namely, that states have various tools to ensure compliance with their laws by out-of-state wineries, such as licensing and other requirements. *See*, *e.g.*, *Granholm v. Heald*, 544 U.S. 460, 490 (2005) ("Out-of-state wineries face the loss of state and federal licenses if they fail to comply with state law."); *see also Cooper v. McBeath*, 11 F.3d 547, 554 (5th Cir. 1994) ("In this age of split-second communications by means of computer networks, fax machines, and other technological marvels, there is no shortage of less burdensome, yet still suitable, options. At first blush, interstate investigations would seem hardly more difficult than intrastate ones."). These principles readily apply here, especially considering that the Constitution allows states to prohibit the sale of alcohol, but forbids states from prohibiting the sale of handguns.

compliance with the various state and local gun control laws to be included in databases accessible by FFLs nationwide." 880 F.3d at 190.

But 36 states think that relying on NICS adequately vindicates their interests. According to an FBI report cited by the Government, 36 states—including every state in this circuit, as well as the District of Columbia—rely *solely* on NICS to run background checks. *See* FBI Criminal Justice Information Services, *National Instant Criminal Background Check System (NICS) Operations* 3 (2014), *available at* https://www.fbi.gov/about-us/cjis/nics/reports/2014-operations-report.

What's more, the fact that nearly three-quarters of states rely entirely on NICS, and not on their own databases, further demonstrates why the interstate sales ban serves little purpose: If a D.C. resident wishes to buy a handgun, the dealer will run the *same* NICS background check, regardless of whether the dealer is based in D.C., Texas, or most other states.

And in any event, even assuming the panel is correct that better information sharing would make the system more effective, that only furthers the point here: There are less restrictive alternatives to ensure compliance with state handgun laws.

Indeed, a majority of the Senate has voted to repeal the federal ban on interstate handgun sales, in favor of other regulations believed to be more effective at ensuring compliance with state handgun laws, including better information sharing—reflecting their view that the ban is not necessary to enforce those laws. *See*

Public Safety and Second Amendment Rights Protection Act of 2013 § 124, S. Amend. 715 to Safe Communities, Safe Schools Act of 2013, S. 649, 113th Cong., 1st Sess. (2013), 159 Cong. Rec. S2598, S2616 (daily ed. Apr. 11, 2013) (text of bill); *see also* 159 Cong. Rec. S2729, S2740 (daily ed. Apr. 17, 2013) (S. Amend. 715 roll call vote).[7]

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[7] Neither the panel nor the Government claims that better information sharing between the states and the federal government would conflict with *Printz v. United States*, 521 U.S. 898 (1997). To the contrary, as Judge Owen observed in her concurrence: "The Government has not explained how or why a state would be able to provide information such as mental health information for purposes of a transfer of a handgun by an in-state FFL but could not provide that information to an out-of-state FFL." 880 F.3d at 197 (Owen, J., concurring).

And for good reason. To begin with, *Printz* involved "the forced participation of the States' executive in the actual administration of a federal program"—not the mere "provision of information to the Federal Government," and certainly not merely providing information to the federal Government to further compliance with *state* law, as is the case here. 521 U.S. at 918. Nor did *Printz* concern "conditions upon the grant of federal funding." *Id.* at 917. Indeed, Congress already uses federal funding conditions to encourage states to share information in other contexts. *See*, *e.g.*, REAL ID Act of 2005 § 202(d)(12), Pub. L. No. 109-13, 119 Stat. 302, 314-15 (codified at 49 U.S.C. § 30301 note) (States shall "provide electronic access to all other States to information contained in the motor vehicle database of the State"); *id.* § 204(a), 119 Stat. at 315 (codified at 49 U.S.C. § 30301 note) ("The Secretary may make grants to a State to assist the State in conforming to the minimum standards set forth in this title."). *See also* 49 U.S.C. § 30503(a) ("Each State shall make titling information maintained by that State available for use in operating the National Motor Vehicle Title Information System.").

Finally, there is an even more fundamental reason why there is no conflict with *Printz:* None of these proposed less restrictive

C.

Finally, the ban on interstate handgun sales is not only over-inclusive—it is under-inclusive as well: the ban does not apply to either rifles or shotguns. *See* 18 U.S.C. § 922(b)(3) (permitting interstate sale of rifles and shotguns, so long as the sale is conducted in person and complies with state law). What's more, federal law presumes that long-gun dealers are capable of learning and complying with the laws of all 50 states. *See id.* ("any licensed manufacturer, importer or dealer shall be presumed . . . to have had actual knowledge of the State laws and published ordinances" of the buyer's residence).

The Government contends that there is nothing wrong with under-inclusiveness, citing *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015). But *Williams-Yulee* acknowledges that under-inclusivity "raises a red flag" and can "reveal that a law does not actually advance a compelling interest." *Id.* at 1668. The Court in *Williams-Yulee* upheld a Florida law banning judicial candidates from soliciting contributions against First Amendment challenge—but only after concluding that the ban "aims squarely at the conduct most likely to undermine public confidence in the integrity of the judiciary." *Id.* Here, by contrast, it is difficult to imagine that the Government is less concerned with

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alternatives forces a state to do anything. The point here is simply that a state could strengthen compliance with its laws by sharing more information with the federal Government. That a state might be unwilling to do so is up to that state. But a state's unwillingness to undertake a suggested less restrictive alternative is not so much a *defense* to strict scrutiny, as it is a *violation* of it.

unlawful purchases of shotguns and rifles than it is with handguns.

Moreover, *Williams-Yulee* has been criticized for departing from established precedent, and instead applying a weakened version of narrow tailoring. *See, e.g., The Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989) ("[T]he facial underinclusiveness of [the statute] raises serious doubts about whether Florida is, in fact, serving, with this statute, the significant interests which appellee invokes in support of affirmance."); *Citizens United v. FEC*, 558 U.S. 310, 362 (2010) ("[T]he statute is both underinclusive and overinclusive. . . . [I]f Congress had been seeking to protect dissenting shareholders, it would not have banned corporate speech in only certain media within 30 or 60 days before an election. A dissenting shareholder's interests would be implicated by speech in any media at any time.").

For example, four Justices dissented in *Williams-Yulee* for this reason. *See* 135 S. Ct. at 1680 (Scalia, J., joined by Thomas, J., dissenting) ("The state ordinarily may not regulate one message because it harms a government interest yet refuse to regulate other messages that impair the interest in a comparable way. . . . The Court's decision disregards these principles."); *id.* at 1682 (Kennedy, J., dissenting); *id.* at 1685 (Alito, J., dissenting).

The Government's heavy reliance on *Williams-Yulee* thus reinforces the concern that it is treating the Second Amendment as a second-class right. *See, e.g.,* Noah B. Lindell, Comment, Williams-Yulee *and the*

Anomaly of Campaign Finance Law, 126 Yale L.J. 1577, 1577–78 (2017) ("As the decision filters down into the lower courts and into other areas of law, *Williams-Yulee*'s forgiving form of tailoring analysis could unduly dilute what should be the most protective level of judicial scrutiny. There is already some evidence . . . of such dilution.").

* * *

No one disputes that the Government has a compelling interest in preventing dangerous individuals from purchasing handguns. But as the district court held, and the panel properly assumed, handgun restrictions must be narrowly tailored to serve that interest. Law-abiding Americans should not be conflated with dangerous criminals. Constitutional rights must not give way to hoplophobia.

The ban on interstate handgun sales fails strict scrutiny. After all, a categorical ban is precisely the opposite of a narrowly tailored regulation. It applies to all citizens, not just dangerous persons. Instead of requiring citizens to comply with state law, it forbids them from even trying. Nor has the Government demonstrated why it needs a categorical ban to ensure compliance with state handgun laws. Put simply, the way to require compliance with state handgun laws is to require compliance with state handgun laws.

The Government's defense of the federal ban—that state handgun laws are too complex to obey—is not just wrong under established precedent, it is troubling for a more fundamental reason. If handgun laws

are too complex for law-abiding citizens to follow, the answer is not to impose even more restrictive rules on the American people. The answer is to make the laws easier for all to understand and follow. The Government's proposed prophylaxis—to protect against the violations of the few, we must burden the constitutional rights of the many—turns the Second Amendment on its head. Our Founders crafted a Constitution to promote the liberty of the individual, not the convenience of the Government.

I would affirm the district court. I respectfully dissent.

APPENDIX E

U.S. Const. amend. II

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. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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18 U.S.C. § 921(a)(2)

The term "interstate or foreign commerce" includes commerce between any place in a State and any place outside of that State, or within any possession of the United States (not including the Canal Zone) or the District of Columbia, but such term does not include commerce between places within the same State but through any place outside of that State. The term "State" includes the District of Columbia, the

Commonwealth of Puerto Rico, and the possessions of the United States (not including the Canal Zone).

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18 U.S.C. § 922

(a) It shall be unlawful—

* * *

(3) for any person other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector to transport into or receive in the State where he resides (or if the person is a corporation or other business entity, the State where it maintains a place of business) any firearm purchased or otherwise obtained by such person outside that State, except that this paragraph (A) shall not preclude any person who lawfully acquires a firearm by bequest or intestate succession in a State other than his State of residence from transporting the firearm into or receiving it in that State, if it is lawful for such person to purchase or possess such firearm in that State, (B) shall not apply to the transportation or receipt of a firearm obtained in conformity with subsection (b)(3) of this section, and (C) shall not apply to the transportation of any firearm acquired in any State prior to the effective date of this chapter [effective Dec. 16, 1968];

* * *

(b) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver—

* * *

(3) any firearm to any person who the licensee knows or has reasonable cause to believe does not reside in (or if the person is a corporation or other business entity, does not maintain a place of business in) the State in which the licensee's place of business is located, except that this paragraph (A) shall not apply to the sale or delivery of any rifle or shotgun to a resident of a State other than a State in which the licensee's place of business is located if the transferee meets in person with the transferor to accomplish the transfer, and the sale, delivery, and receipt fully comply with the legal conditions of sale in both such States (and any licensed manufacturer, importer or dealer shall be presumed, for purposes of this subparagraph, in the absence of evidence to the contrary, to have had actual knowledge of the State laws and published ordinances of both States), and (B) shall not apply to the loan or rental of a firearm to any person for temporary use for lawful sporting purposes;

* * *

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27 C.F.R. § 478.24

(a) The Director shall annually revise and furnish Federal firearms licensees with a compilation of

State laws and published ordinances which are relevant to the enforcement of this part. The Director annually revises the compilation and publishes it as "State Laws and Published Ordinances—Firearms" which is furnished free of charge to licensees under this part. Where the compilation has previously been furnished to licensees, the Director need only furnish amendments of the relevant laws and ordinances to such licensees.

(b) "State Laws and Published Ordinances—Firearms" is incorporated by reference in this part. It is ATF Publication 5300.5, revised yearly. The current edition is available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402. It is also available for inspection at the Office of the Federal Register, Room 8401, 1100 L Street NW., Washington, DC. This incorporation by reference was approved by the Director of the Federal Register.

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27 C.F.R. § 478.96

(a) The provisions of this section shall apply when a firearm is purchased by or delivered to a person not otherwise prohibited by the Act from purchasing or receiving it.

* * *

(c)

(1) A licensed importer, licensed manufacturer, or licensed dealer may sell or deliver a rifle or shotgun, and a licensed collector may sell or

deliver a rifle or shotgun that is a curio or relic to a nonlicensed resident of a State other than the State in which the licensee's place of business is located if—

(i) The purchaser meets with the licensee in person at the licensee's premises to accomplish the transfer, sale, and delivery of the rifle or shotgun;

(ii) The licensed importer, licensed manufacturer, or licensed dealer complies with the provisions of § 478.102;

(iii) The purchaser furnishes to the licensed importer, licensed manufacturer, or licensed dealer the firearms transaction record, Form 4473, required by § 478.124; and

(iv) The sale, delivery, and receipt of the rifle or shotgun fully comply with the legal conditions of sale in both such States.

(2) For purposes of paragraph (c) of this section, any licensed manufacturer, licensed importer, or licensed dealer is presumed, in the absence of evidence to the contrary, to have had actual knowledge of the State laws and published ordinances of both such States.

(Approved by the Office of Management and Budget under control number 1140-0021)

27 C.F.R. § 478.99(a)

Interstate sales or deliveries. A licensed importer, licensed manufacturer, licensed dealer, or licensed collector shall not sell or deliver any firearm to any person not licensed under this part and who the licensee knows or has reasonable cause to believe does not reside in (or if a corporation or other business entity, does not maintain a place of business in) the State in which the licensee's place of business or activity is located: Provided, That the foregoing provisions of this paragraph (1) shall not apply to the sale or delivery of a rifle or shotgun (curio or relic, in the case of a licensed collector) to a resident of a State other than the State in which the licensee's place of business or collection premises is located if the requirements of § 478.96(c) are fully met, and (2) shall not apply to the loan or rental of a firearm to any person for temporary use for lawful sporting purposes (see § 478.97).

D.C. Code § 7-2501.01

As used in this unit the term:

* * *

(9) "Firearm" means any weapon, regardless of operability, which will, or is designed or redesigned, made or remade, readily converted, restored, or repaired, or is intended to, expel a projectile or projectiles by the action of an explosive; the frame or receiver of any such device. . . .

* * *

D.C. Code § 7-2502.01(a)

Except as otherwise provided in this unit, no person or organization in the District of Columbia ("District") shall receive, possess, control, transfer, offer for sale, sell, give, or deliver any destructive device, and no person or organization in the District shall possess or control any firearm, unless the person or organization holds a valid registration certificate for the firearm. . . .

D.C. Code § 7-2502.06(a)

An application for a registration certificate shall be filed (and a registration certificate issued) prior to taking possession of a firearm from a licensed dealer or from any person or organization holding a registration certificate therefor. In all other cases, an application for registration shall be filed immediately after a firearm is brought into the District. It shall be deemed compliance with the preceding sentence if such person personally communicates with the Metropolitan Police Department (as determined by the Chief to be sufficient) and provides such information as may be demanded; provided, that such person files an application for a registration certificate within 48 hours after such communication.

D.C.M.R. § 24-2320.3 (2018)

An applicant seeking to register a pistol he or she will purchase from a firearms dealer pursuant to this section shall:

(a) Acquire the firearm registration application (P.D. 219) either from any licensed firearms dealer in the District of Columbia, or in person at the Firearms Registration Section at the Metropolitan Police Department headquarters, or by mailing a request with a self-addressed, stamped envelope to Firearms Registration Section, Metropolitan Police Department, 300 Indiana Avenue, NW, Washington, D.C. 20001;

(b) Obtain assistance necessary to complete the application by presenting the firearm registration application to a firearms dealer licensed under federal law either:

(1) Located inside the District if the firearm is purchased within the District; or

(2) Located outside the District if the firearm is purchased outside the District;

(c) Appear in person at MPD headquarters to take these steps:

(1) Report to the Firearms Registration Section with the completed firearm registration application and provide the following:

(A) [RESERVED];

(B) A valid driver's license or a letter from a physician attesting that the applicant

has vision at least as good as that required for a driver's license; and

(C) Residency verification, such as a District of Columbia driver's license or identification card, a current rental agreement, or a deed to property that includes a home;

(2) Complete a firearm registration test;

(3) If successful on the test, pay all applicable fees at the MPD cashier, including thirty-five dollars ($ 35) for fingerprinting and thirteen dollars ($ 13) for a firearm registration; and

(4) Present a fee receipt and submit to fingerprinting.

(d) Await notification from the Firearms Registration Section via mail, telephone, or other electronic communication on whether all statutory and regulatory requirements for registration have been satisfied;

(e) Upon notification that all statutory and regulatory requirements for registration have been satisfied, an applicant shall either:

(1) Return to the Firearms Registration Section to complete the registration process and obtain the approved firearms registration certificate; or

(2) Choose to receive the completed firearms registration certificate by mail; and

(f) Present the approved firearm registration application to the dealer licensed under federal law or, if federal law such as 18 U.S.C. § 922 prohibits the dealer

from delivering the pistol to the applicant because the dealer is not within the District of Columbia, have that firearms dealer transport the pistol to a dealer located within the District, where the applicant will take delivery of the pistol.

D.C.M.R. § 24-2320.3 (2010)

An applicant seeking to register a pistol he or she will purchase from a firearms dealer pursuant to this section shall:

(a) Acquire the Firearm Registration application (PD 219) either from any licensed firearms dealer in the District of Columbia, or in person at the Firearms Registration Section at Metropolitan Police Department (MPD) headquarters or by mailing a request with a self-addressed, stamped envelope to Firearms Registration Section, Metropolitan Police Department, 300 Indiana Avenue, NW, Washington, DC 20001;

(b) Present the Firearm Registration application to a licensed firearm dealer, whose assistance is necessary to complete the application;

(c) Appear in person at MPD headquarters to take these steps:

(1) Report to the Firearms Registration Section with the completed Firearm Registration application, acquire two fingerprint cards, and provide the following:

(A) Two passport-sized facial photos;

(B) A valid driver's license or a letter from a physician attesting that the applicant has vision as [sic] least as good as that required for a driver's license; and

(C) Residency verification, such as a District of Columbia driver's license or identification card, a current rental agreement, or a deed to property that includes a home;

(2) Complete a Firearm Registration test with at least a 75% proficiency;

(3) If successful on the test, pay all applicable and reasonable fees required by the Chief at the MPD cashier, including thirty five dollars ($ 35) for fingerprinting and thirteen dollars ($ 13) for a firearm registration;

(4) Present a fee receipt and the two fingerprint cards to the MPD fingerprint examiner, and submit to fingerprinting; and

(5) Return to the Firearms Registration Section with one fingerprint card for the office file and the other for submission to the Federal Bureau of Investigation (FBI) for fingerprint analysis for the purpose of a criminal record check;

(d) Await notification by mail to the address on the Firearm Registration application of whether all statutory and regulatory requirements for registration have been satisfied;

(e) Upon notification that all statutory and regulatory requirements for registration have been

satisfied, return to the Firearms Registration Section to complete the registration process and obtain an MPD seal on the completed Firearms Registration certificate;

(f) Present the sealed Firearm Registration application to the licensed firearms dealer and take delivery of the applicant's pistol pending completion of a ballistic identification procedure, or, in the case of a purchase from a firearms dealer located in another jurisdiction, have that firearms dealer transport the applicant's pistol to a licensed firearms dealer in the District, where the applicant will take delivery of the pistol pending completion of a ballistic identification procedure;

(g) Transport the pistol to the Firearms Registration Section for completion of a ballistic identification procedure between the hours of 9:00 AM through 5:00 PM, Monday through Friday, pay a ballistic identification fee of twelve dollars ($ 12); and

(h) Retrieve the registered pistol from the Firearms Registration Section and transport it to the applicant's home.