

# WHEN THOUGHTS AND PRAYERS ARE NOT ENOUGH: WHY AGE-BASED RESTRICTIONS ON PURCHASING FIREARMS PASS CONSTITUTIONAL MUSTER

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*After the tragic shooting at Marjory Stoneman Douglas High School that took the lives of seventeen students and staff members and injured countless others, the community debated how this event could have been prevented. There were security failures on the part of the school and police—unlocked doors, passive deputies and a security guard, and a broken PA system—all of which may have lessened the casualties had they been operating properly. However, these security measures might not have been tested and found lacking if another preventative measure had already taken place: prohibiting the young shooter from legally purchasing a weapon.*

*Florida legislators passed the Marjory Stoneman Douglas High School Public Safety Act in response to the tragedy, which prevents people under*

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*twenty-one from purchasing a firearm. The National Rifle Association (NRA) quickly filed suit to enjoin the law, asserting that it violated the Second Amendment. The district court determined that the Public Safety Act was constitutional, and the NRA promptly appealed to the Eleventh Circuit.*

*This Comment argues the Act passes constitutional muster because age-based restrictions on purchasing weapons do not violate the Second Amendment under the two-step test. A historical analysis of case precedent, commentary, and laws existing near the nation's founding support holding the Public Safety Act constitutional at step one. However, because there is some conflict within the historical record, a court could, out of an abundance of caution, move to step two. Under step two, a court should apply intermediate scrutiny to the Act because it does not implicate the "core" of the Second Amendment's protections—self-defense in the home. When assessed with intermediate scrutiny, it is clear that the Public Safety Act contains an important government interest in protecting public safety and is reasonably tailored to that goal because it leaves alternative channels to purchase firearms and contains exemptions for purchases by certain groups such as military members. Because the Act contains an important government interest and reasonably fits that objective, the Act is constitutional.*

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## INTRODUCTION

*“They say that no laws could have been able to prevent the hundreds of  
senseless tragedies that have occurred. We call B.S.”*

—Emma Gonzalez<sup>1</sup>

*“In the midst of their grief, they mobilized the youth of our nation and  
created a movement. This is their moment. Not just for themselves, but  
for all of us.”*

—Lin-Manuel Miranda<sup>2</sup>

On February 14, 2018, an expelled nineteen-year-old student took an Uber to his former high school—Marjory Stoneman Douglas High School in Parkland, Florida.<sup>3</sup> In only five minutes and thirty-two seconds, he killed fourteen students and three staff members and injured seventeen

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1. *Florida Student to NRA and Trump: ‘We Call BS’*, YOUTUBE (Feb. 17, 2018), <https://www.youtube.com/watch?v=ZxD3o-9H1IY> [https://perma.cc/P9GB-RA5P].

2. Daniel Kreps, *Lin-Manuel Miranda, Ben Platt Release New Song for March for Our Lives*, ROLLING STONE (Mar. 19, 2018, 1:47 PM), <https://www.rollingstone.com/music/music-news/lin-manuel-miranda-ben-platt-release-new-song-for-march-for-our-lives-127037> [https://perma.cc/YS87-H4V5].

3. Edmund DeMarche, *2 Years Later, What Happened at Parkland: The Stoneman Douglas High School Shooting*, Fox 13 TAMPA BAY (Feb. 14, 2020), <https://www.fox13news.com/news/2-years-later-what-happened-at-parkland-the-stoneman-douglas-high-school-shooting> [https://perma.cc/R2S2-TR3X].

others.<sup>4</sup> The shooter legally purchased a Smith & Wesson M&P 15 Rifle from a federally licensed firearms dealer in Florida.<sup>5</sup> He passed all of the requisite background checks.<sup>6</sup> On March 16, 2021, a twenty-one-year-old purchased a handgun and then murdered six Asian American women and two others later that day in Atlanta, Georgia.<sup>7</sup> Six days later, a twenty-one-year old used a legally purchased firearm to murder ten people in a Boulder, Colorado grocery store.<sup>8</sup> One month later, a nineteen-year-old legally purchased two assault rifles before killing eight people at a FedEx facility in Indianapolis, Indiana.<sup>9</sup> The FBI had investigated the shooter after his mother reported he might commit

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4. *Id.* The students and staff members killed in the shooting were Alyssa Alhadeff, 14; Scott Beigel, 35; Martin Duque Anguiano, 14; Nicholas Dworet, 17; Aaron Feis, 37; Jaime Guttenberg, 14; Chris Hixon, 49; Luke Hoyer, 15; Cara Loughran, 14; Gina Montalto, 14; Joaquin Oliver, 17; Alaina Petty, 14; Meadow Pollack, 18; Helena Ramsay, 17; Alex Schachter, 14; Carmen Schentrup, 16; and Peter Wang, 15. Laurel Wamsley & Richard Gonzales, *17 People Died in the Parkland Shooting. Here Are Their Names*, NPR (Feb. 15, 2018, 7:39 PM), <https://www.npr.org/sections/thetwo-way/2018/02/15/586095587/17-people-died-in-the-parkland-shooting-here-are-their-names> [https://perma.cc/LSY5-K286].

5. Skyler Swisher & Paula McMahon, *[The Shooter] Passed Background Check, Including Mental Health Question, to Get AR-15 Rifle*, SUN SENTINEL (Feb. 15 2018, 8:15 PM), <https://www.sun-sentinel.com/local/broward/parkland/florida-school-shooting/fl-florida-school-shooting-guns-20180215-story.html> [https://perma.cc/43HJ-V3EE]. The name of the shooter has been omitted from the title of the source to prevent the glorification of his horrific acts.

6. *Id.*

7. Aimee Sachs, *Atlanta Shooting Suspect Bought Gun on Day of Rampage*, COURTHOUSE NEWS SERV. (Mar. 26, 2021), <https://www.courthousenews.com/accused-atlanta-gunman-bought-handgun-on-day-of-rampage>; Richard Luscombe, *Atlanta Spa Shootings Spark New Push for Gun Controls*, GUARDIAN (Mar. 19, 2021, 9:47 AM), <https://www.theguardian.com/us-news/2021/mar/19/atlanta-spa-shootings-gun-controls-new-push> [https://perma.cc/6NQX-DY6W]. The people killed in the shooting were Daoyou Feng, 44; Hyun Jung Grant, 51; Suncha Kim, 69; Paul Andre Michels, 54; Soon Chung Park, 74; Xiaojie Tan, 49; Delaina Ashley Yaun, 33; and Yong Ae Yue, 63.

8. Alex Sundby, *Gun Used in Boulder Mass Shooting Was Bought Legally, Police Chief Says*, CBS News (Mar. 26, 2021, 7:16 PM), <https://www.cbsnews.com/news/boulder-colorado-shooting-gun-bought-legally-police>. The people killed in the shooting were Tralona Bartkowiak, 49; Suzanne Fountain, 59; Teri Leiker, 51; Kevin Mahoney, 61; Lynn Murray, 62; Rikki Olds, 25; Neven Stanisic, 23; Denny Stong, 20; Eric Talley, 51; Jody Waters, 65.

9. Madeline Holcombe et al., *Indianapolis FedEx Shooter Bought Two Weapons Used in Killings Last Year Despite FBI Concerns*, CNN (Apr. 19, 2021), <https://www.cnn.com/2021/04/18/us/indianapolis-shooting-fedex-sunday/index.html> [https://perma.cc/LP7S-4FMZ]. The people killed in the shooting were Matthew R. Alexander, 32; Samaria Blackwell, 19; Amarjeet Johal, 66; Jasvinder Kaur, 50; Amarjit Sekhon, 48; Jaswinder Singh, 68; Karli Smith, 19; and John Weisert, 74.

violent acts.<sup>10</sup> The young Columbine High School shooters purchased some of their weapons from a gun show.<sup>11</sup> These are only a few instances where young individuals committed an offense in part due to legal access to a firearm.<sup>12</sup>

In the aftermath of the Parkland shooting, the Florida governor signed the Marjory Stoneman Douglas High School Public Safety Act<sup>13</sup> (the “Public Safety Act” or “the Act”).<sup>14</sup> Among other safety measures, the Act prevents “[a] person younger than 21 years of age [from purchasing] a firearm.”<sup>15</sup> The National Rifle Association (NRA) quickly filed suit to enjoin enforcement of the Act,<sup>16</sup> alleging “[the purchasing] ban infringes upon, and imposes an impermissible burden upon, the Second Amendment rights of [the Plaintiffs].”<sup>17</sup> The District Court found that age limitations on purchasing firearms are constitutional, and the NRA filed for appellate review in the Eleventh Circuit on July 8, 2021.<sup>18</sup>

Legislatures and public policy advocates have debated Second Amendment legislation for decades. This Comment does not advocate for the most appropriate legislative actions to curb gun violence. Rather, this Comment argues that the constitutionality of the Public Safety Act renders similarly configured legislation equally constitutional because

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10. *Id.*

11. See *The Point of No Return*, COAL. TO STOP GUN VIOLENCE, <https://www.csgv.org/point-return> [<https://perma.cc/GX5T-TTHT>] (describing how the Columbine shooters avoided scrutiny by purchasing their firearms from a gun show). The students and staff members killed in the shooting were Cassie Bernall, 17; Steven Curnow, 14; Corey DePooter, 17; Kelly Fleming, 16; Matthew Kechter, 16; Daniel Mauser, 15; Daniel Rohrbough, 15; William “Dave” Sanders, 47; Rachel Scott, 17; Isaiah Shoels, 18; John Tomlin, 16; Lauren Townsend, 18; and Kyle Velasquez, 16.

12. See Larry Buchanan et al., *How They Got Their Guns*, N.Y. TIMES (Feb. 14, 2018), <https://www.nytimes.com/interactive/2015/10/03/us/how-mass-shooters-got-their-guns.html> [<https://perma.cc/73LL-G4JK>] (describing how many recent mass shooters often legally acquired their firearms).

13. FLA. STAT. § 790.065 (2019).

14. 790.065(13); see Ray Sanchez & Holly Yan, *Florida Gov. Rick Scott Signs Gun Bill*, CNN (Mar. 9, 2018, 10:21 PM), <https://www.cnn.com/2018/03/09/us/florida-gov-scott-gun-bill/index.html> [<https://perma.cc/38WQ-9W4L>].

15. FLA. STAT. § 790.065(13) (2019). “Firearm” means any weapon . . . which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive . . . .” *Id.* § 790.001(6).

16. See *infra* Section I.D (describing the procedural history of the case).

17. Second Amended Complaint for Declaratory and Injunctive Relief, ¶ 29, Nat'l Rifle Ass'n of Am., Inc. v. Swearingen, No. 4:18-cv-137-MW-CAS, 2020 WL 5646480, at \*1 (N.D. Fla. May 1, 2020).

18. Nat'l Rifle Ass'n of Am., Inc. v. Swearingen, No. 4:18-cv-137-MW-MAF, 2021 WL 2592545 (N.D. Fla. June 24, 2021); Notice of Appeal to Court of Appeals, Nat'l Rifle Ass'n of Am., Inc. v. Swearingen, No. 4:18-cv-137-MW-MAF (N.D. Fla. July 8, 2021).

age-based restrictions on purchasing weapons do not violate the Second Amendment.

When evaluating Second Amendment challenges, circuit courts predominantly apply the two-step test.<sup>19</sup> The first step requires a court to examine whether the regulated activity is protected by the Second Amendment.<sup>20</sup> If the court determines that the activity is not protected by the Second Amendment, the law is constitutional.<sup>21</sup> However, if the court finds that the activity is protected by the Second Amendment, the court moves on to the test's second step: weighing the government's interest against the protected activity to determine the constitutionality.<sup>22</sup> If the law passes some form of means-end scrutiny, it is constitutional.<sup>23</sup>

Under step one, the historical record supports that the purchase of firearms by people under twenty-one likely does not fall within the protections of the Second Amendment.<sup>24</sup> Thus, the Public Safety Act and similar legislation are likely constitutional at step one.<sup>25</sup> However, because of the difficulty of parsing the Founders' intent and the historical record, the Act could be evaluated at step two using a means-end test.<sup>26</sup> At step two, intermediate scrutiny is appropriate because the Act does not restrict the possession of firearms; it merely restricts a small group from purchasing them.<sup>27</sup> The regulation furthers an important and consistently acknowledged government interest—public safety—and data suggests that there is a reasonable fit between protecting public safety and preventing persons under twenty-one from

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19. Specifically, the court determines:

whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee . . . . If it does not, [the] inquiry is complete. If it does, [the court] must evaluate the law under some form of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails, it is invalid.

United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010) (creating the two-step test adopted by the majority of circuit courts to evaluate Second Amendment challenges). *But see infra* notes 93–98 and accompanying text (reviewing other circuit courts' approaches to Second Amendment challenges).

20. *Marzzarella*, 614 F.3d at 89; *see infra* Section I.B.

21. *Marzzarella*, 614 F.3d at 89; *see infra* Section I.B.

22. *Marzzarella*, 614 F.3d at 89; *see infra* Section I.B.

23. *Marzzarella*, 614 F.3d at 89; *see infra* Section I.B.

24. *See infra* Section II.A.

25. *See infra* Section II.A.

26. *See infra* Section II.A.

27. *See infra* Section II.B.

purchasing dangerous firearms.<sup>28</sup> Thus, the Public Safety Act and similar legislation are constitutional.

Part I of this Comment explores the Supreme Court's Second Amendment jurisprudence, including a detailed evaluation of its most prominent cases—*District of Columbia v. Heller*<sup>29</sup> and *McDonald v. City of Chicago*.<sup>30</sup> Additionally, Part I provides the framework for how circuit courts evaluate Second Amendment challenges under the two-step test.<sup>31</sup> Finally, this Part explores gun violence in the United States and Florida's legislative response to the Parkland shooting.<sup>32</sup> Part II of this Comment argues that the Public Safety Act's purchasing restriction does not violate the Second Amendment under the two-step test.<sup>33</sup> Accordingly, this Comment concludes that the Public Safety Act and similar legislation are constitutional.

## I. BACKGROUND

Before determining how a court will evaluate Florida's new gun regulation, this Comment examines Supreme Court Second Amendment jurisprudence. This Part first provides an overview of older case law, examining how the Court transformed the Second Amendment from a collective right for state militias to an individual right in its landmark decision *Heller*.<sup>34</sup> This Part then reviews circuit court approaches to Second Amendment challenges.<sup>35</sup> Finally, this Part analyzes the public health crisis of gun violence, highlights scientific developments concerning youth brain development, and reviews the Public Safety Act.<sup>36</sup>

### A. *The Evolution of the Supreme Court's Second Amendment Jurisprudence*

The Supreme Court did not substantively speak on the scope of the Second Amendment until the early mid-twentieth century.<sup>37</sup> Since the Supreme Court's decision in *United States v. Miller*,<sup>38</sup> courts had largely

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28. See *infra* Section II.C.

29. 554 U.S. 570 (2008).

30. 561 U.S. 742 (2010); see *infra* Section I.A.

31. See *infra* Section I.B.

32. See *infra* Section I.C.

33. See *infra* Sections II.A-C.

34. See *infra* Section I.A.2.

35. See *infra* Section I.B.

36. See *infra* Sections I.C-D.

37. See *United States v. Miller*, 307 U.S. 174, 178 (1939) (holding that the first clause of the Second Amendment limits its scope to members of the militia).

38. 307 U.S. 174 (1939).

determined that the Second Amendment conferred a collective right belonging to the states to assist in maintaining their militias.<sup>39</sup> However, in 2008, the Supreme Court departed from this view and determined that the Second Amendment protected an individual's right to keep and bear arms.<sup>40</sup> The following Sections will address this jurisprudential transformation, culminating with a discussion of *Heller*—the case that wrought this fundamental change.

### *1. A collective rather than individual right: Pre-Heller evolving jurisprudence*

The Second Amendment states, “[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”<sup>41</sup> The Amendment was passed as a compromise to temper the fear of disarmament of state militias.<sup>42</sup> Although the Amendment did not curtail the centralized power to raise an army, the Founders readily adopted it to prevent the federal government from taking the people’s arms—the ultimate check on tyranny.<sup>43</sup>

Before the decision in *Heller*, the Supreme Court had only substantively spoken on the Second Amendment in 1939 when it

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39. See *Miller*, 307 U.S. at 178 (1939) (holding that the Second Amendment must be read according to its announced purpose). See generally, Richard A. Allen, *What Arms? A Textualist’s View of the Second Amendment*, 18 GEO. MASON CIV. RTS. L.J. 191, 191 & n.2 (2008) (gathering cases endorsing the collective rights theory prior to *Heller*).

40. District of Columbia v. Heller, 554 U.S. 570, 592 (2008).

41. U.S. CONST. amend. II.

42. See generally David E. Vandercoy, *The History of the Second Amendment*, 28 VALPARAISO U. L. REV. 1007, 1022–28, 1036–38 (1994) (describing the debate of centralized armies among the founding political parties). In the wake of the Revolutionary War, the drafters of the Constitution believed the primary evil facing the new nation was a tyrannical government, preventable by people’s possession of arms through state militias. *Id.* at 1025–26. The new U.S. Constitution granted Congress sweeping power to raise armies and declare war. U.S. CONST. art. 1, § 8, cl. 11–12. Antifederalists were concerned that this power could decimate the militias’ abilities to fight an oppressive government and result in disarmament. See *Second Amendment*, Hist. CHANNEL (Nov. 27, 2019), <https://www.history.com/topics/united-states-constitution/2nd-amendment> [https://perma.cc/Y2U5-MDJM]; Nelson Lund & Adam Winkler, *The Second Amendment*, CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-ii/interprets/99> [https://perma.cc/WYQ5-KZ9J]. Federalists and Antifederalists disagreed about whether there were sufficient checks and balances within the new Constitution to prevent this disarmament, Vandercoy, *supra*, at 1027, so James Madison proposed the Second Amendment as a compromise. *Second Amendment*, *supra*. See generally THE FEDERALIST No. 46 (James Madison) (discussing the debate about centralized armies).

43. Lund & Winkler, *supra* note 42.

evaluated the National Firearms Act<sup>44</sup> in *Miller*.<sup>45</sup> The Act banned shotguns under a specific barrel length.<sup>46</sup> The Court found that firearm regulations must have some “reasonable relationship to the preservation or efficiency of a well regulated militia.”<sup>47</sup> It stated that the “obvious purpose” of the Second Amendment was “to assure the continuation and render possible the effectiveness” of state militias.<sup>48</sup> By tying the Second Amendment to the collective preservation of state militias, the Court seemed to reject an individual right to keep and bear arms.<sup>49</sup> For years, state and federal courts largely followed this collective-right interpretation, considering the Second Amendment almost dead letter law<sup>50</sup> until 2008 when the Supreme Court revived it in its *Heller* decision.<sup>51</sup>

## 2. Recent Supreme Court Second Amendment decisions: Heller and McDonald

While many perceive the right to bear arms as a guaranteed individual right existing since the country’s founding, the right to bear arms was not determined to be an individual right until 2008 in *Heller*.<sup>52</sup> In a 5–4 decision, a divided Supreme Court upturned its prior endorsement of the Second Amendment as a collective right and held that the Second Amendment protects “an individual right to keep and bear arms” in the home for self-defense.<sup>53</sup> The respondent—Dick Heller, a District of Columbia (D.C.) special police officer—filed suit after the District

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44. Pub. L. No. 73-474, 48 Stat. 1236 (1934).

45. 307 U.S. 174, 176 (1939). Before *Miller*, the Supreme Court had issued relatively few rulings on the Second Amendment. See, e.g., *Nunn v. State* 1 Ga. 243, 251 (1846) (ruling that a Georgia law violated the Second Amendment’s protection of the right to keep and bear arms due to its vague wording); *United States v. Cruikshank*, 92 U.S. 542, 552–53 (1875) (determining the First and Second Amendments do not apply to actions by the state government); *Presser v. Illinois*, 116 U.S. 252, 260, 264–65 (1886) (finding that an Illinois law forbidding unsanctioned militias did not violate the Second Amendment).

46. *Miller*, 307 U.S. at 175.

47. *Id.* at 178.

48. *Id.*

49. *Id.* See generally, Stephen Kiehl, *In Search of a Standard: Gun Regulations After Heller and McDonald*, 70 MD. L. REV. 1131, 1134–41 (2011) (discussing the differences between a “collective” and “individual” rights approach to the Second Amendment).

50. See Allen, *supra* note 38, at 191 & n.2 (gathering cases endorsing the collective rights theory prior to *Heller*).

51. *Heller*, 554 U.S. at 576–92.

52. See *id.* at 579, 581 (claiming that the text of the Second Amendment engenders a “strong presumption” that the right to bear arms is “exercised individually and belongs to all Americans”).

53. *Id.* at 595, 636.

refused to grant him a license to keep his on-duty handgun at his home.<sup>54</sup> D.C. law prohibited the possession and registration of handguns, even within one's home, with no exception for self-defense.<sup>55</sup> D.C. law further required citizens to keep their registered firearms "unloaded and disassembled or bound by a trigger lock or similar device" unless they are located in a place of business or are being used for lawful recreational activities.<sup>56</sup> Residents could get a one-year license from the chief of police to carry a handgun under a different provision.<sup>57</sup> Heller argued that the handgun registration prohibition, the registration provision within the home, and the trigger-lock provision violated the Second Amendment because they ultimately prevented the use of firearms within the home.<sup>58</sup> The district court dismissed the complaint,<sup>59</sup> and the U.S. Court of Appeals for the D.C. Circuit reversed, finding that the Second Amendment "protects an individual right to possess firearms and that the city's total ban on handguns, [and the disassembly requirement] violated that right."<sup>60</sup> The Supreme Court granted certiorari, and Justice Scalia authored the majority opinion.<sup>61</sup>

To determine the constitutionality of the D.C. law, Justice Scalia evaluated the meaning of the Second Amendment through an originalist lens to determine whether the right was individual or collective.<sup>62</sup> Guided by the text's meaning at the time of ratification,<sup>63</sup> the majority found that the Second Amendment contained two interdependent

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54. *Id.* at 575–76.

55. *Id.* at 574, 630.

56. *Id.* at 575 (citing D.C. Code §§ 7-2501.01(12), 7-2502.01(a), 7-2502.02(a)(4), 7-2507.02 (2001)).

57. *Id.* at 575.

58. *Id.* at 576.

59. *Id.* (citing *Parker v. District of Columbia*, 311 F. Supp. 2d 103, 109 (2004)).

60. *Id.* (citing *Parker*, 478 F.3d at 401).

61. *Id.* at 573.

62. See *id.* at 576 ("[T]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." (internal quotation marks omitted)). This method "excludes secret or technical meanings" not understood by ordinary citizens. *Id.* at 576–77; see also Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 Nw.U.L.REV. 923, 939–59 (2009) (exploring the originalist structure of the *Heller* opinion and discussing the invocation of original public meaning to decipher the meaning of the Second Amendment). Despite the majority introducing most of this opinion as dicta, circuit courts generally treat Supreme Court dicta almost as binding as the actual holding. David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 St. Louis U.L.J. 193, 199–200 nn.16–17 (2017).

63. *Heller*, 554 U.S. at 591–605.

clauses: a prefatory clause and an operative clause.<sup>64</sup> First, the Court undertook a systematic analysis of the operative clause—"the right of the people to keep and bear Arms, shall not be infringed."<sup>65</sup> It found this clause contains an "individual right to possess and carry weapons in case of confrontation."<sup>66</sup> Second, the Court similarly evaluated the prefatory clause, "[a] well regulated Militia, being necessary to the security of a free State," and found that this clause explains the purpose for the codification of the Second Amendment: preventing the disarmament of the militia.<sup>67</sup>

The Court concluded that the clauses fit "perfectly" together when evaluated within their historical contexts.<sup>68</sup> Although the purpose for codification centered on protecting the militia, the opinion emphasized that a prefatory clause does not announce the only reason for the codification of the right.<sup>69</sup> In fact, operative clauses tend to guarantee rights beyond the corresponding purpose of the prefatory clause.<sup>70</sup> Thus, the Supreme Court held that the Second Amendment supported

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64. *Id.* at 577. In other words, if rephrased, the Second Amendment could validly read, "[b]ecause a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed." *Id.*

65. U.S. CONST. amend. II. For instance, the phrase "right of the people" when viewed in the context of other constitutional provisions creates a presumption of an individual right. *Heller*, 554 U.S. at 579–81. "Keep and Bear Arms" was interpreted to "have," "retain," or "carry" arms for confrontational purposes. *Id.* at 581–85. Importantly, Justice Scalia stated that "arms" were not confined to weapons in existence in the eighteenth century. *Id.* at 582. He asserted the ridiculousness of such an argument, pointing out how the Amendments, such as First and Fourth, are adapted to modern times. *Id.*

66. *Heller*, 554 U.S. at 592.

67. *Id.* at 595, 598–99 ("[T]yrants had eliminated a militia consisting of all the able-bodied men . . . by taking away the people's arms."). The majority concluded that "well-regulated Militia" referred to able-bodied men who are "capable of acting in concert for the common defense," not congressionally regulated military forces. *Id.* at 595–96; U.S. CONST. art I, § 8, cl. 15 ("The Congress shall have Power . . . [t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions . . .").

68. *Heller*, 554 U.S. at 598 ("[The clauses] fit[] perfectly . . . [because] history showed that the way tyrants had eliminated a militia consisting of all the able-bodied men was . . . by taking away the people's arms . . .").

69. *Id.* at 599 (suggesting Americans also valued self-defense and hunting); see *id.* at 578 (arguing "a prefatory clause does not limit or expand the scope of the operative clause"). If read only to protect keeping arms in the militia, the Second Amendment "fits poorly with the operative clause's description of the holder of that right as 'the people.'" *Id.* at 581. Evaluating historical tradition, constitutions, and early case law, Justice Scalia determined that the phrase "keep arms" has historically been understood to refer to a broader right than just militia service. *Id.* at 582–84, 599, 601–03, 610–19. These sources support an individualized right to bear arms. *Id.*

70. *Id.* at 578.

"the right of law-abiding, responsible citizens to use arms in defense of hearth and home."<sup>71</sup> Justice Scalia then reviewed case law and historical commentary through the nineteenth century and Supreme Court precedent to further support the Court's conclusion that the Second Amendment is a right guaranteed to each individual.<sup>72</sup>

The majority then stressed that this individual Second Amendment right is "not unlimited."<sup>73</sup> The opinion highlighted four "longstanding" and "presumptively lawful" exceptions to this individual right: "possession of firearms by felons and the mentally ill," prohibitions on "carrying... firearms in sensitive places," and "conditions and qualifications on the commercial sale of arms."<sup>74</sup> The Court acknowledged that this list of presumptively lawful regulations was not exhaustive.<sup>75</sup> However, the Court explicitly declined to define the full scope of the Second Amendment right, giving the lower courts little guidance on future Second Amendment challenges.<sup>76</sup>

The Supreme Court then applied the newly interpreted Second Amendment to the law at issue. It concluded that the D.C. handgun ban and storage requirements were unconstitutional.<sup>77</sup> The Court declared that possessing handguns is inherent to the right of self-defense, particularly where the need for self-defense is most acute—inside the home.<sup>78</sup> Under any standard of scrutiny,<sup>79</sup> the Court held that a ban on handguns within the home fails "constitutional muster."<sup>80</sup> Further, the Court found that the requirement to keep these weapons inoperable in the home was also unconstitutional because it interfered with a person's

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71. *Id.* at 635. The Court also had to square its previous interpretation of the Second Amendment as a collective right in *Miller* with its decision in *Heller*, where the right was interpreted as an individual right. Because the *Miller* court did not undertake an analysis of the Second Amendment, the Court reasoned that the opinion merely held that the Second Amendment "does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns." *Id.* at 625.

72. *Id.* at 605–26.

73. See *id.* at 626–27 ("[T]he right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.").

74. *Id.* at 626–27, 627 n.26.

75. *Id.* at 627 n.26.

76. *Id.* at 626; see *United States v. Marzzarella*, 614 F.3d 85, 89, 92 (2010) (opining that the *Heller* opinion leaves much of this area unsettled and interpreting *Heller* to create its own test).

77. *Heller*, 554 U.S. at 628–29.

78. *Id.* at 628 ("The handgun ban amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for [self-defense].").

79. The Court typically applies one of three levels of scrutiny to challenges of an enumerated constitutional right: rational basis, intermediate scrutiny, or strict scrutiny. See *infra* notes 126–32 and accompanying text (describing the levels of scrutiny).

80. *Heller*, 554 U.S. at 628–29.

ability to use firearms for the “core lawful purpose of self-defense.”<sup>81</sup> Although the Court did not apply any specific test to determine whether these laws were unconstitutional, it stressed that lower courts should evaluate Second Amendment challenges under a heightened level of scrutiny.<sup>82</sup>

Two years later, in *McDonald*, the Supreme Court incorporated the Second Amendment as applied to the states.<sup>83</sup> Chicago had a city ordinance that prohibited firearm possession unless the person had a valid registration.<sup>84</sup> The ordinance also prohibited registering most handguns, “effectively banning handgun possession” by Chicago residents.<sup>85</sup> The petitioners challenged this state law under the Second Amendment in the wake of *Heller*.<sup>86</sup> The Court determined that the right to keep and bear arms is “fundamental to [the] scheme of ordered liberty,” and therefore, the Second Amendment, through the Fourteenth Amendment Due Process Clause, applies to the states.<sup>87</sup> Thus, the states must not infringe on the privileges of the Second Amendment when they create legislation that touches the right to keep and bear arms.<sup>88</sup>

#### B. How Circuit Courts Interpret Heller in Second Amendment Challenges

After the Court issued *Heller* and *McDonald*, Second Amendment advocates brought lawsuits nationwide challenging various firearms regulations to test the decisions’ limits.<sup>89</sup> However, because the *Heller* majority did “not undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment,”<sup>90</sup> many people and courts were left wondering where the outer bounds of the Second Amendment

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81. *Id.* at 630.

82. *Id.* at 628 n.27 (explaining that rational basis is not appropriate for a “specific, enumerated right” and highlighting that rational basis evaluation would make the Second Amendment redundant). *But see id.* at 687–90 (Breyer, J., dissenting) (reviewing the appropriate level of scrutiny to apply in Second Amendment challenges and concluding that an interest-balancing approach is most appropriate); *id.* at 636–80 (Stevens, J., dissenting) (refusing to adopt any specific test for the Second Amendment but arguing that the majority fails to correctly interpret the scope of the Second Amendment).

83. *McDonald v. City of Chicago*, 561 U.S. 742, 759 (2010).

84. *Id.* at 750.

85. *Id.*

86. *Id.* at 752.

87. *Id.* at 767, 778.

88. *See id.* at 767–80.

89. SARAH HERMAN PECK, CONG. RSCH. SERV., R44618, POST-HELLER SECOND AMENDMENT JURISPRUDENCE 1, 12 (2019).

90. *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

would lie.<sup>91</sup> The majority did not provide clear guidance to lower courts for evaluating Second Amendment challenges.<sup>92</sup>

Without instruction, circuit courts developed their own methodology—the most commonly adopted being the two-step test.<sup>93</sup> To determine if a Second Amendment violation has occurred, courts ask the following two questions:

First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee. If it does not, our inquiry is complete. If it does, we evaluate the law under some form of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails, it is invalid.<sup>94</sup>

The Second, Third, Fourth, Fifth, Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits have affirmatively adopted this approach for Second Amendment challenges.<sup>95</sup> The First and Eighth Circuits evaluate Second Amendment challenges by applying a “text, history, and tradition”

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91. *United States v. Chapman*, 666 F.3d 220, 225 (4th Cir. 2012) (citing *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010); see Nina Totenberg, *Supreme Court Strikes Down D.C. Handgun Ban*, NPR (June 26, 2008), <https://www.npr.org/templates/story/story.php?storyId=91934910> [https://perma.cc/9VC3-SAKJ]) (noting that the Court's failure to establish clear guidelines for analyzing future gun restrictions “leaves open dozens, if not hundreds, of questions to be answered by the courts in the coming years”).

92. See *Heller*, 554 U.S. at 635 (“[T]here will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.”); see also *N.Y. Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 253 (2d Cir. 2015) (lamenting that *Heller* left lower courts no guidance on the proper approach to future Second Amendment challenges); Nat'l Rifle Ass'n of Am., Inc. v. Swearingen, No. 4:18-CV-137-Mw/MAF, 2021 WL 2592545, at \*3 (N.D. Fla. June 24, 2021) (“[A]nd when it comes to what test applies, *Heller* is about as clear as the Suwannee River . . . . Second Amendment law is not clear.”).

93. See *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010) (evaluating *Heller* and creating the two-step test). This was the first circuit to adopt this test.

94. *Id.* (internal citation omitted).

95. See *N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 254; *Marzzarella*, 614 F.3d at 89; *Chester*, 628 F.3d at 680; Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives (*BATFE I*), 700 F.3d 185, 194 (5th Cir. 2012); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Duncan v. Becerra*, 970 F.3d 1133, 1145 (9th Cir. 2020), *reh'g en banc granted*, 988 F.3d 1209 (9th Cir. 2021); *United States v. Reese*, 627 F.3d 792, 800–01 (10th Cir. 2010); *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1260 n.34 (11th Cir. 2012); *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1252 (D.C. Cir. 2011).

analysis as in *Heller*.<sup>96</sup> The Seventh Circuit has not fully committed to an approach, alternating between the two-step test or evaluating the government's interests against an individual's Second Amendment rights.<sup>97</sup> The Supreme Court has not spoken on any approach since its *Heller* decision.<sup>98</sup>

### 1. Step one

Step one of the two-step test examines whether the regulated conduct at issue "falls within the scope of the Second Amendment" as historically understood.<sup>99</sup> In other words, this step requires the court to employ a historical analysis to determine whether the restricted activity is protected by an individual's right to bear arms.<sup>100</sup> A court may review a variety of materials to conduct its historical analysis, such as scholarly

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96. See *Heller II*, 670 F.3d at 1271 (Kavanaugh, J., dissenting); Powell v. Tompkins, 783 F.3d 332, 347 n.9 (1st Cir. 2015) (acknowledging the two-part framework but concluding the court has "hewed closely and cautiously to *Heller*'s circumscribed analysis and holding"); United States v. Bena, 664 F.3d 1180, 1183 (8th Cir. 2011) (relying heavily on *Heller* to determine the constitutionality of a Second Amendment provision without using the two-step test).

97. See Horsley v. Trame, 808 F.3d 1126, 1130–31 (7th Cir. 2015) (using the two-step test to evaluate an age-based restriction on Firearm Owner Identification Cards); Ezell, 651 F.3d at 701, 702–03 (invoking a two-step framework). But see United States v. Skoien, 614 F.3d 638, 642 (7th Cir. 2010) (en banc) (eschewing the "levels of scrutiny' quagmire" and deciding the impediment of the Second Amendment dictates how rigorously the government must justify its law).

98. The Supreme Court granted certiorari on its first Second Amendment case in over a decade concerning a gun licensing scheme. N.Y. State Rifle & Pistol Ass'n v. City of New York, 883 F.3d 45 (2d Cir. 2018), vacated, 140 S. Ct. 1525 (2020) (per curiam). However, New York repealed the law in question, and the Supreme Court held the case was moot. *N.Y. State Rifle & Pistol Ass'n*, 140 S. Ct. at 1526–27. Notably, in April 2021, the Supreme Court granted certiorari on a new Second Amendment case, potentially giving the Court the opportunity to affirm or denounce the two-step test. See Pete Williams, *Supreme Court to Take up Major Second Amendment Concealed Handgun Case*, NBC NEWS (Apr. 26, 2021, 9:55 AM), <https://www.nbcnews.com/politics/supreme-court/supreme-court-consider-right-carry-gun-outside-home-n1265357> [https://perma.cc/L8V5-SHPA].

99. See, e.g., *BATFE I*, 700 F.3d 185, 194 (5th Cir. 2012) (evaluating an age regulation by first exploring if there was historical precedent near the time of ratification to restrict such people under twenty-one from purchasing handguns).

100. *Marzzarella*, 614 F.3d at 89. Courts at step one look at historical and legal sources from before, during, and after the ratification of the Second Amendment through the nineteenth century to comport with the Court's approach in *Heller*. See *Heller*, 554 U.S. at 605 (reviewing "a variety of legal and other sources to determine the public understanding" of the Second Amendment from the time of ratification through the nineteenth century); see, e.g., *Horsley*, 808 F.3d at 1130–31 (reviewing the historical record concerning the scope of eighteen-to-twenty-year-olds' Second Amendment rights through the nineteenth century); *BATFE I*, 700 F.3d at 200–04 (parsing the legal and historical record through the nineteenth century).

literature,<sup>101</sup> older statutes,<sup>102</sup> and Founding Era beliefs about the right.<sup>103</sup> If the court concludes that the law in question does not regulate conduct protected by the Second Amendment, then the law is constitutional.<sup>104</sup> However, if the law does burden conduct understood to be protected by the Second Amendment, the court moves to step two.<sup>105</sup>

When there is conflict within the historical record or because of the inherent difficulty in parsing the historical record, some courts will, out of “an abundance of caution,” move to step two.<sup>106</sup> By moving to step two, the courts favorably assume that the plaintiff’s Second Amendment right is intact, and the regulation in question burdens conduct by the Second Amendment. For example, in *National Rifle Ass’n of America, Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*,<sup>107</sup> the Fifth Circuit evaluated 18 U.S.C. § 922(b), which prohibits federally licensed firearms dealers from selling handguns to any person under twenty-one.<sup>108</sup> The historical analysis at step one strongly suggested purchasing restrictions for people under twenty-one fell outside of the Second Amendment’s protections.<sup>109</sup> However, because of the inherent

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101. *Heller*, 554 U.S. at 605–10, 616–19 (discussing post-ratification and post-civil war commentary).

102. *Heller II*, 670 F.3d 1244, 1253–54 (D.C. Cir. 2011); *Ezell v. City of Chicago*, 651 F.3d 684, 705–06 (7th Cir. 2011).

103. See *BATFE I*, 700 F.3d at 200–02; *United States v. Rene E.*, 583 F.3d 8, 15–16 (1st Cir. 2009); see also *Horsley*, 808 F.3d at 1130 (using treatises); *Heller*, 554 U.S. at 600–25 (using state constitutions, public commentary, case law, and legislation).

104. *BATFE I*, 700 F.3d at 195 (citing *Marzzarella*, 614 F.3d at 89).

105. *Id.*

106. *Id.* at 204; see, e.g., *Woppard v. Gallagher*, 712 F.3d 865, 875 (4th Cir. 2013) (“We are not obliged to impart a definitive ruling at the first step . . . [O]ther courts of appeals have sometimes deemed it prudent to instead resolve post-*Heller* challenges . . . at the second step . . .”). But see *Rene E.*, 583 F.3d at 16 (declining to proceed to step two); *Young v. Hawaii*, 992 F.3d 765, 786–823 (9th Cir. 2021)(en banc), *petition for cert. docketed*, 20-1639 (May 25, 2021) (acknowledging that the historical record on whether the Second Amendment at the founding protected an individual carrying a firearm openly in public was “mixed,” but despite these conflicts, upholding Hawaii’s concealed-carry gun licensing scheme at step one).

107. 700 F.3d 185 (5th Cir. 2012).

108. *Id.* at 188; 18 U.S.C. § 922(b)(1) (“It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver[] any firearm or ammunition . . . other than a shotgun or rifle . . . to any individual who the licensee knows or has reasonable cause to believe is less than twenty-one years of age . . .”).

109. *BATFE I*, 700 F.3d at 200–04.

difficultly in this task, the court proceeded to step two.<sup>110</sup> Similarly, in *Horsley v. Trame*,<sup>111</sup> when considering whether a law that required eighteen-to-twenty-year-olds to obtain parental permission for a Firearm Owner's Identification Card was constitutional,<sup>112</sup> the Seventh Circuit found that the historical record conflicted on whether this age group was within the scope of the Second Amendment and continued to step two.<sup>113</sup>

Courts struggle to map *Heller*'s longstanding presumptively lawful regulations onto the bifurcated framework of the two-step test and struggle to define additional presumptively lawful regulations derived from *Heller* in the context of new challenges. Justice Scalia purported the list of four longstanding regulations was not "exhaustive."<sup>114</sup> However, the majority provided little clarity as to why the four regulations—possession by felons, possession by the mentally ill, carrying firearms in sensitive locations, and conditions on the sale of firearms—included in this list were presumptively lawful, leaving lower courts with uncertainty about how this provision applies to laws not within the list.<sup>115</sup> Consequently, courts are tasked with applying *Heller*'s presumptively lawful analysis to three types of laws: "laws that fit exactly within the *Heller* list, such as a law banning gun possession by convicted felons[;] laws that might be analogized to something on the *Heller* list . . . [; or] other types of laws are that 'longstanding.'"<sup>116</sup>

This struggle has left circuit courts adopting a myriad of approaches to longstanding and presumptively lawful regulations.<sup>117</sup> The Fifth Circuit explained the most frequently used approaches:

We admit that it is difficult to map Heller's "longstanding," "presumptively lawful regulatory measures," onto this two-step framework. It is difficult to discern whether "longstanding prohibitions on the possession of firearms by felons and the mentally ill, . . . or laws imposing conditions and qualifications on the commercial sale of arms," by virtue of their presumptive validity,

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110. *Id.* at 204 ("[W]e are unable to divine the Founders' specific views on whether 18-to-20-year-olds had a stronger claim than 17-year-olds to the Second Amendment guarantee. The Founders may not even have shared a collective view on such a subtle and fine-grained distinction.").

111. 808 F.3d 1126 (7th Cir. 2015).

112. *Id.* at 1130.

113. *Id.*

114. *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

115. *Id.*

116. Kopel & Greenlee, *supra* note 62, at 215–16.

117. See generally *id.* at 212–28 (reviewing how circuit courts apply *Heller*'s longstanding and presumptively lawful regulations at step one or step two). This Comment reviews presumptively lawful measures at both step one and step two.

either (i) presumptively fail to burden conduct protected by the Second Amendment, or (ii) presumptively trigger and pass constitutional muster under a lenient level of scrutiny.<sup>118</sup>

In the first approach, courts apply longstanding and presumptively lawful measures at step one.<sup>119</sup> If, after its historical review, a court finds that a regulation is longstanding and thus presumptively lawful, the law is found not to burden activity protected by the Second Amendment, and the law is constitutional under step one since it is outside the Second Amendment's protections.<sup>120</sup> In some circuits, a litigant may then rebut this presumption by showing that the regulation in question has more than a de minimis effect on his right.<sup>121</sup> Some circuit courts review longstanding and presumptively lawful measures at step two. In this approach, some circuit courts have interpreted the *Heller* language to mean that although these four categories do burden Second Amendment conduct (and thus fail at step one), they nevertheless "presumptively satisfy some form of heightened means ends scrutiny" at step two.<sup>122</sup>

Whether evaluated at step one or step two, circuit courts have generally agreed that some regulations can be "longstanding" if they have Founding Era roots, or even if the regulations do not mirror the

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118. *BATFE I*, 700 F.3d at 196 (citing *Heller*, 554 U.S. at 626–27).

119. *Id.* at 221–23.

120. See, e.g., *United States v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010) ("[T]hese longstanding limitations are exceptions to the right to bear arms."); *BATFE I*, 700 F.3d at 196 ("[W]e state that a longstanding, presumptively lawful regulatory measure—whether or not it is specified on *Heller*'s illustrative list—would likely fall outside the ambit of the Second Amendment."); *United States v. Bena*, 664 F.3d 1180, 1183 (8th Cir. 2011) ("It seems most likely that the Supreme Court viewed the regulatory measures listed in *Heller* as presumptively lawful because they do not infringe on the Second Amendment right."); *United States v. Focia*, 869 F.3d 1269, 1286 (11th Cir. 2017) ("These measures comport with the Second Amendment because they affect individuals or conduct *unprotected* by the right to keep and bear arms." (emphasis added)).

121. See, e.g., *Heller II*, 670 F.3d 1244, 1253 (D.C. Cir. 2011).

122. See *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 837 F.3d 678, 690 (6th Cir. 2016) (en banc); see, e.g., *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011) (determining that, although prohibition against a certain group of citizens owning firearms—domestic violence misdemeanants—may be "longstanding," the court would evaluate the regulation under heightened scrutiny); see also *United States v. Masciandaro*, 638 F.3d 458, 472 (4th Cir. 2011) (reviewing longstanding regulations at step two because "presumptively" indicates that the court should analyze the burden on the individual's right using a means end test); *BATFE I*, 700 F.3d 185, 204 (5th Cir. 2012) (discussing how the court "face[d] institutional challenges in conducting a definitive review of the relevant historical record"); *Woppard v. Gallagher*, 712 F.3d 865, 875 (4th Cir. 2013) (finding it "prudent to instead resolve post-*Heller* challenges to firearm prohibitions at the second step," particularly where the regulated conduct may implicate Second Amendment rights outside of the home).

"limits that were on the books in 1791."<sup>123</sup> The Supreme Court itself established this principle in *Heller*.<sup>124</sup> The presumptively lawful regulations in the *Heller* framework included prohibitions on felons and the mentally ill, and those prohibitions were not enacted until the mid-twentieth century.<sup>125</sup> So, theoretically, the court's review of a particular activity could extend beyond *Heller*'s evaluation of the nineteenth century and into the mid-twentieth century.

## 2. Step two

If the law burdens conduct protected by the Second Amendment, or if there is conflict within the historical record, the court proceeds to step two and evaluates the law under the appropriate level of scrutiny. There are three types of scrutiny a court could apply: rational basis scrutiny, intermediate scrutiny, or strict scrutiny.<sup>126</sup> Under rational basis, the court assumes the law is valid and asks whether it is "rationally related to a legitimate [government] interest."<sup>127</sup> Intermediate scrutiny requires the government to show the law furthers an important governmental interest, and that there is a "reasonable fit" between the law and its objective.<sup>128</sup> The fit between the law and the governmental interest does not need to be perfect.<sup>129</sup> Under strict scrutiny, the law must further a compelling government interest and be narrowly tailored to serve that interest.<sup>130</sup> Further, the government's means must be the "least-restrictive method."<sup>131</sup> The Supreme Court rejected the

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123. *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc).

124. *BATFE I*, 700 F.3d at 196; *see District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008) ("[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.").

125. *BATFE I*, 700 F.3d at 196.

126. *See Heller*, 554 U.S. at 634 (listing the three "traditionally expressed levels" of scrutiny).

127. *United States v. Marzzarella*, 614 F.3d 85, 95–96 n.13 (3d Cir. 2010).

128. *See BATFE I*, 700 F.3d at 205 (noting that "[a] law that burdens the core of the Second Amendment" is subject to strict scrutiny, while a "less severe law" would be subject to intermediate scrutiny); *Heller II*, 670 F.3d 1244, 1262 (D.C. Cir. 2011) (applying intermediate scrutiny to a firearm restriction after finding it did not severely burden the Second Amendment right).

129. *Marzzarella*, 614 F.3d at 98; *see N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 261 (2d Cir. 2015) (quoting *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002) (plurality)) (requiring evidence that "'fairly support[s]' the government rationale to pass constitutional muster under intermediate scrutiny").

130. *Marzzarella*, 614 F.3d at 99.

131. *Id.* at 100.

application of rational basis review for Second Amendment claims, so courts usually must choose between either intermediate or strict scrutiny.<sup>132</sup> Regulations that threaten and severely burden the “core” Second Amendment protection—the “right of law-abiding, responsible citizens” to possess firearms for self-defense in the home<sup>133</sup>—trigger strict scrutiny.<sup>134</sup> Laws straying from the “core” receive intermediate scrutiny.<sup>135</sup>

Although courts have not defined what constitutes the “core” of the Second Amendment, they typically only apply strict scrutiny when the law in question prohibits “responsible citizens” from possessing arms in the home for self-defense.<sup>136</sup> For example, a provision of one of the laws challenged in *Heller* prohibited handgun possession.<sup>137</sup> The Supreme Court found that this type of categorical ban would not even pass rational basis, let alone strict scrutiny.<sup>138</sup> Similarly, in *Wrenn v. District of Columbia*,<sup>139</sup> D.C. enacted a law that required concealed carry applicants to demonstrate “good reason to fear injury.”<sup>140</sup> The court found that the regulation acted as a functional ban on possessing a firearm for self-defense and was unconstitutional under any level of scrutiny.<sup>141</sup> *Heller* ensured “guns would be available to each *responsible citizen* as a rule (*i.e.*, at least to those no more prone to misuse that access than anyone else).”<sup>142</sup> Here, the majority of D.C. residents fell into this category.<sup>143</sup>

In some instances, circuit courts that apply strict scrutiny to firearm regulations are being overturned en banc because the law did not actually infringe on the core of the Second Amendment right, and thus,

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132. *Heller*, 554 U.S. at 628 n.27 (“If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant . . .”); *see also* Kopel & Greenlee, *supra* note 62, at 274 n.486 (listing many examples of cases rejecting rational basis review for any Second Amendment question).

133. *Heller*, 554 U.S. at 634–35.

134. *BATFE I*, 700 F.3d 185, 195 (5th Cir. 2012).

135. *Id.*

136. *See, e.g.*, *Wrenn v. District of Columbia*, 864 F.3d 650, 666–67 (D.C. Cir. 2017) (applying strict scrutiny).

137. *Heller*, 554 U.S. at 635.

138. *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.” (citations omitted)).

139. 864 F.3d 650 (D.C. Cir. 2017).

140. *Id.* at 655 (quoting D.C. Code § 22-4506(a)-(b)).

141. *Id.* at 666.

142. *Id.*

143. *Id.*

intermediate scrutiny was more appropriate.<sup>144</sup> Moreover, in a survey of Second Amendment jurisprudence between 2008 and 2017, relatively few cases have been found to apply strict scrutiny on firearm regulations.<sup>145</sup> In fact, “[t]here has been ‘near unanimity in the post-*Heller* case law that, when considering regulations that fall within the scope of the Second Amendment, intermediate scrutiny is appropriate.”<sup>146</sup>

Unless a regulation implicates the core Second Amendment right, courts apply intermediate scrutiny to firearms regulations. Courts select intermediate scrutiny when the law in question imposes mere conditions on the possession or purchase of firearms.<sup>147</sup> For example, in *United States v. Masciandaro*,<sup>148</sup> the defendant argued that a law that prohibited persons from carrying loaded firearms within a national park violated the Second Amendment.<sup>149</sup> The court applied

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144. See, e.g., *Kolbe v. Hogan*, 849 F.3d 114, 121 (4th Cir. 2017) (en banc) (overturning a three-judge panel ruling that found Maryland’s ban on assault weapons and large-capacity magazines warranted strict scrutiny); *Teixeira v. County of Alameda*, 873 F.3d 670, 678 (9th Cir. 2017) (en banc) (finding that the plaintiffs failed to state a claim for Second Amendment infringement under strict scrutiny because although the ordinance restricted their ability to sell firearms, it did not restrict the ability of any resident to actually purchase a firearm).

145. See generally Kopel & Greenlee, *supra* note 62, at 274–309 (dissecting Second Amendment cases and finding that most courts used intermediate scrutiny). The Seventh Circuit, keeping with its trend of cloudy precedent, see *supra* note 97, applied “not quite ‘strict scrutiny’” in theory to a regulation that banned all firing ranges. *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011). However, the language of the court read mostly like strict scrutiny as it required the government to demonstrate its public safety concerns created “serious risks” to public safety. *Id.* at 709. The court also stressed there were less restrictive alternatives to this law, *id.* at 710, a prong typically left for strict scrutiny. Kopel & Greenlee, *supra* note 62, at 302.

146. *Jones v. Becerra*, 498 F. Supp. 3d 1317, 1328 (S.D. Cal. 2020) (quoting *Silvester v. Harris*, 843 F.3d 816, 823 (9th Cir. 2016)), *appeal filed*, 20-56174 (Nov. 9, 2020); see *Wrenn*, 864 F.3d at 666 (“[W]e’ve never been asked to review so much as a ‘substantial’ burden on a ‘core’ protected right.... [I]n fact, we’ve never applied more than intermediate scrutiny.”).

147. See, e.g., *Kachalsky v. County of Westchester*, 701 F.3d 81, 96 (2d Cir. 2012) (applying intermediate scrutiny to a concealed carry licensing requirement); *Silvester*, 843 F.3d at 819 (upholding a ten-day waiting period for most firearms purchases under intermediate scrutiny). But see *Jackson v. City & County of San Francisco*, 746 F.3d 953, 964–66 (9th Cir. 2014) (holding that intermediate scrutiny was the appropriate standard even though California’s law requiring handguns to be stored in a locked container when not on the person implicated the core of the Second Amendment right). The court argued that the California law, although similar to the law in *Heller*, only placed a burden on the manner in which persons exercise their Second Amendment right. *Id.* at 964.

148. 638 F.3d 458 (4th Cir. 2011).

149. *Id.* at 459–60.

intermediate scrutiny because as a person moves away from the core Second Amendment right, that is away from the home, public safety interests begin to exceed a person's interests in self-defense.<sup>150</sup> Similarly, regulations that restrict classes of people, such as felons, from possessing firearms warrant intermediate scrutiny even if that ban is for life.<sup>151</sup> Lastly, even regulations that prohibit the possession of certain types of firearms and ammunition are typically upheld under intermediate scrutiny.<sup>152</sup>

Courts specifically considering firearm regulations based on age have only applied intermediate scrutiny under the two-step test.<sup>153</sup> At step one, courts considered whether eighteen-to-twenty-year-olds' ability to purchase firearms was within the scope of Second Amendment

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150. *Id.* at 470–73; see also *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1123 (10th Cir. 2015) (upholding a ban on firearms in post offices under intermediate scrutiny).

151. The federal circuits have unanimously held that the federal prohibition preventing felons from owning firearms is constitutional. *See, e.g., United States v. Moore*, 666 F.3d 313, 316–17 (4th Cir. 2012) (collecting cases and applying intermediate scrutiny). Circuit courts have also held that laws preventing domestic violence offenders from possessing firearms are constitutional. *See, e.g., Stimmel v. Sessions*, 879 F.3d 198, 203 (6th Cir. 2018) (same). This extends to those persons subject to domestic violence protective orders. *See, e.g., United States v. Chapman*, 666 F.3d 220, 226 (4th Cir. 2012) (applying intermediate scrutiny to a Second Amendment challenge concerning domestic violence protective orders); *BATFE I*, 700 F.3d 185, 205 (5th Cir. 2012) (“Unquestionably, the challenged federal laws trigger nothing more than ‘intermediate’ scrutiny . . . [T]his ban does not disarm an entire community, but instead prohibits . . . handgun sales to . . . a discrete category.”).

152. *See, e.g., N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 260 (2d Cir. 2015) (upholding a ban on semi-automatic weapons and types of magazines under intermediate scrutiny). When challenged, several state assault weapons bans (generally meaning semi-automatic rifles) have been upheld in federal court. *See generally PECK, supra* note 89, at 26–29 (analyzing the federal courts' decisions to uphold assault weapons bans under intermediate scrutiny because the laws “[do] not completely ban handgun possession,” the core of the Second Amendment right described in *Heller*). *But see Duncan v. Becerra*, 970 F.3d 1133, 1145–46 (9th Cir. 2020) (applying strict scrutiny to strike down a law banning the possession of large-capacity magazines because large-capacity magazines are popular add-ons for handguns, the most common self-defense weapon), *reh'g en banc granted*, 988 F.3d 1209 (9th Cir. 2021). The California Attorney General is petitioning for a rehearing en banc. *See generally supra* notes 144–46 and accompanying text (discussing the trend of en banc reversals).

153. *See Horsley v. Trame*, 808 F.3d 1126, 1130–31 (7th Cir. 2015) (considering and rejecting a challenge to an Illinois law requiring a parental signature for firearms applications for people under twenty-one); *BATFE I*, 700 F.3d at 195 (analyzing 18 U.S.C. § 922(b)–(c), which prohibits federal firearms dealers from selling handguns to people under twenty-one); *Nat'l Rifle Ass'n of Am., Inc., v. McCraw*, 719 F.3d 338, 347–48 (5th Cir. 2013) (upholding a Texas law that prohibited eighteen-to-twenty-year-olds from carrying handguns in public under intermediate scrutiny).

protection at the time of ratification.<sup>154</sup> After in-depth historical analyses, each court concluded that people under twenty-one were not within the scope of Second Amendment protections.<sup>155</sup> Although the courts could have stopped their analysis at step one because the law is constitutional, the Fifth and Seventh Circuits acknowledged the fruitlessness of historical inquiries, opting to move to step two and evaluate these laws under intermediate scrutiny.<sup>156</sup> The courts found that the laws only involved a discrete community and did not prevent these communities from *possessing* firearms.<sup>157</sup> The laws merely placed conditions on *obtaining* arms.<sup>158</sup> Thus, intermediate scrutiny was appropriate, and the laws were ultimately found to be constitutional.<sup>159</sup>

Once a court selects intermediate scrutiny as the appropriate means-end evaluation, it must analyze the purported government interest and the reasonability of the law to achieve that objective.<sup>160</sup> Courts consistently have held that public safety concerns, particularly concerning firearm regulations, constitute an important government interest.<sup>161</sup> Once the government establishes the importance of its interest, the court examines whether the legislature reasonably adapted a regulation to achieve that objective.<sup>162</sup> To support this interest, the government must present factual evidence demonstrating the public safety concern, as well as legislative history supporting that goal.<sup>163</sup> To determine whether the legislation reasonably fits the important

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154. *Horsley*, 808 F.3d at 1130–31; *McCraw*, 719 F.3d at 347–48; *BATFE I*, 700 F.3d at 200–04.

155. *Horsley*, 808 F.3d at 1131; *McCraw*, 719 F.3d at 347; *BATFE I*, 700 F.3d at 203–04; *Rene E.*, 583 F.3d at 16. In *Horsley* and *BATFE I*, the courts found that a “minor” was considered a person under twenty-one. *Horsley*, 808 F.3d at 1130; *BATFE I*, 700 F.3d at 201. The courts analyzed historical evidence that the Framers felt eighteen-to-twenty-year-olds should not have firearms. *Horsley*, 808 F.3d at 1130–31; *BATFE I*, 700 F.3d at 200–03. The decisions also discuss whether these regulations comport with disarming categories of people for safety. *BATFE I*, 700 F.3d at 200. Drawing on various scholarship, the courts concluded that during the Founding Era, it was sensible to disarm “certain classes of individuals” who endangered public safety. *BATFE I*, 700 F.3d at 203–04; see *Horsley*, 808 F.3d at 1131; *McCraw*, 719 F.3d at 347.

156. *Horsley*, 808 F.3d at 1131; *BATFE I*, 700 F.3d at 204; see *supra* note 106.

157. *BATFE I*, 700 F.3d at 209; *Horsley*, 808 F.3d at 1131–32.

158. *BATFE I*, 700 F.3d at 209; *Horsley*, 808 F.3d at 1132.

159. *BATFE I*, 700 F.3d at 211; *Horsley*, 808 F.3d at 1134.

160. *BATFE I*, 700 F.3d at 195.

161. See *id.* at 209 (citing *Schall v. Martin*, 467 U.S. 253, 264 (1984)) (“The ‘legitimate and compelling state interest’ in protecting the community from crime cannot be doubted.”).

162. *Id.* at 209.

163. See, e.g., *id.* at 207–09 (using crime statistics concerning persons under twenty-one to conclude that the federal law reasonably fit the government objective).

governmental objective, courts will look at factors such as whether a person will age out of the restriction<sup>164</sup> and whether there are exemptions that permit alternative methods of obtaining firearms.<sup>165</sup> Courts also consider the legislative context to determine how serious the problem is compared to the enacted legislation and reviews empirical data that shapes that issue.<sup>166</sup> Only once the government establishes an important government interest and demonstrates that the regulation reasonably fits to meet that interest may a court find the law constitutional.<sup>167</sup> Having explored how courts evaluate Second Amendment challenges, the next Section discusses why these laws are necessary in the first place. The fate of these firearms laws is important because of the pervasive problem of gun violence in the United States.

### C. Gun Violence in the United States and Its Impact on Youth

An expansive Second Amendment right inherently produces an expansive problem of gun violence in the United States.<sup>168</sup> Each year, approximately 39,000 citizens are killed by firearms.<sup>169</sup> In 2020, there were 19,411 willful, malicious, or accidental deaths and 39,492 willful, malicious, or accidental injuries involving a firearm.<sup>170</sup> One study found that the gun homicide rate was almost twenty-five times higher in the

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164. See *id.* at 207 (discussing that the persons subject to this purchasing requirement “grow up and out of its reach”).

165. See *id.* (suggesting that adolescents can obtain firearms through other methods such as gifts, thereby reducing the “severity” of the law’s burden on the Second Amendment right).

166. See *Horsley v. Trame*, 808 F.3d 1126, 1133 (7th Cir. 2015); *Tyler v. Hillsdale Cnty. Sheriff’s Dep’t.* 837 F.3d 678, 694 (6th Cir. 2016) (en banc) (finding that government “reference to legislative findings, academic studies, or other empirical data is necessary” to justify its regulation).

167. See *BATFE I*, 700 F.3d at 195.

168. See John W. Schoen, *States with Strict Gun Laws Have Fewer Firearms Deaths. Here’s How Your State Stacks Up*, CNBC, <https://www.cnbc.com/2018/02/27/states-with-strict-gun-laws-have-fewer-firearms-deaths-heres-how-your-state-stacks-up.html> [https://perma.cc/5UJH-9H4R] (last updated Feb. 27, 2018) (explaining that states with stricter gun laws have fewer per capita gun-related deaths than states with more relaxed laws).

169. *Fatal Injury Reports, National, Regional, and State, 1981–2019*, CDC, <https://webappa.cdc.gov/sasweb/ncipc/mortrate.html> [https://perma.cc/TV7R-C8N3] (in the form at the link, under “Year Range” select “1999 to 2019 (ICD-10, National and Regional”; under “Intent or manner of the injury” select “All Intents”; under “Cause or mechanism of the injury” select “Firearm”; in “Select specific options” table under Year(s) of report” select “2015” to “2019”; and finally “submit request”) (averaging data from the past five years of available data from 2015–2019).

170. GUN VIOLENCE ARCHIVE, [gunviolencearchive.org](http://gunviolencearchive.org) (last updated July 14, 2021).

United States in 2010 than it was in other high-income countries.<sup>171</sup> In fact, the United States has the twenty-eighth highest death rate from gun violence.<sup>172</sup> In 2019, gun violence killed approximately twelve people per 100,000—greater than most industrialized countries.<sup>173</sup> Suicides account for most of the gun-related deaths.<sup>174</sup> Of the 48,344 suicides in 2018, 24,432 (50.5%) involved a firearm.<sup>175</sup>

Gun violence impacts children and teenagers<sup>176</sup> at alarming rates. In 2019, 692 children and 3,096 teenagers were killed or injured by firearms,<sup>177</sup> making firearms the leading cause of death for U.S. children and teenagers.<sup>178</sup> Furthermore, “about [38%] of all suicides by people under [twenty-one] are committed with a [firearm].”<sup>179</sup> Young adults also commit gun violence at disturbing rates. Approximately “[50%] of all gun homicides are committed by people younger than [twenty-

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171. Erin Grinshteyn & David Hemenway, *Violent Death Rates in the US Compared to Those of the Other High-Income Countries*, 123 PREVENTIVE MED. 20, 22 (2019).

172. Sharon Shahid & Megan Duzor, *History of Mass Shooters*, VOA, <https://projects.voanews.com/mass-shootings> [<https://perma.cc/R4D6-NXPB>].

173. *All Injuries, 1999–2019 Results*, CDC, <https://www.cdc.gov/nchs/fastats/injury.htm> [<https://perma.cc/MM5Z-F98V>]. But see Lawrence W. Reed, *Guns Prevent Thousands of Crimes Every Day, Research Shows*, FOUND. FOR ECON. EDUC. (Aug. 23, 2019), <https://fee.org/articles/guns-prevent-thousands-of-crimes-every-day-research-show> [<https://perma.cc/A4TD-NCRV>] (arguing that firearms benefit society by helping prevent crime).

174. John Gramlich, *What the Data Says About Gun Deaths in the U.S.*, PEW RSCH. CTR. (Aug. 16, 2019), <https://www.pewresearch.org/fact-tank/2019/08/16/what-the-data-says-about-gun-deaths-in-the-u-s> [<https://perma.cc/HHX4-FEQ4>] (“[S]uicides have long accounted for the majority of U.S. gun deaths. In 2017, six-in-ten gun-related deaths in the U.S. were suicides.”). The rest of gun-related deaths stem from homicide, unintentional, law enforcement-related, or undetermined circumstances. *Id.*

175. *Suicide*, NAT’L INSTIT. OF MENTAL HEALTH, <https://www.nimh.nih.gov/health/statistics/suicide.shtml#:~:text=on%20Suicide%20Prevention.,Suicide%20is%20a%20Leading%20Cause%20of%20Death%20in%20the%20United,lives%20of%20over%2048%2C000%20people> [<https://perma.cc/GKQ8-KHYP>].

176. Children and teenagers are considered to be from the ages of one to nineteen for the purposes of this Section.

177. GUN VIOLENCE ARCHIVE, *supra* note 170.

178. *Causes of Injury-Related Death*, CDC, <https://wisqars-viz.cdc.gov:8006/explore-data/home> [<https://perma.cc/D4QG-EW7Q>] (at the link, select the year 2019 and select “explore data button”; add an “Ages” filter from “0 to 4” to “15 to 19”; and update “Group By” to “Mechanism” and “Submit”). Per the Centers for Disease Control and Prevention (CDC), 28.8% of deaths in this age range were caused by a firearm, and 27.5% were caused by motor vehicles or traffic. *Id.*

179. Adam Winkler & Cara Natterson, *There’s a Simple Way to Reduce Gun Violence: Raise the Gun Age*, WASH. POST (Jan. 6, 2016), <https://www.washingtonpost.com/posteverything/wp/2016/01/06/there-a-simple-way-to-fight-mass-shootings-raise-the-gun-age>.

five].<sup>180</sup> Most of the perpetrators are between eighteen and twenty-four years old.<sup>181</sup>

Although 99% of firearm deaths result from instances other than mass shootings,<sup>182</sup> active shooter incidents are nevertheless embedded into the conversation concerning gun regulation. The number of these events is increasing in frequency as is the average casualty rate.<sup>183</sup> Between 2000 and 2018, there were 277 active shooter incidents resulting in 2,430 casualties—884 deaths and 1,546 injuries.<sup>184</sup> Including the Columbine High School shooting in 1999, of the 97 mass shootings as of August 2021, 26 of the shooters were under 25 years old.<sup>185</sup>

Research shows there are generally four commonalities among mass shooters: childhood trauma, personal crisis, other shooting examples to

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180. *Id.*

181. *Id.; see also BATFE I*, 700 F.3d 185, 207–10 (5th Cir. 2012) (reviewing crime statistics for people under twenty-one and determining that preventing people under twenty-one from having firearms is critical to public safety because of that age group's propensity to commit violent acts with firearms).

182. See *Facts and Figures*, U.C. DAVIS HEALTH, <https://health.ucdavis.edu/what-you-can-do/facts.html> [<https://perma.cc/5868-UX3S>]. There are two common definitions of mass shooting events. These different definitions can result in slightly different statistics. The Congressional Research Service and other organizations define “mass shooting” as “a multiple homicide incident in which four or more victims are murdered with firearms—not including the offender(s)—within one event.” Shahid & Duzor, *supra* note 172. The FBI uses the term “Active Shooter” to define instances where there is as “one or more individuals actively engaged in killing or attempting to kill people in a populated area. Implicit in this definition is the shooter’s use of one or more firearms.” *Active Shooter Incidents in the United States in 2019*, FED. BUREAU OF INVESTIGATION (Apr. 2020), <https://www.fbi.gov/file-repository/active-shooter-incidents-in-the-us-2019-042820.pdf/view> [<https://perma.cc/7DM3-SUGG>].

183. See David Noriega & Tess Owens, *Nearly All Mass Shooters Have Had 4 Things in Common*, VICE (Nov. 19, 2019), <https://www.vice.com/en/article/a35mya/nearly-all-mass-shooters-since-1966-have-had-four-things-in-common> [<https://perma.cc/CUP5-A8UJ>] (reviewing the Department of Justice-funded study of all mass shootings since 1966); *see also Quick Look: 277 Active Shooter Incidents in the United States from 2000 to 2018*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/about/partnerships/office-of-partner-engagement/active-shooter-incidents-graphics> [<https://perma.cc/7ESE-V82Z>]. The increase of these events coincides with the federal assault weapons ban expiring in 2004. Louis Klarevas et al., *The Effect of Large-Capacity Magazine Bans on High-Fatality Mass Shootings, 1990–2017*, 109 AM. J. PUB. HEALTH 1754, 1758 (2019).

184. *Quick Look: 277 Active Shooter Incidents in the United States from 2000 to 2018*, *supra* note 183.

185. Mark Follman et al., *US Mass Shootings, 1982–2021: Data from Mother Jones’ Investigation*, MOTHER JONES, <https://www.motherjones.com/politics/2012/12/mass-shootings-mother-jones-full-data> [<https://perma.cc/5XET-68KX>] (last updated May 26, 2021, 10:50 PM) (data collected by downloading CSV file and filtering on age of shooter and date of incident after Columbine High School).

validate their feelings, and access to a firearm.<sup>186</sup> Loopholes in gun laws are an additional factor in these events.<sup>187</sup> The shooters<sup>188</sup> mostly obtained their weapons legally,<sup>189</sup> and their primary weapon of choice was a handgun—not the widely publicized AR-15, a semi-automatic rifle.<sup>190</sup> However, mass shooters have used semi-automatic rifles in four of the five deadliest mass shootings in the country.<sup>191</sup> Further, shooters can use gun-enhancing features, such as large-capacity magazines and bump stocks, to increase the casualty rates of their events.<sup>192</sup>

The American Medical Association has declared gun violence a public health crisis.<sup>193</sup> Despite this crisis, Congress had prevented the Centers for Disease Control and Prevention (CDC) and National Institutes of Health (NIH) from conducting research on this public health crisis for

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186. Noriega & Owens, *supra* note 183.

187. See, e.g., *Mass Shootings*, GIFFORDS L. CTR., <https://giffords.org/issues/mass-shootings> [https://perma.cc/M5MV-VSR2] (analyzing various policies that could curb gun violence, including implementing federal background checks, preventing domestic abusers from receiving weapons, banning large-capacity magazines, and regulating assault weapons).

188. The FBI does not provide data on “active shooter” weapons. Thus, this portion will look to “mass shootings” instead.

189. Shooters obtained their weapons in the following ways: 50% legally; 12% theft or borrowed; 18% illegally purchased; 3% gifted; 1% assembled; and 32% unknown. Shahid & Duzor, *supra* note 172. Handguns are the most prevalent weapon used in mass shootings in 78% of incidents, with 28% of shooters using assault rifles, 23% using rifles, and 24% using shotguns. *Id.* These numbers will not equal 100% as many shooters used more than one weapon. *Id.*

190. *Weapon Types Used in Mass Shootings in the United States Between 1982 and February 2020, by Number of Weapons and Incidents*, STATISTA, <https://www.statista.com/statistics/476409/mass-shootings-in-the-us-by-weapon-types-used> [https://perma.cc/K37Q-6TJ9] (last updated Sept. 10, 2021).

191. See William Cummings & Bart Jansen, *Why the AR-15 Keeps Appearing at America’s Deadliest Mass Shootings*, U.S.A. TODAY (Feb. 14, 2018), <https://www.usatoday.com/story/news/nation/2018/02/14/ar-15-mass-shootings/339519002> [https://perma.cc/4X4E-U4N2] (listing the deadliest mass shootings and the weapons used in each); Daniel Wolfe & John Murphy-Teixidor, *Mass Shootings in the US Fast Facts*, CNN, <https://www.cnn.com/2019/08/19/us/mass-shootings-fast-facts/index.html> [https://perma.cc/J9XK-QRHU] (last updated July 14, 2021) (listing mass shootings by fatalities).

192. See Louis Klarevas et al., *supra* note 183, at 1755 (“[T]he data indicated that utilizing LCMs in high-fatality mass shootings resulted in a 62% increase in the mean death toll.”).

193. *AMA Calls Gun Violence “A Public Health Crisis”*, AM. MED. ASS’N (June 14, 2016), <https://www.ama-assn.org/press-center/press-releases/ama-calls-gun-violence-public-health-crisis> [https://perma.cc/Z9W3-2UTA].

approximately twenty-five years.<sup>194</sup> Fortunately, Congress has appropriated \$25 million to research eradicating gun violence.<sup>195</sup> This critical research could “help [the country] understand the problems associated with gun violence and determine how to reduce the high rate of firearm-related deaths and injuries.”<sup>196</sup> Without this research, it may be hard for legislators to determine how to address this pervasive issue appropriately.

Presently, scientific research supports that people under twenty-five are at a higher risk to harm themselves and others as their brains continue to develop. Neuroscience research unequivocally demonstrates that the prefrontal cortex is the last area of the brain to develop and does not fully mature until at least the age of twenty-five.<sup>197</sup> This area of the brain controls “executive functions” such as assessing risk and impulse control.<sup>198</sup> This delay in maturity means that a person’s “response inhibition, emotional regulation, planning and organization . . . continue to develop between adolescence and young adulthood.”<sup>199</sup> Furthermore, adolescent hormonal changes can have

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194. See Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, § 104, 110 Stat. 3009, 3009-244 (1996); see also Sheryl Gay Stolberg, *Can New Gun Violence Research Find a Path Around the Political Stalemate?*, N.Y. TIMES, <https://www.nytimes.com/2021/03/27/us/politics/gun-violence-research-cdc.html> [https://perma.cc/U959-HYN8] (last updated Apr. 2, 2021) (“Federal money for gun research all but disappeared after Congress in 1996 enacted the so-called Dickey Amendment, which barred the C.D.C. from spending money to ‘advocate or promote gun control.’”). In a strange turn of events, after Mr. Dickey’s passing, his wife and a researcher convinced Congress to appropriate \$25 million to the CDC and NIH to research gun violence. *Id.*

195. Stolberg, *supra* note 194.

196. AMA Calls Gun Violence “A Public Health Crisis,” *supra* note 193. For more information on why the CDC cannot research this issue, see generally Matt Laslo, *The CDC Could Totally Study Gun Violence—It Just Needs Money*, WIRED (Aug. 7, 2019, 12:07 PM), <https://www.wired.com/story/cdc-gun-violence-research-money> [https://perma.cc/G8A9-AP5L], for a discussion on the history of the Dickey Amendment and how it prevents Congress from allocating funds for research.

197. See Elizabeth R. Sowell, et al., *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 NATURE NEUROSCIENCE 859, 859–60 (1999); Tulio M. Otero & Lauren A. Barker, *The Frontal Lobes and Executive Functioning*, HANDBOOK OF EXEC. FUNCTIONING 29, 35 (2014). See generally Brief for the Am. Med. Ass’n & the Am. Acad. of Child & Adolescent Psychiatry at 2–37, Miller v. Alabama, 567 U.S. 460 (2012) (reviewing the scientific studies that support the conclusion that “adolescent behavior is more likely to be impulsive and motivated by the possibility of reward, with less self-regulation and effective risk assessment. In other words, the adolescent brain is biologically biased to engage in exploring new environments and experiences which can involve taking risks”).

198. Sowell et al., *supra* note 197, at 859–60.

199. *Id.* at 860.

significant effects on behavior.<sup>200</sup> This delay in development, coupled with the hormonal changes, results in impaired decision-making abilities and reduced self-control among this age group.<sup>201</sup> Thus, adolescents are generally impulsive and lack the brain maturity for rational decision-making.<sup>202</sup> Because of this incomplete brain development, eighteen-to-twenty-year-olds are at higher risk of violence<sup>203</sup> and are disproportionately more likely to commit violent crimes with firearms.<sup>204</sup>

The federal governmental has somewhat recognized the risk that youth poses regarding access to firearms. At the federal level, firearm regulations are sparse and only contain two main categories of regulated action: purchases and possession. Licensed firearms dealers may not sell a handgun to anyone under twenty-one.<sup>205</sup> They also cannot sell long guns to any person under eighteen.<sup>206</sup> Unlicensed firearms dealers cannot sell handguns to a person under eighteen.<sup>207</sup> Unlicensed firearm dealers may sell long guns to anyone of any age.<sup>208</sup> For

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200. Mariam Arain et al., *Maturation of the Adolescent Brain*, 9 NEUROPSYCHIATRIC DISEASE & TREATMENT 449, 450 (2013); see Allan Siegel & Jeff Victoroff, *Understanding Human Aggression: New Insights from Neuroscience*, 32 INT'L J.L. PSYCHIATRY 209, 210-11 (2009) (describing the neurological mechanisms of aggression in mammals).

201. See Arain et al., *supra* note 200, at 453 (explaining how an adolescent's brain uses the prefrontal cortices less than adults and accordingly, provides a partial explanation for adolescent behaviors such as intense mood swings and quickness to anger).

202. *Id.*

203. See Michael Dreyfuss et al., *Teens Impulsively React Rather Than Retreat from Threat*, 36 DEV. NEUROSCIENCE 220, 220 (2014) (discussing adolescent proclivity towards risk-taking may contribute to higher crime rates within this age group).

204. In 2017, among eighteen-to-twenty-year-olds, arrests were highest for homicide, rape, and robbery. *Crime in the United States*, U.S. DEP'T OF JUST. (2017), <https://ucr.fbi.gov/crime-in-the-u-s/2017/crime-in-the-u-s-2017/topic-pages/tables/table-38> [<https://perma.cc/9U4S-BFET>]. This age group makes up approximately 10% of the population but accounts for over 15% of homicide and manslaughter arrests. *Id.* "Firearm homicides and violent crimes disproportionately involve individuals under age 21, both as perpetrators and as victims." RAND CORP., THE SCIENCE OF GUN POLICY: A CRITICAL SYNTHESIS OF RESEARCH EVIDENCE ON THE EFFECTS OF GUN POLICIES IN THE UNITED STATES 1, 145 (2018).

205. 18 U.S.C. § 922(b)(1).

206. *Id.* § 922(b)(1), (c)(1).

207. *Id.* § 922(x)(1), (5). The Bureau of Alcohol, Tobacco, and Firearms considers a person within the purview of licensing regulations as someone who "engages in the business of dealing in firearms." U.S. DEP'T OF JUST., DO I NEED A LICENSE TO BUY AND SELL FIREARMS? 6 (2016), <https://www.atf.gov/file/100871/download> [<https://perma.cc/3ABS-SE8Y>]. BATFE *I* views this as a person who conducts business in firearms as a predominant career. *Id.*

208. *Id.*

possession, federal law prohibits any person under eighteen from possessing a handgun or handgun ammunition.<sup>209</sup> There is no minimum age for possession of long guns.<sup>210</sup> States can adopt higher age restrictions, but they cannot change the age to be below the federal minimum. Because of the public health crisis of gun violence and federal inaction, state legislatures are attempting to curb this crisis on their own, particularly following many nationalized, tragic shootings.

*D. The Marjory Stoneman Douglas High School Public Safety Act and Florida's Response*

After the devastating mass shooting at Marjory Stoneman Douglas High School that took the lives of fourteen students and three staff members,<sup>211</sup> the Florida legislature reflected on how laws could have prevented this tragedy.<sup>212</sup> There were numerous failures on the part of school officials to prepare students for such an event and during the shooting itself,<sup>213</sup> despite the fact that many students and faculty acted heroically to save their classmates.<sup>214</sup> Many students and adults agreed that without the shooter's ability to purchase a Smith & Wesson M&P 15

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209. *Id.* § 922(x)(2), (5).

210. *Id.*

211. DeMarche, *supra* note 3.

212. See Dan Sweeney, *Florida House Sends Stoneman Douglas Gun and School Bill to Gov. Scott*, SUN SENTINEL (Mar. 7, 2018), <https://www.sun-sentinel.com/local/broward/parkland/florida-school-shooting/fl-florida-school-shooting-legislature-20180307-story.html> [https://perma.cc/62UE-WK9N].

213. See *Unprepared and Overwhelmed: Two Decades After Columbine and Five Years After Sandy Hook, Educators and Police Still Weren't Ready for Parkland*, SUN SENTINEL (Dec. 28, 2018), <https://projects.sun-sentinel.com/2018/sfl-parkland-school-shooting-critical-moments> [https://perma.cc/7RLQ-PV3M] (describing the various blunders by the Sheriff's Office and the school district—including campus security failing to stop the shooter as he walked onto campus and missed opportunities to call a Code Red (active shooter) that would have kept students in locked classrooms as the fire alarm went off).

214. Peter Wang, fifteen, was killed by the gunman as he held the door open to allow classmates to escape. Tom Embury-Dennis, *Florida School Shooting: 15-Year-Old Student Died Holding Door Open for Others to Escape*', INDEP. (Feb. 16, 2019), <https://www.independent.co.uk/news/world/americas/florida-school-shooting-latest-student-died-holding-door-peter-wang-a8213436.html> [https://perma.cc/35FU-U987]. Anthony Borges, fifteen, was shot by the gunman five times while closing and locking a classroom door to save fellow students. Megan Friedman, *These Are Some of the Heroes of the Marjory Stoneman Douglas School Shooting*, REDBOOK (Feb. 20, 2018), <https://www.redbookmag.com/life/a18371040/parkland-school-shooting-heroes-stories> [https://perma.cc/U5TV-3CWU]. He miraculously survived. *Id.* Scott Beigel, thirty-five, unlocked his classroom to allow stranded students in the hallway to enter. *Id.* As he quickly ushered students into his room, he was killed. *Id.*

Rifle,<sup>215</sup> this shooting could have been prevented.<sup>216</sup> The shooter legally purchased his weapon when he was eighteen years old from Sunrise Tactical Supply in Coral Springs, Florida, a federally licensed firearm dealer.<sup>217</sup> The background check in Florida merely consisted of confirming that he did not have a criminal history and had not been declared “mentally defective.”<sup>218</sup> Federal law—absent stricter state regulation in 2017—allowed the shooter to purchase long guns from federally licensed firearms dealers at eighteen years old.<sup>219</sup>

One week after the shooting, Governor Rick Scott announced a proposal to combat gun violence,<sup>220</sup> and almost two weeks later, he signed the Marjory Stoneman Douglas High School Public Safety Act into law.<sup>221</sup> The Act states “there is a need to comprehensively address the crisis of gun violence, including but not limited to, gun violence on school campuses . . . by temporarily restricting” access to firearms.<sup>222</sup> The Public Safety Act created three categories of legal and regulatory changes: mental health provisions, firearm safety, and school safety.<sup>223</sup>

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215. Swisher & McMahon, *supra* note 5.

216. See *A Peace Plan for a Safer America*, MARCH FOR OUR LIVES, <https://marchforourlives.com/peace-plan> [https://perma.cc/G8EQ-SDVY] (advocating for, among other policy changes, an increase in the age for purchasing a firearm after the Parkland shooting).

217. Swisher & McMahon, *supra* note 5.

218. *Id.*

219. 18 U.S.C. § 922(b)(1), (c)(1).

220. Governor Scott Announces “Major Action Plan” to Keep FL Students Safe, ABC ACTION NEWS WFTS TAMPA BAY (Feb. 23, 2018, 4:07 PM), <https://www.abcactionnews.com/news/state/governor-scott-announcing-major-action-plan-to-keep-fl-students-safe>.

221. S. Rules Comm., Report on Senate Bill No. 7026, 2d Reg. Sess., (Fla. 2018); S. 7026, 2d Reg. Sess. (Fla. 2018). Students across the country organized and advocated for this change. They organized nationwide school walkouts, local rallies, and the March for Our Lives on the Washington National Mall. Charlotte Alter, *The School Shooting Generation Has Had Enough*, TIME (Mar. 22, 2018, 7:00 AM), <https://time.com/longform/never-again-movement> [https://perma.cc/CWA2-JDTJ].

222. S.B. 7026 (2018). But see Emily Plakon, Comment, *Reactionary Legislation: The Marjory Stoneman Douglas High School Public Safety Act*, 49 STETSON L. REV. 679, 681 (2020) (critiquing the legislative response to the Parkland shooting as “reactionary”).

223. *Florida Senate Passes Marjory Stoneman Douglas High School Public Safety Act*, FLA. TREND (Mar. 6, 2018), <https://www.floridatrend.com/article/24092/florida-senate-passes-marjory-stoneman-douglas-high-school-public-safety-act> [https://perma.cc/D346-HK32]. The new law prohibits a person who is “mentally defective” or has been committed to a mental institution from owning or possessing a firearm; creates a process for law enforcement to petition the court to require individual to surrender all firearms if risk protection order granted; mandates a three-day waiting period for all firearms; bans bump stocks; and criminalizes threats about mass shootings. *Id.*

Importantly, the Act changed the age in which a person may purchase a firearm from a licensed dealer:

A person younger than 21 years of age may not purchase a firearm. The sale or transfer of a firearm to a person younger than 21 years of age may not be made or facilitated by a licensed importer, licensed manufacturer, or licensed dealer. A person who violates this subsection commits a felony of the third degree.<sup>224</sup>

Violators of the law are subject to imprisonment for up to five years or a fine up to \$5,000.<sup>225</sup> The Act grants exceptions for this age requirement for a “law enforcement officer or correctional officer... or a servicemember.”<sup>226</sup> However, this Act does not address the gun show loophole, which continues to allow this age group to legally purchase firearms at gun shows. Through this legislation, Florida joined seventeen states and D.C. in raising the age for purchasing a handgun to twenty-one and joined five states to raise the age for long gun purchases from a licensed firearm dealer to twenty-one.<sup>227</sup>

The NRA immediately filed a complaint against then-Florida Attorney General Pam Bondi on March 9, 2018 in the District Court in the Northern District of Florida.<sup>228</sup> The complaint alleged that Florida banning firearms sales to people under twenty-one is unconstitutional because it “imposes an impermissible burden upon... Second Amendment rights.”<sup>229</sup> In January 2020, defendants filed a Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to

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224. FLA. STAT. § 790.065(13) (2019).

225. § 775.082–083.

226. *Id.*

227. See *Minimum Age to Purchase & Possess*, GIFFORDS L. CTR., [https://giffords.org/lawcenter/gun-laws/policy-areas/who-can-have-a-gun/minimum-age/#footnote\\_12\\_5627](https://giffords.org/lawcenter/gun-laws/policy-areas/who-can-have-a-gun/minimum-age/#footnote_12_5627) [https://perma.cc/Q35W-9LRP] (describing the various age-based state initiatives for the purchase and possession of firearms by state).

228. Complaint for Declaratory and Injunctive Relief, Nat'l Rifle Ass'n of Am., Inc. v. Bondi, No. 4:18-cv-137-MW/CAS, 2018 WL 11014100, at \*1 (N.D. Fla. Mar. 21, 2018).

229. *Id.* ¶¶ 22, 27. The NRA moved to amend its initial complaint and added two unnamed plaintiffs under the pseudonyms of Jane Doe and John Doe. The NRA claims it wanted these names to prevent harassment of those involved in the suit. Dara Kam, *NRA Drops Its Attempt to Hide Plaintiffs' Names in Florida Gun Lawsuit*, ORLANDO WKLY. (Nov. 19, 2019, 10:21 AM), <https://www.orlandoweekly.com/Blogs/archives/2019/11/19/nra-drops-its-attempt-to-hide-plaintiffs-names-in-florida-gun-lawsuit>. The Florida Attorney General successfully challenged the use of the pseudonyms. Nat'l Rifle Ass'n of Am., Inc. v. Bondi, No. 4:18CV137-MW/CAS, 2018 WL 11014101, at \*1 (N.D. Fla. May 13, 2018). The NRA appealed this decision to the Eleventh Circuit but then voluntarily dismissed its appeal. See Kam, *supra*.

state a claim.<sup>230</sup> The court denied this motion.<sup>231</sup> The parties then filed Motions for Summary Judgment,<sup>232</sup> and the District Court determined that the Public Safety Act was constitutional.<sup>233</sup> The court found that age restrictions on firearm purchases were “longstanding” in time and analogous to the four provisions in *Heller*—aimed at classes of people that could be dangerous with firearms.<sup>234</sup> The NRA appealed the decision to the Eleventh Circuit in July, and the court is awaiting briefing on the issues.<sup>235</sup> Having reviewed the relevant steps for analyzing Second Amendment constitutional challenges, the following Part will argue that the Public Safety Act satisfies the two-step test and thus is constitutional.

## II. ANALYSIS

The following analysis applies the foregoing case law to the Public Safety Act, which prohibits individuals under twenty-one years of age from purchasing a firearm. First, Section II.A argues that the Eleventh Circuit should apply the two-step test to evaluate the Public Safety Act.<sup>236</sup> Under step one, the provisions of the Act likely do not fall within the scope of the Second Amendment right as traditionally understood and are constitutional. Next, Section II.B finds that even if the Act does fall within the Second Amendment’s scope, at most, intermediate scrutiny is appropriate under step two.<sup>237</sup> Lastly, Section II.C finds that under an intermediate scrutiny evaluation, the Public Safety Act is constitutional.<sup>238</sup>

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230. Nat'l Rifle Ass'n of Am., Inc. v. Swearingen, No. 4:18CV137-MW/CAS, 2020 WL 5646480, at \*3 (N.D. Fla. May 1, 2020). The party's name changed at this stage because Pam Bondi was no longer the Florida Attorney General.

231. *Id.*

232. Pls.' Mot. for Summ. J. & Inc. Mem. of Law, Nat'l Rifle Ass'n of Am., Inc. v. Swearingen, No. 4:18CV137-MW/CAS (N.D. Fla. *filed* Sept. 3, 2020) (arguing that because there is no material dispute as to the history and text of the Second Amendment protecting persons under twenty-one, the Motion for Summary Judgement should be granted); Defs.' Mot. for Summ. J. & Inc. Mem. of Law, Nat'l Rifle Ass'n of Am., Inc. v. Swearingen, No. 4:18CV137-MW-MAF, 2020 WL 6131183 (N.D. Fla. *filed* Sept. 3, 2020) (arguing that plaintiffs' claim fails as a matter of law because the law does not burden conduct protected by the Second Amendment).

233. Nat'l Rifle Ass'n of Am., Inc. v. Swearingen, No. 4:18CV137-MW-MAF, 2021 WL 2592545, at \*17 (N.D. Fla. June 24, 2021).

234. *Id.* at \*13, \*15.

235. Nat'l Rifle Ass'n of Am., Inc. v. Comm'r, Fla. Dep't of L. Enf't, No. 21-12314 (11th Cir. filed July 8, 2021).

236. See *infra* Section II.A.

237. See *infra* Section II.B.

238. See *infra* Section II.C.

*A. The Marjory Stoneman Douglas High School Public Safety Act Is Likely Constitutional Under Step One Because It Does Not Impinge on Conduct Traditionally Protected by the Second Amendment.*

The Eleventh Circuit must apply the two-step test to the Public Safety Act.<sup>239</sup> Under the two-step test, step one asks whether the regulated activity is protected by the Second Amendment.<sup>240</sup> This question requires a historical analysis of the Founders' intentions about the contours of Second Amendment protections.<sup>241</sup> This historical review looks to legal and historical sources from the time of ratification through approximately the nineteenth century.<sup>242</sup> If the conduct is not protected by Second Amendment, then the regulation is constitutional.<sup>243</sup> The court could also determine that the conduct is constitutional by determining that the restricted activity in question is "longstanding" and thus presumptively lawful and beyond the purview of the Second Amendment.<sup>244</sup>

The Public Safety Act regulates the ability of persons under twenty-one years old to purchase a firearm.<sup>245</sup> The court must determine whether the Second Amendment protects the rights of people under

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239. See *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1260 n.34 (11th Cir. 2012) ("Like our sister circuits, we believe a two-step inquiry is appropriate . . ."); *Nat'l Rifle Ass'n of Am., Inc. v. Swearingen*, No. 4:18CV137-MW-MAF, 2021 WL 2592545, at \*4 (N.D. Fla. June 24, 2021) (confirming that the two-step test is the appropriate Second Amendment framework in this jurisdiction). Further, the two-step test conforms to the framework of *Heller*. See *District of Columbia v. Heller*, 554 U.S. 570, 628 n.27, 635 (determining whether Heller was protected by the Second Amendment at all and stating that rational basis was not appropriate for evaluating the regulation, implying that some other scrutiny must be applied in evaluating the constitutionality of the law). The two-step test also conforms to Supreme Court analysis for another fundamental right: the First Amendment. See *BATFE I*, 700 F.3d 185, 197–98 (5th Cir. 2012) (analogizing the two-step test to Supreme Court jurisprudence in its decision to adopt the two-step test).

240. *GeorgiaCarry.Org, Inc.*, 687 F.3d at 1260 n.34.

241. See *Heller*, 554 U.S. at 577–628 (requiring an evaluation of the D.C. handgun ban through a historical lens by using a variety of historical sources through time).

242. *Heller*, at 605; see also *Nat'l Rifle Ass'n of Am., Inc. v. Swearingen*, No. 4:18CV137-MW-MAF, 2021 WL 2592545, at \*7 (N.D. Fla. June 24, 2021) ("[E]vidence from both before and after ratification is relevant . . .").

243. *Id.* at 622 (quoting *United States v. Miller*, 307 U.S. 174, 178 (1958)).

244. Courts have struggled in determining where *Heller's* longstanding and thus presumptively lawful regulatory measures fit into the two-step test. See *supra* note 114–22 and accompanying text. This paper proceeds to consider it at step one and step two. See *United States v. Focia*, 869 F.3d 1269 (11th Cir. 2017); *Nat'l Rifle Ass'n of Am., Inc. v. Swearingen*, No. 4:18CV137-MW-MAF, 2021 WL 2592545, at \*10–17 (N.D. Fla. June 24, 2021). The Eleventh Circuit has determined that if the regulated conduct is "longstanding" in time and analogous to an item in non-exhaustive list in *Heller*, the conduct falls outside of the protections of the Second Amendment at step one. *Id.* at \*12.

245. FLA. STAT. § 790.065(13) (2019).

twenty-one to purchase a firearm. If this age group was not protected by the Second Amendment near the time of ratification, the Public Safety Act is constitutional. In the alternative, if age restriction laws are longstanding in time and similar to *Heller*'s categorical list, the Public Safety Act is presumptively lawful and constitutional at step one. However, if this age group is protected by the Second Amendment, the Public Safety Act must then be evaluated under some form of heightened scrutiny at step two. *Heller* requires a court to scrutinize the historical record to determine if the Second Amendment protects a certain group or activity.<sup>246</sup>

The historical record largely supports that eighteen-to-twenty-year-olds were subject to firearms restrictions or, at a minimum, that these types of restrictions are longstanding and thus beyond the scope of Second Amendment protection.<sup>247</sup> First, the age of majority at common law was uncontestedly twenty-one until the 1970s.<sup>248</sup> *Black's Law Dictionary* noted infants are any person under twenty-one years old.<sup>249</sup> It is thus reasonable that citizens supported restricting the right to keep and bear arms for people under twenty-one.<sup>250</sup> Moreover, the historical record indicates that these "infants" may have been prohibited from even possessing firearms, not just purchasing them.<sup>251</sup> Although the age of majority is now eighteen and some may argue the right should now reflect that change, Justice Scalia stressed "the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change [the] interpretation of the right."<sup>252</sup> *Heller* emphasizes respecting the right as traditionally

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246. *Heller*, 554 U.S. at 576–619.

247. See generally Amit Vora, *Defending an Under-21 Firearm Ban Under the Second Amendment Two Step*, 71 STAN. L. REV. ONLINE 1, 4–7 (2018) (analyzing the historical record for age restrictions).

248. BLACK'S LAW DICTIONARY 847 (9th Ed. 2009); see also JOHN INDERMAUR, PRINCIPLES OF THE COMMON LAW 195 (Edmund H. Bennett ed., 1878) ("An infant in the eyes of the law is a person under the age of twenty-one years . . ."); David B. Kopel & Joseph G.S. Greenlee, *The Second Amendment Rights of Young Adults*, 43 S. ILL. U. L.J. 496, 603 (2019) (conceding that people under twenty-one were minors in the founding era).

249. BLACK'S LAW DICTIONARY, *supra* note 247 at 847.

250. BATFE I, 700 F.3d 185, 202 (5th Cir. 2012).

251. Robert Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 OKLA. L. REV. 65, 96 (1983) (citing THOMAS COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS 57 (7th ed. 1903)) ("Colonial and English societies of the eighteenth century, as well as their modern counterparts, have excluded infants" from the right to bear arms); Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to "Bear Arms"*, 49 L. & CONTEMP. PROBS. 151, 161 (1986) (discussing that certain groups of people such as "violent criminals, children, and those of unsound mind" could be banned from firearms possession (emphasis added)).

252. District of Columbia v. Heller, 554 U.S. 570, 627–28 (2008).

understood.<sup>253</sup> The age of majority at the time of ratification was twenty-one.<sup>254</sup> So, people under twenty-one may not have been protected by the Second Amendment at this time.

Second, some states enacted legislation near ratification that prohibited minors from purchasing firearms.<sup>255</sup> Gun regulations were commonplace at the time of the founding,<sup>256</sup> including laws that restricted certain groups from purchasing firearms.<sup>257</sup> By the end of the nineteenth century, nineteen states and D.C. had passed laws restricting people under twenty-one from purchasing or possessing firearms.<sup>258</sup> These laws suggest that excluding this age group from purchasing or even possessing firearms was not a ridiculous proposition and a longstanding tradition. For example, Delaware criminalized the sale of a deadly weapon to a minor.<sup>259</sup> Because minors at the time included people under twenty-one,<sup>260</sup> this law effectively banned those under twenty-one from purchasing a weapon. Further, nineteenth-century courts and authors confirmed these restrictions comported with the Second Amendment legally and historically.<sup>261</sup> For example, Thomas

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253. *Compare Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives (BATFE II)*, 714 F.3d 334, 339–44 (5th Cir. 2013) (Jones, J., dissenting) (per curiam) (opining that the decision in *Heller* never mentions age restrictions as a requirement to exercise Second Amendment rights), *with Heller*, 554 U.S. at 626–27 (stressing that the Court was not “undertak[ing] an exhaustive historical analysis . . . of the full scope of the Second Amendment” in its decision).

254. *Supra* notes 248–50 and accompanying text.

255. *Contra Kopel & Greenlee, supra* note 248, at 602 (lamenting, however, that these states laws were not the majority approach).

256. *BATFE I*, 700 F.3d 185, 200 (5th Cir. 2012).

257. ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* 113–18 (2011).

258. For a comprehensive list, *see BATFE I*, 700 F.3d at 202, n.14 listing various state statutes. *See Kopel & Greenlee, supra* note 248, at 602 (finding fifteen states specifically “prohibited minors from buying handguns in stores”).

259. *State v. Quail*, 92 A. 859, 859 (Del. 1914).

260. *Supra* notes 247–54 and accompanying text.

261. *See, e.g., BATFE I*, 700 F.3d at 197–98 (scrutinizing early cases in reaching its conclusion that age restrictions on purchasing handguns comport with the Second Amendment); *United States v. Rene E.*, 583 F.3d 8, 15–16 (1st Cir. 2009) (finding that the founding generation likely would have regarded age-based restrictions on possessing handguns “consistent with the right to keep and bear arms”); *State v. Callicutt*, 69 Tenn. 714 (1878) (upholding the conviction under Tennessee law that criminalized selling pistols to minors—those under twenty-one); *Coleman v. State*, 32 Ala. 581, 582–83 (1858) (same). *But see David B. Kopel & Joseph G.S. Greenlee, History and Tradition in Modern Circuit Cases on the Second Amendment Rights of Young People*, 43 S. ILL. U. L.J. 119, 121–31 (2018) (criticizing the circuit courts’ interpretations of these early age restriction cases and arguing that many were “indefensible” interpretations in light of *Heller*).

Cooley, author of the widely relied upon 1868 *Treatise on Constitutional Limitations* cited by the *Heller* Court, agreed that “the State may prohibit the sale of arms to minors.”<sup>262</sup>

However, other historians have argued that courts have taken these cases and comments out of context, concluding that “no founding-era sources” suggest the Second Amendment directly restricted the rights of people under twenty-one.<sup>263</sup> Some of these laws and cases also occurred long after the Second Amendment’s ratification, suggesting the laws could have strayed from the original intent of the Founders.<sup>264</sup> Nevertheless, in *Heller*, Justice Scalia considered possession bans on felons and the mentally ill as presumptively lawful and longstanding even though they were not passed until the twentieth century,<sup>265</sup> demonstrating that even later-passed regulations about firearms are longstanding and therefore consistent with *Heller*’s presumptively lawful regulatory measures.

Third, Founding Era attitudes specifically endorsed disarming certain groups of individuals who posed a public safety threat.<sup>266</sup> The Founders thought that only those who were “virtuous” should own arms.<sup>267</sup> The concept of “virtuous” citizens excluded criminals, children, and the mentally ill.<sup>268</sup> This reasoning suggests that the Founders would have supported restricting the purchase of firearms by children—people under twenty-one.<sup>269</sup>

However, some historical sources did support that eighteen-to-twenty-year-olds were protected by the Second Amendment because this age group was part of the militia at the time of the Second

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262. *BATFE I*, 700 F.3d at 203 (quoting THOMAS M. COOLEY, TREATISE ON CONSTITUTIONAL LIMITATIONS 740 n.4 (5th ed. 1883) (citing *State v. Callicutt*, 69 Tenn. 714 (1878))).

263. See, e.g., Kopel & Greenlee, *supra* note 261, at 154–55 (examining federal precedent on age-based restriction Second Amendment cases and contradicting many of the conclusions the circuit courts drew); *Nat'l Rifle Ass'n of Am., Inc. v. Swearingen*, No. 4:18CV137-MW-MAF, 2021 WL 2592545, at \*6 (N.D. Fla. June 24, 2021) (“[T]his Court has found no case or article suggesting that, during the Founding Era, any law existed that imposed restrictions on 18-to-20-year-olds' ability to purchase firearms.”).

264. *BATFE II*, 714 F.3d 334, 340–45 (5th Cir. 2013) (per curiam) (cautioning against using nineteenth-century laws as support for the Founders' intent concerning firearm age restrictions).

265. See *supra* note 125 and accompanying text.

266. *United States v. Rene E.*, 583 F.3d 8, 15–16 (1st Cir. 2009).

267. *BATFE I*, 700 F.3d 185, 201 (5th Cir. 2012).

268. *Id.* at 201 (emphasis added) (An “implication of this emphasis on the virtuous citizen is that the right to arms does not preclude laws disarming unvirtuous citizens (i.e., criminals) or those who, like *children* or the mentally [ill], are deemed incapable of virtue”).

269. See *supra* notes 247–54 and accompanying text defining children.

Amendment's ratification.<sup>270</sup> Members of the militia were expected to own firearms and understand how to use them.<sup>271</sup> Further, the second Militia Act of 1792<sup>272</sup> required eighteen-year-olds to be a part of the militia.<sup>273</sup> On its face, this appears to create a conflicting historical understanding of who may benefit from Second Amendment protections. If the militia allowed this age group to purchase and possess weapons, they should surely be within the purview of the Second Amendment, should they not? This argument fails for two reasons: first, *Heller* specifically addressed this theory and decoupled the right to keep and bear arms with the duty to serve in the militia;<sup>274</sup> second, there is no reason, should the regulation be constitutional, that a law cannot target this age group while leaving ample exceptions for military-related needs.<sup>275</sup>

The common law age of majority being twenty-one, the presence of early statutory restrictions, and common perceptions about gun control near the ratification era indicate that age restrictions like those in the Public Safety Act place the Public Safety Act and its targets outside the purview of the Second Amendment at step one. Further, there is considerable evidence that preventing this age group from purchasing weapons "is consistent with a longstanding, historical tradition," and similar to the other regulations in *Heller*, and thus age restriction laws are beyond Second Amendment protection. Nevertheless, there is an inherent challenge with parsing any historical record. To attempt to definitively conclude the Founders' view on the Second Amendment's scope as applied to eighteen-to-twenty-year-olds would be disingenuous.<sup>276</sup>

When there is disagreement within the historical record, as here, it may be appropriate to proceed to step two out of an abundance of

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270. Kopel & Greenlee, *supra* note 248, at 505. Further, at the time of ratification, nine states allowed militia service at eighteen, and five allowed it at eighteen. Nat'l Rifle Ass'n of Am., Inc. v. Swearingen, No. 4:18CV137-MW-MAF, 2021 WL 2592545, at \*7 (N.D. Fla. June 24, 2021) (reviewing the age for militia service for each state at the time of the Second Amendment's ratification).

271. Kopel & Greenlee, *supra* note 248, at 507–08.

272. Act of May 8, 1792, ch. 33, 1 Stat. 271 (1792) (repealed 1903).

273. *BATFE II*, 714 F.3d 334, 339 (5th Cir. 2013) (Jones, J., dissenting) (per curiam) ("Eighteen year olds were required by the 1792 Militia Act to be available for service, and militia members were required to furnish their own weapons . . .").

274. *District of Columbia v. Heller*, 554 U.S. 570, 589–94 (2008).

275. See, e.g., FLA. STAT. § 790.065(13) (2019) (exempting military personnel from the age restriction for purchasing firearms).

276. See *id.* at 204 ("The Founders may not even have shared a collective view on such a subtle and fine-grained distinction.").

caution.<sup>277</sup> Moving to step two prevents prematurely dismissing an action and undermining an individual's Second Amendment right to keep and bear arms. Other courts evaluating the historical record on the protections for persons under twenty-one<sup>278</sup> have noted that there are conflicting arguments on both sides as to whether eighteen-to-twenty-year-olds fall within the purview of the Second Amendment.<sup>279</sup> Because of the uncertainty of the historical record concerning Founding Era attitudes near ratification, and to prevent trampling an individual's Second Amendment rights, the Eleventh Circuit could proceed to step two of the two-step test. Although there have been longstanding and presumptively lawful restrictions on this age group's ability to purchase firearms, circuit courts have exhibited reluctance to dispose of Second Amendment claims at step one and have proceeded to step two.<sup>280</sup> Thus, this Comment will now examine the Public Safety Act at step two.

*B. Under Step Two, at Most, Intermediate Scrutiny Is the Appropriate Heightened Scrutiny Standard to Apply to the Marjory Stoneman Douglas High School Public Safety Act.*

Intermediate scrutiny is the appropriate standard to evaluate the Public Safety Act under step two because the regulated conduct in the Act does not threaten the "core" of the Second Amendment despite some burdens on the right. Under step two, the court must choose what level of scrutiny to apply to the law in question.<sup>281</sup> Rational basis review of Second Amendment challenges is typically not appropriate.<sup>282</sup> Therefore, only intermediate scrutiny and strict scrutiny could be applied in this case. The appropriate level of scrutiny depends on "(1) how close the law comes to the core of the Second Amendment right, and (2) the severity of the law's burden on the right."<sup>283</sup> A regulation threatening a core Second Amendment Right, such as "the right of a law-

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277. See cases cited *supra* note 106 and accompanying text.

278. See, e.g., *supra* notes 107–10 and accompanying text (finding conflict in the historical record for this age group specifically).

279. See *supra* notes 247–75 and accompanying text; *see also BATFE II*, 714 F.3d 334, 346 (5th Cir. 2013) (Jones, J., dissenting) (per curiam) (stressing the conflict within the historical record concerning persons under twenty-one's ability to purchase handguns).

280. See *supra* notes 104–06 and accompanying text. But see Nat'l Rifle Ass'n of Am., Inc. v. Swearingen (finding restrictions on persons under twenty-one are in line with the *Heller* longstanding and presumptively lawful restrictions).

281. See *BATFE I*, 700 F.3d at 205–08.

282. See *District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008).

283. *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013) (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011)) (internal quotation marks omitted).

abiding, responsible adult to possess and use a handgun to defend his or her home," triggers strict scrutiny."<sup>284</sup>

The Public Safety Act does not implicate the core of the Second Amendment because it does not prohibit eighteen-to-twenty-year-olds' ability to possess firearms in the home for self-defense. Circuit courts are only finding that a regulation impermissibly interferes with the core of the Second Amendment when the challenged regulation bans the *possession* of firearms for self-defense.<sup>285</sup> The Public Safety Act does not infringe on the ability of this age group to defend their home. It merely prevents them from purchasing firearms and thus does not warrant strict scrutiny.<sup>286</sup> However, unlike previously upheld federal statutes concerning age,<sup>287</sup> the Public Safety Act does prevent the purchase of all firearms, not just handguns.<sup>288</sup> Such regulations are presumptively valid;<sup>289</sup> strict scrutiny requires presumptive invalidity.<sup>290</sup> So, intermediate scrutiny is the most appropriate means-end evaluation of the Act. The Public Safety Act is also a temporary ban since the people subject to the ban will age out of it. The temporary nature of the Act moves the regulation away from the core of the Second Amendment and thus from strict scrutiny analysis.<sup>291</sup>

Moreover, the core of the Second Amendment entails "the right of law-abiding, *responsible* citizens to use arms" in defense of the home;<sup>292</sup> the Public Safety Act merely decides which citizens are in fact

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284. *BATFE I*, 700 F.3d at 195.

285. *Supra* notes 133–46 and accompanying text (reviewing the types of regulations that threaten the "core" of Second Amendment protections).

286. *See supra* notes 118–52 and accompanying text (explaining when courts choose intermediate scrutiny).

287. *See, e.g., BATFE I*, 700 F.3d at 188–90 (evaluating 18 U.S.C. § 922(b)(1) that prohibited persons under twenty-one from purchasing a handgun from a federally licensed firearm dealer).

288. FLA. STAT. § 790.065(13) (2019). Although the Act's expansion to "all firearms" could shift the Act into a strict scrutiny analysis, the alteration still does not prohibit the age group from *possessing* firearms at all. The Act prevents a group more prone to impulsive risk taking and violence from purchasing firearms—an analogous presumptively lawful and longstanding regulation *Heller* to the similar ban on firearm possession by felons and the mentally ill. *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008).

289. FLA. STAT. § 790.065(13).

290. *Cf. Michael M. v. Superior Ct. of Sonoma Cnty.*, 450 U.S. 464, 497 n.4 (1981) (Stevens, J., dissenting) ("[Regulations], which are subjected to 'strict scrutiny,' are presumptively invalid....").

291. *See BATFE I*, 700 F.3d at 207 ("[T]hese laws demand only an 'intermediate' level of scrutiny because they regulate commercial sales through an age qualification with temporary effect.").

292. *See Heller*, 554 U.S. at 635 (2008) (emphasis added).

"responsible."<sup>293</sup> When making determinations of who is a responsible citizen, courts only apply intermediate scrutiny.<sup>294</sup> Even when a law bans an entire class of people from possessing firearms for life, the courts still only use an intermediate scrutiny evaluation.<sup>295</sup> Such determinations on responsibility "[are] several steps removed from the core constitutional right identified in *Heller*."<sup>296</sup> Thus, intermediate scrutiny is most appropriate. Some gun advocates may argue that the classes of people generally whom are generally considered "irresponsible"—i.e., felons—are inherently dangerous, unlike the class targeted in the Act, who are typically law-abiding citizens, so a court should apply strict scrutiny.<sup>297</sup> However, this argument falters when considering the crime statistics for people under twenty-one.<sup>298</sup> Historically, eighteen-to-twenty-year-olds are not responsible firearm owners, and the crime statistics demonstrate this age group's involvement in violent crimes.<sup>299</sup> The Public Safety Act, by targeting a historically irresponsible class of firearm owners, is therefore similar to other class possession bans. The Act further distinguishes itself from similar class bans by being temporary as applied to the class and leaving alternate channels for the group to still possess firearms.<sup>300</sup> Thus, intermediate scrutiny is the appropriate level of scrutiny because these distinguishing considerations remove the Act from impacting the core protections of the Second Amendment.

The Public Safety Act does create some burden on the ability of persons under twenty-one to express their Second Amendment rights; however, exceptions within the law ease that burden, further removing this regulation from the core of the Second Amendment and strict scrutiny. Persons under twenty-one wishing to possess a firearm can no

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293. See FLA. STAT. § 790.065 (2019).

294. See *supra* note 151 and accompanying text (reviewing cases that analyze possession bans on classes of people, even for life, under no more than intermediate scrutiny).

295. United States v. Skoien, 587 F.3d 803, 812 (7th Cir. 2009), *reh'g en banc granted, opinion vacated*, 08-3770, 2010 WL 1267262 (7th Cir. Feb. 22, 2010), and *on reh'g en banc*, 614 F.3d 638 (7th Cir. 2010).

296. *Id.*; see Whrenn v. District of Columbia, 864 F.3d 650, 666 (D.C. Cir. 2017) (noting that *Heller* only protected firearm possession "to those no more prone to misuse that access that anyone else").

297. Cf. BATFE I, 700 F.3d at 205 (observing that categorical regulation of these groups is warranted for public safety).

298. See *supra* Section I.C evaluating the high crime statistics for this age group.

299. See *supra* Section I.C describing how persons under twenty-five are not responsible firearms owners because of their proclivity to violence.

300. See *supra* note 151.

longer purchase that firearm themselves.<sup>301</sup> Arguably, this could amount to a functional ban on the possession of firearms, which would warrant strict scrutiny.<sup>302</sup> However, the law leaves ample channels to obtain weapons and thus is not a functional ban on the possession of firearms.<sup>303</sup> People under twenty-one may obtain a firearm either as a gift, from a parent, or importantly, from an unlicensed federal firearms dealer.<sup>304</sup> An estimated 22% of people already obtain their firearms legally from an unlicensed dealer.<sup>305</sup> The Act more closely resembles a regulation dictating the *manner* in which a person under twenty-one may obtain a weapon.<sup>306</sup> The only manner in which this age group may not purchase a firearm is through a federally licensed firearms dealer.<sup>307</sup>

Even if the burden of obtaining firearms is substantial for this age group, circuit courts have repeatedly used intermediate scrutiny where the burden is "substantial."<sup>308</sup> As previously discussed, the Act is temporary. The Act's temporary nature not only removes the regulation from the core of the second amendment, but it also lessens the burden on this age group and justifies intermediate scrutiny.<sup>309</sup> Any individual impacted by the purchasing restriction will "soon grow up and out of its reach."<sup>310</sup> Having established that intermediate scrutiny is the most appropriate standard for the Public Safety Act because it does not implicate the core of the Second Amendment—possession of a handgun in the home for self-defense—and does not substantially burden this age group from obtaining firearms, the Act must now withstand the prongs of intermediate scrutiny.

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301. FLA. STAT. § 790.065(13) (2019).

302. See *District of Columbia v. Heller*, 554 U.S. 570, 627–29 (2008) (holding that a law that functionally prohibits persons from possessing handguns within the home would fail under any level of scrutiny).

303. See, e.g., *BATFE I*, 700 F.3d 185, 189–90 (5th Cir. 2012) (emphasizing other methods in which a person under twenty-one may obtain firearms).

304. *Id.*

305. See Matthew Miller et al., *Firearm Acquisition Without Background Checks*, ANNALS OF INTERNAL MED. (Feb. 21, 2017), <https://www.acpjournals.org/doi/10.7326/M16-1590> [https://perma.cc/YD7T-EE4L]; *supra* note 207.

306. See *Horsley v. Trame*, 808 F.3d 1126, 1132 (7th Cir. 2015) (upholding a law requiring persons under twenty-one to procure a particular registration before possessing a firearm, thereby regulating the manner in which a person can obtain such a firearm).

307. FLA. STAT. § 790.065(13) (2019).

308. See *supra* notes 102–47 and accompanying text (describing instances where courts used intermediate scrutiny despite banning the *possession* of firearms from an entire group of people—a substantial burden).

309. See *supra* notes 126–59 and accompanying text.

310. *BATFE I*, 700 F.3d 185, 207 (5th Cir. 2012).

*C. The Marjory Stoneman Douglas High School Public Safety Act Serves an Important Public Safety Interest, and There Is a Reasonable Fit Between Protecting Public Safety and the Act; Thus, the Act Is Constitutional at Step Two.*

The Public Safety Act satisfies the requirements of intermediate scrutiny because it recognizes an important government interest—public safety—and is reasonably tailored to this concern. Intermediate scrutiny requires a two-prong test where the government must demonstrate that the challenged law furthers an important governmental interest and that there is a reasonable fit between the law and that objective.<sup>311</sup> First, the court will determine the validity of the purported government interest.<sup>312</sup> If the court deems the interest important, it will then assess the fit between the regulation and the government's purported objective.<sup>313</sup> The fit must be reasonable.<sup>314</sup> For firearm regulations, courts consider empirical data and legislative history.<sup>315</sup> If the government demonstrates that it has an important interest, and the law reasonably fits that objective, the law is constitutional.<sup>316</sup>

The Public Safety Act addresses an important government interest—public safety—satisfying the first prong of intermediate scrutiny.<sup>317</sup> The Supreme Court has consistently recognized that public safety is an important government interest—even a compelling one.<sup>318</sup> The Fifth and Seventh Circuits have confirmed public safety qualifies as an important government interest with eighteen-to-twenty-year-olds specifically because this age group is prone to impulsive behavior that endangers the public.<sup>319</sup> The Florida legislature observed that “there is a need to comprehensively address the crisis of gun violence, including but not limited to, gun violence on school campuses . . . by temporarily

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311. *See id.* at 205 (defining intermediate scrutiny).

312. *Id.*

313. *Id.*

314. *Id.*

315. *See supra* notes 163–61 and accompanying discussion.

316. *BATFE I*, 700 F.3d at 207.

317. *See, e.g., Horsley v. Trame*, 808 F.3d 1126, 1132 (7th Cir. 2015) (“It is clear that Illinois has an important and compelling interest in its citizens’ safety.”).

318. *Schall v. Martin*, 467 U.S. 253, 264 (1984) (“The ‘legitimate and compelling state interest’ in protecting the community from crime cannot be doubted.”).

319. *Horsley*, 808 F.3d at 1132–33; *BATFE I*, 700 F.3d at 209–10 (“[C]urbing violent crime perpetrated by young persons under 21—by preventing such persons from acquiring handguns from FFLs—constitutes an important government objective.”).

restricting" access to firearms for this age group.<sup>320</sup> Furthermore, public safety is even an important interest when a law restricts a fundamental right such as the Second Amendment.<sup>321</sup> The Public Safety Act satisfies the first prong of intermediate scrutiny under these considerations.

Under the second prong of intermediate scrutiny, the Florida legislature reasonably tailored a solution to achieve their objective because independent research supports that this age group is prone to impulsivity and that limiting their access to firearms could decrease firearms deaths and injuries.<sup>322</sup> Because of incomplete brain development until the age of twenty-five, this age group is more impulsive.<sup>323</sup> This delay in brain development results in decreased self-control during this time.<sup>324</sup> Coupled with adolescent hormonal changes that result in negative emotional states, these factors can lead to violent behavior against oneself or others.<sup>325</sup> This empirical evidence supports drawing the age line no earlier than twenty-one. In fact, this evidence supports prohibiting firearm purchases until age twenty-five once brain development is complete.<sup>326</sup> Florida could have sought to prohibit persons under twenty-five from possessing a firearm but instead reasonably tailored the law to prevent persons under *twenty-one* from purchasing a firearm. Moreover, these types of age restrictions on firearms could effectively prevent this age group's risk of committing violent acts, such as homicides or suicides.<sup>327</sup> These considerations support that the Act's selected means were reasonably adapted to achieve its objective of strengthened public safety.

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320. FLA. STAT. § 790.065(13) (2019). But see Emily Plakon, *Reactionary Legislation: The Marjory Stoneman Douglas High School Public Safety Act*, 49 STETSON L. REV. 679, 681–82 (2020) (critiquing the legislative response to the Parkland shooting as "reactionary" instead of thoroughly researching the most effective regulations).

321. Cf. BATFE I, 700 F.3d at 197–98 (recognizing that states may limit fundamental rights for public safety).

322. See *supra* Section I.C.

323. See *supra* Section I.C.

324. See Horsley, 808 F.3d at 1133 ("[T]he brain does not . . . mature until the early 20s in those relevant parts that govern impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable." (citation omitted)).

325. See *supra* Section I.C.

326. See *supra* notes 197–204 and accompanying text (detailing adolescent brain development under the age of twenty-five).

327. See Katherine A. Vittes et al., *Legal Status and Source of Offenders' Firearms in States with the Least Stringent Criteria for Gun Ownership*, 19 INJURY PREVENTION 26, 29–30 (2013) (finding that 17% of offenders could not have obtained a firearm if the minimum purchase age had been twenty-one years old).

Crime data further supports the reasonable fit of the Public Safety Act and its purpose because young adults commit gun violence at disturbing rates due to their impulsivity. Most of the perpetrators of gun violence are between eighteen and twenty-one years old, including a disproportionate number of mass shooters, such as the shooter in Parkland, Florida.<sup>328</sup> This age group also has an extremely high suicide rate.<sup>329</sup> When Congress enacted its federal regulations preventing people under twenty-one from purchasing a handgun, it studied gun violence among this age group.<sup>330</sup> Congress's investigation was concerned not only with those under eighteen but also those under twenty-one.<sup>331</sup> The congressional studies concluded that "minors under the age of 21 years account[] for 35 percent of the arrests for the serious crimes of violence including murder, rape, robbery, and aggravated assault."<sup>332</sup> The Seventh Circuit recently relied upon similar evidence to uphold Illinois' age-based firearms regulation.<sup>333</sup> This data suggests that the Florida legislature acted reasonably by targeting its law to persons under twenty-one.

Finally, the Public Safety Act is a reasonable fit to the interest of public safety because it also leaves alternative channels for those under twenty-one to purchase weapons and has exemptions.<sup>334</sup> When evaluating the law's fit to the interest, courts look favorably upon laws with alternative methods and exemptions. For example, in *United States v. Rene E.*,<sup>335</sup> the court emphasized "the circumscribed nature of [its] decision," finding that the federal prohibition on handgun possession contained exceptions.<sup>336</sup> Similarly, in *Horsley*, there were alternative methods for a person under twenty-one to obtain a Firearms Owner Identification Card.<sup>337</sup> Both laws were upheld under intermediate scrutiny because they did not overly restrict the targeted class.<sup>338</sup> In contrast, in *Heller*, the law acted as a ban on handgun possession.<sup>339</sup>

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328. See *supra* notes 176–79 (reviewing the crime statistics for people under twenty-one).

329. See *id.*

330. BATFE I, 700 F.3d 185, 207–08 (5th Cir. 2012).

331. *Id.*

332. *Id.* (citations omitted).

333. *Horsley v. Trame*, 808 F.3d 1126, 1133 (7th Cir. 2015).

334. See FLA. STAT. § 790.065(13) (2019) (exempting military personnel from the Public Safety Act).

335. 583 F.3d 8 (1st Cir. 2009).

336. *Id.* at 15–16.

337. *Horsley*, 808 F.3d at 1131–33.

338. *Id.* at 1134; *Rene E.*, 583 F.3d at 8–10.

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

Because of the ban and lack of exemptions, the Court struck down the law.<sup>340</sup> Here, the Public Safety Act not only allows for persons under twenty-one to obtain firearms from a plethora of sources,<sup>341</sup> it also exempts military-like and other law enforcement personnel from its reach.<sup>342</sup> These alternative channels and exemptions further support a reasonable fit. Because the Public Safety Act serves an important government interest and the legislature reasonably tailored this law to its objective by selecting the most at-risk group for gun violence and left channels for adolescents to obtain and use firearms, the Act passes constitutional muster under intermediate scrutiny at step two.

#### CONCLUSION

Americans are no strangers to gun violence. In a rare glimmer of legislative action, the Florida legislature acted quickly after a devastating mass shooting in a local high school. The Marjory Stoneman Douglas High School Public Safety Act addressed one of the root causes of the shooting—the ability of a nineteen-year-old to purchase a weapon. Of course, such legislation did not come without Second Amendment legal challenges.

Under the two-step test, the Public Safety Act is not a violation of the Second Amendment. The historical record demonstrates that the sale of firearms to people under twenty-one is not protected by the Second Amendment and therefore does not burden an individual's Second Amendment right. Even if the court finds that the regulation does burden the Second Amendment right or moves to step two out of an abundance of caution, at most, intermediate scrutiny is the appropriate mode of evaluation of this law because the Public Safety Act does not implicate the "core" of the Second Amendment—*responsible* citizens possessing arms in the home for self-defense. Protecting the public safety of Floridians is an important government interest, and the Florida legislature tailored its legislation to prevent gun violence among the riskiest group, leaving alternative channels to obtain firearms for self-defense of the home, and creating exemptions for important groups like military personnel to purchase a weapon. Thus, the Public Safety Act passes constitutional muster.

The Public Safety Act is a constitutional legislative model for state and federal legislatures that may deem age as one of the contributors to gun

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340. *Id.* at 629, 635.

341. See *supra* Section II.B (describing the various ways that this age group can still get a firearm).

342. FLA. STAT. § 790.065(13) (2019).

violence in the United States. If other states or the federal government wished to increase the purchasing age of firearms, Florida's Act is a blueprint to do so.

Out of the shadows of tragedy, the Florida legislature did something the federal government has yet to do about gun violence—act. In truth, the Public Safety Act pales in comparison to the sweeping firearm legislation needed to protect our children. To the thousands of people who have lost their lives to gun violence, to the fourteen children at Marjory Stoneman Douglas High School, who will tell their story?<sup>343</sup> When our children tell our story, let it be one of action.<sup>344</sup> We should act. We can act. We must act. History has its eyes on us.<sup>345</sup>

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343. LIN-MANUEL MIRANDA, WHO LIVES, WHO DIES, WHO TELLS YOUR STORY (Atlantic Records 2015).

344. LIN-MANUEL MIRANDA, THE STORY OF TONIGHT (Atlantic Records 2015).

345. LIN-MANUAL MIRANDA, HISTORY HAS ITS EYES ON YOU (Atlantic Records 2015).