No. 19-2250

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

TANNER HIRSCHFELD and NATALIA MARSHALL,

Plaintiffs-Appellants,

v.

BUREAU OF ALCOHOL, FIREARMS, TOBACCO, & EXPLOSIVES, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Virginia

No. 3:19-cv-05106-JCC
The Honorable Glen E. Conrad

BRIEF OF AMICI CURIAE ILLINOIS, CALIFORNIA, CONNECTICUT, DELAWARE, THE DISTRICT OF COLUMBIA, HAWAII, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, AND WASHINGTON IN SUPPORT OF DEFENDANTS-APPELLEES' PETITION FOR REHEARING OR REHEARING EN BANC

KWAME RAOUL
Attorney General
State of Illinois

JANE ELINOR NOTZ
Solicitor General

Attorneys for Amici States

ALEX HEMMER
Deputy Solicitor General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-5526
alex.hemmer@ilag.gov

(*Additional counsel on signature page*)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

Page(s)

STATUTES AND REGULATIONS

OTHER AUTHORITIES

IDENTITY AND INTEREST OF AMICI STATES

The amici States of Illinois, California, Connecticut, Delaware, the District of Columbia, Hawaii, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington submit this brief in support of Defendants-Appellees' rehearing petition pursuant to Federal Rule of Appellate Procedure 29(b)(2).

Amici States have a substantial interest in the public health, safety, and welfare of their communities, which includes protecting their residents from the harmful effects of gun violence and promoting the safe use of firearms. *See Kolbe v. Hogan*, 849 F.3d 114, 139 (4th Cir. 2017) (en banc) (States' "interest in the protection of [their] citizenry and the public safety is not only substantial, but compelling"). To serve that interest, amici States have long exercised their governmental prerogative to seek to ensure that, within their borders, only those individuals who are likely to use firearms responsibly can access them. This includes enacting regulations that, like the federal measures challenged here, bar young people from purchasing firearms. Those longstanding regulations are constitutional under any proper reading of

the Second Amendment, both because they are presumptively lawful regulatory measures and because they are well-tailored to amici States' interest in protecting their communities.

Although amici States have reached different conclusions about how best to regulate in this area, they share an interest in safeguarding their constitutional right to enact age-based firearm regulations that protect their communities from gun violence. They write to explain why this proceeding "involves a question of exceptional importance," Fed. R. App. P. 35(a)(2): The panel decision, if it is not reheard en banc and reversed, may call into question amici States' ability to regulate in this area and, in addition, undermine public safety within their borders by rendering unenforceable an important federal backstop on which they rely.

ARGUMENT

The Case Should Be Reheard En Banc.

As defendants explain, en banc review of the panel decision is urgently needed. The panel decision for the first time strikes down an age-based firearm restriction, and in doing so breaks with decisions of the Fifth Circuit and multiple other federal courts. Pet. 7. And it does

so on the basis of multiple erroneous premises, including that age-based firearms restrictions are subject to Second Amendment scrutiny (notwithstanding their historical pedigree) and that such restrictions are not reasonably tailored to the governmental interest in public safety. *Id.* at 7-15.

Amici States write to support defendants' request for en banc review. Measures similar to the federal restrictions at issue here have been enacted by nineteen States and the District of Columbia. Those statutes are fully consistent with the Second Amendment, but the panel decision's reasoning is likely to raise unnecessary questions about their constitutionality. The decision also needlessly imperils public safety in amici States by removing an important safeguard on firearm access nationwide. The Court should grant the petition for rehearing en banc.

A. The panel decision raises questions about the constitutionality of state laws nationwide.

The Court should rehear this case en banc because the panel decision, if not corrected, will raise questions about the constitutionality of state laws that, like the federal restrictions at issue here, protect public safety by limiting young people from accessing firearms. Under any proper interpretation of the Second Amendment, these statutes fall

well within amici States' power to protect public safety and do not transgress the Constitution. But the panel's expansive reasoning, if left unchecked, may prompt litigants to raise constitutional challenges to these longstanding and important regulatory regimes.

As the Supreme Court has explained, States have substantial "latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons," *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996), an authority that encompasses the protection of their communities against gun violence. The Second Amendment rights identified in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), do not change that: As Judge Wilkinson has observed, these cases do not "abrogate" the States' "core responsibility" of "[p]roviding for the safety of citizens within their borders." *Kolbe*, 849 F.3d at 150 (Wilkinson, J., concurring).

Thus, although States have reached different conclusions about how best to regulate the sale and use of, and access to, firearms, almost all States have determined that imposing age-based restrictions on the sale or use of firearms is necessary to promote public safety and curb

gun violence within their borders.[1] Of most immediate relevance, nineteen States and the District of Columbia have, like Congress, chosen to limit the circumstances under which people under 21 can purchase firearms. All twenty of these jurisdictions have enacted a measure analogous to the federal restrictions at issue here, prohibiting the sale of handguns by federally licensed dealers (or, in some cases, all sellers) to people under 21.[2] Several of these States likewise generally prohibit the sale of long guns to people under 21 (subject, in some cases, to exceptions).[3] Some States go further and generally prohibit such

---

[1] Giffords Law Center, *Minimum Age to Purchase and Possess*, https://giffords.org/lawcenter/gun-laws/policy-areas/who-can-have-a-gun/minimum-age/ (last visited September 2, 2021).

[2] Cal. Penal Code § 27505(a); Conn. Gen. Stat. § 29-34(b); D.C. Code Ann. § 22-4507; Del. Code Ann. tit. 24, § 903; Fla. Stat. § 790.065(13); Haw. Rev. Stat. Ann. § 134-2(a), (d), (h); 430 Ill. Comp. Stat. 65/3(a), 65/4(a)(2); Iowa Code § 724.22(2); Mass. Gen. Laws ch. 140, §§ 130, 131E(b); Md. Code Ann., Pub. Safety § 5-134(b); Mich. Comp. Laws § 28.422(3)(b), (12); Mo. Rev. Stat. § 571.080; Neb. Rev. Stat. §§ 69-2403, 69-2404; N.J. Stat. Ann. §§ 2C:58-3(c)(4), 3.3(c), 6.1(a); N.Y. Penal Law § 400.00(1)(a), (12); Ohio Rev. Code Ann. § 2923.21(A)(2); R.I. Gen. Laws §§ 11-47-35(a)(1), 11-47-37; Vt. Stat. Ann. tit. 13, § 4020; Wash. Rev. Code Ann. § 9.41.240; W. Va. Code § 61-7-10(d).

[3] Cal. Penal Code § 27510; Fla. Stat. § 790.065(13); Haw. Rev. Stat. Ann. § 134-2(a), (d), (h); 430 Ill. Comp. Stat. 65/3(a), 65/4(a)(2); Vt. Stat. Ann. tit. 13, § 4020.

young people from even possessing certain firearms (subject, again, to certain exceptions).[4]

Moreover, virtually all States have enacted *some* age-based regulations governing firearm access. In addition to the twenty jurisdictions that prohibit the sale of certain firearms to people under the age of 21, another 25 States prohibit the sale of some or all firearms to people under the age of 18.[5] And a similar number of States have

---

[4] Conn. Gen. Stat. § 29-28(b)(10); D.C. Code Ann. § 7-2502.03(a)(1); Haw. Rev. Stat. Ann. §§ 134-2(a), 134-2(d), 134-4, 134-5; 430 Ill. Comp. Stat. 65/2(a)(1), 65/4(a)(2)(i); Iowa Code § 724.22(2); Md. Code Ann., Pub. Safety § 5-133(d); Mass. Gen. Laws ch. 140, § 131(d)(iv); N.J. Stat. Ann. § 2C:58-6.1(b); N.Y. Penal Law § 400.00(1)(a); Wash. Rev. Code Ann. § 9.41.240.

[5] Ala. Code §§ 13A-11-57, -76; Alaska Stat. § 11.61.210(a)(6); Ariz. Rev. Stat. § 13-3109(A); Ark. Code Ann. § 5-73-109(a); Ga. Code Ann. § 16-11-101.1(b); Idaho Code Ann. § 18-3302A; Ind. Code Ann. § 35-47-2-3(i); Ky. Rev. Stat. Ann. § 527.110(1)(a); La. Rev. Stat. Ann. § 14:91; Me. Rev. Stat. Ann. tit. 17-A, §§ 554-A, 554-B; Minn. Stat. § 609.66(1b); Miss. Code Ann. § 97-37-13; Mo. Rev. Stat. § 571.060.1(2); N.C. Gen. Stat. § 14-315; N.D. Cent. Code § 62.1-03-02; N.H. Rev. Stat. Ann. § 159:12; Okla. Stat. Ann. tit. 21, § 1273(A); Or. Rev. Stat. § 166.470(1)(a); 18 Pa. Cons. Stat. Ann. §§ 6110.1(c), 6302; S.C. Code Ann. § 16-23-30(A)(3); Tenn. Code Ann. § 39-17-1303(a)(1); Tex. Penal Code Ann. § 46.06(a)(2); Utah Code Ann. § 76-10-509.9; Va. Code Ann. § 18.2-309(B); Wis. Stat. § 948.60(2)(b).

imposed a minimum age of 18 on the possession of certain firearms—or even a minimum age requirement of 16, 17, or 19.[6]

The panel decision will raise questions about these statutes' constitutionality in at least two respects. First, the panel decision breaks with the previously unanimous judicial consensus that age-based firearm restrictions are "presumptively lawful regulatory measures" because of the long history of jurisdictions enacting such measures. *Heller*, 554 U.S. at 626-27 & n.26; *see, e.g.*, *National Rifle Ass'n v. ATF*, 700 F.3d 185, 203-04 (5th Cir. 2012) (canvassing the "considerable historical evidence of age- and safety-based restrictions on the ability to access arms"); *Lara v. Evanchick*, No. 20-cv-1582, 2021 WL 1432802, at *10 (W.D. Pa. Apr. 16, 2021) (describing the "established consensus . . . that age-based restrictions" on access to firearms fall outside the scope of the Second Amendment), *appeal docketed*, No. 21-1832 (3d Cir.). To amici's knowledge, the panel decision is the first published opinion to reach this conclusion.

Second, the panel decision is also an outlier in concluding that age-based firearm restrictions do not satisfy means-end scrutiny. As

---

[6] Giffords Law Center, *supra* n.1.

multiple amici have explained, a plethora of neuroscience and social science research supports Congress's conclusion that allowing young people ready access to firearms would create an unacceptable public-health risk. *See* Giffords Br. 16-26; Brady Br. 21-25; *infra* pp. 12-13. On the basis of this evidence, multiple courts have likewise held that, even if age-based restrictions implicate the Second Amendment, they satisfy intermediate scrutiny because they are "reasonably adapted to an important government interest"—namely, public safety. *National Rifle Ass'n*, 700 F.3d at 207; *see also, e.g.*, *Horsley v. Trame*, 808 F.3d 1126, 1132-34 (7th Cir. 2015) (similar with respect to Illinois law); *National Rifle Ass'n v. McCraw*, 719 F.3d 338, 348 (5th Cir. 2013) (same with respect to Texas law). Again, to amici's knowledge, the panel decision is the first published opinion to reach a contrary conclusion.

Absent rehearing en banc, then, the outlier panel decision could raise questions about the constitutionality of amici States' own statutes by suggesting that longstanding age-based regulations on firearm access not only implicate the Second Amendment, but violate it. The panel decision will certainly prompt a constitutional challenge of this nature in Maryland, which has enacted measures prohibiting people

under 21 from purchasing certain firearms. *See* Md. Code Ann., Pub. Safety § 5-134(b)(1). But its effects will be felt more broadly than that: If not corrected, the panel decision will prompt copycat cases nationwide challenging amici States' longstanding, effective firearms regulations. To be sure, amici States will aggressively defend the constitutionality of their regulations, and are confident that the panel decision's flawed reasoning will not be adopted elsewhere. But, if left uncorrected, the panel decision will encourage litigants to press the same expansive—and erroneous—view of the Second Amendment taken by the panel. The Court should rehear the case en banc to prevent that possibility.

B. The panel decision imperils public safety.

The Court should also rehear the case for a second, independent reason: The panel decision, if left uncorrected, will imperil public safety within amici States by eliminating an important safeguard against the scourge of gun violence.

As other amici have explained, the federal restrictions at issue here serve an important public-safety purpose. Congress found in 1968 that people under the age of 21 accounted for a disproportionate share of violent crimes, including murder, rape, and aggravated assault, 114

Cong. Rec. 12,279, 12,309 (1968) (statement of Sen. Dodd), and that many of the firearms involved in such crimes had been acquired from federally licensed firearms dealers, *Federal Firearms Act: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Sen. Comm. on the Judiciary*, 89th Cong. 67 (1965) (statement of Sheldon S. Cohen, Commissioner of Internal Revenue). Congress thus enacted the "calibrated" statutory restriction at issue here, *National Rifle Ass'n v. ATF*, 700 F.3d at 209, in order to stem young peoples' easy access to dangerous firearms and prevent gun violence. Contemporary scientific evidence explains why this conclusion was a reasonable one for Congress to draw: Because the human brain does not fully develop until one's mid-to-late twenties, young people tend to have lower self-control and make more impulsive decisions. *See* Giffords Br. 16-20 (citing studies reaching conclusions to this effect). The federal restrictions at issue in this case thus serve an important role protecting the public from gun violence.

The panel decision removes these important safeguards, and in doing so endangers amici States' residents. To be sure, many of amici States have independently enacted similar regulations, which serve a

similar role to the challenged federal restrictions. *Supra* pp. 4-7. But, as Congress found decades ago, gun violence in one State cannot easily be addressed simply by enacting regulations that apply only in that State. Congress's investigation into violent crime in the 1960s revealed a "serious problem of individuals going across State lines to procure firearms which they could not lawfully obtain or possess in their own State," S. Rep. No. 89-1866, at 19 (1966), a problem that caused "the laws of . . . States and their political subdivisions [to be] circumvented, contravened, and rendered ineffective," S. Rep. No. 90-1097, at 77 (1968). The federal laws at issue here were intended to address that problem by establishing uniform federal standards on certain aspects of firearms policy—including the acquisition of firearms from federally license dealers by young people—and in doing so "assist the States effectively to regulate firearms traffic within their borders." H.R. Rep. No. 90-1577, at 6 (1968).

The panel decision undermines that goal, and in doing so exposes amici States' residents to the risk of gun violence committed by young people. Even if young people are still prohibited from obtaining firearms in States that have chosen to regulate their access, they may

now simply cross state lines to a State that has chosen not to impose similar regulations. Whereas the federal rules at issue here previously acted as a backstop to amici States' own regulatory decisions, the invalidation of those restrictions leaves States without any recourse when young people obtain firearms out-of-state that they could not buy in-state. The panel decision thus not only contravenes Congress's decision to protect public safety; it undermines amici States' efforts to protect their own communities. *See Mance v. Sessions*, 896 F.3d 699, 707 (5th Cir. 2018) (per curiam) (describing the "compelling government interest in preventing circumvention of the handgun laws of various states").

The real-world effects of that decision could be substantial. As other amici have explained, studies have shown that federal and state minimum-age regulations have led to a reduction in both violent crime and gun-related suicides. *See* Giffords Br. 24-28 (collecting studies). Indeed, one study suggests that federal restrictions like those at issue here may be even more effective at preventing certain firearm-related deaths than are state laws—thus suggesting that the invalidation of the federal backstop could have serious implications for amici States' efforts

to prevent gun violence. *See* Mark Gius, *The Impact of Minimum Age and Child Access Prevention Laws on Firearm-Related Youth Suicides and Unintentional Deaths*, 52 Soc. Sci. J. 168, 173 (2015). The panel majority dismissed this data as evidence only of a "potential correlation" between age-based restrictions and a reduction in gun-related mortality, Op. 82, but under ends-means scrutiny legislatures are entitled to "weigh conflicting evidence and make policy judgments" without "second-guessing by a court," *Kolbe*, 849 F.3d at 140. Here, Congress and amici States have done exactly that. The majority erred in second-guessing Congress's judgment, and its error is likely to endanger public safety nationwide. The Court should grant en banc rehearing to reverse the panel's erroneous decision.

CONCLUSION

For these reasons, the Court should grant rehearing en banc.

Respectfully submitted,

KWAME RAOUL
Attorney General
State of Illinois

JANE ELINOR NOTZ
Solicitor General

/s/ Alex Hemmer
ALEX HEMMER
Deputy Solicitor General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-5526
alex.hemmer@ilag.gov

ROB BONTA
Attorney General
State of California
300 South Spring St., Suite 1702
Los Angeles, CA 90013

WILLIAM TONG
Attorney General
State of Connecticut
165 Capitol Avenue
Hartford, CT 06106

KATHLEEN JENNINGS
Attorney General
State of Delaware
820 N. French Street
Wilmington, DE 19801

KARL A. RACINE
Attorney General
District of Columbia
400 6th Street NW, Suite 8100
Washington, DC 20001

CLARE E. CONNORS
Attorney General
State of Hawaii
425 Queen Street
Honolulu, HI 96813

MAURA HEALEY
Attorney General
Commonwealth of Massachusetts
One Ashburton Place
Boston, MA 02108

DANA NESSEL
Attorney General
State of Michigan
P.O. Box 30212
Lansing, MI 48909

KEITH ELLISON
Attorney General
State of Minnesota
102 State Capitol
75 MLK Blvd.
St. Paul, MN 55155

ANDREW J. BRUCK
Acting Attorney General
State of New Jersey
25 Market Street
Trenton, NJ 08625

HECTOR BALDERAS
Attorney General
State of New Mexico
Post Office Drawer 1508
Santa Fe, NM 87504

LETITIA JAMES
Attorney General
State of New York
The Capitol
Albany, NY 12224

JOSHUA H. STEIN
Attorney General
State of North Carolina
114 W. Edenton Street
Raleigh, NC 27603

ELLEN F. ROSENBLUM
Attorney General
State of Oregon
1162 Court Street NE
Salem, OR 97301

JOSH SHAPIRO
Attorney General
Commonwealth of Pennsylvania
Strawberry Square
Harrisburg, PA 17120

PETER F. NERONHA
Attorney General
State of Rhode Island
150 South Main Street
Providence, RI 02903

THOMAS J. DONOVAN, JR.
Attorney General
State of Vermont
109 State Street
Montpelier, VT 05609

ROBERT W. FERGUSON
Attorney General
State of Washington
1125 Washington St. SE
Olympia, WA 98504

September 3, 2021

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(b)(4) because it contains 2,560 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). This brief complies with the typeface requirement of Rule 32(a)(5) because it has been prepared in a proportionally spaced typeface (14-point Century Schoolbook) using Microsoft Word.

/s/ Alex Hemmer
ALEX HEMMER

September 3, 2021

CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2021, I electronically filed the foregoing Brief of Amici Curiae Illinois et al. with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit using the CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Alex Hemmer
ALEX HEMMER