NO. 20-56174

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MATTHEW JONES, *et al.*,
Plaintiffs-Appellants,

v.

XAVIER BECERRA, in his official capacity as Attorney General of the State of California, *et al.*,
Defendants-Appellees,

Appeal from United States District Court for the Southern District of California
Civil Case No. 3:19-cv-01226-L-AHG (Honorable M. James Lorenz)

OPENING BRIEF OF PLAINTIFFS-APPELLANTS

John W. Dillon
DILLON LAW GROUP, APC
2647 Gateway Road
Suite 105, No. 255
Carlsbad, California 92009
(760) 642-7150
jdillon@dillonlawgp.com

David H. Thompson
Peter A. Patterson
John D. Ohlendorf
Haley N. Proctor
COOPER AND KIRK, PLLC
1523 New Hampshire Ave., NW
Washington, D.C. 20036
(202) 220-9600
(202) 220-9601 (fax)
dthompson@cooperkirk.com

Attorneys for Plaintiffs-Appellants

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiffs-Appellants submit this corporate disclosure and financial interest statement.

Plaintiff-Appellant PWGG, L.P., DBA Poway Weapons and Gear and PWG Range ("PWGG") is a nongovernmental corporate party organized and existing under the laws of California with a principal place of business in Poway, California. PWGG has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Plaintiff-Appellant North County Shooting Center, Inc. ("NCSC") is a nongovernmental corporate party organized and existing under the laws of California with a principal place of business in San Marcos, California. NCSC has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Plaintiff-Appellant Beebe Family Arms and Munitions LLC, DBA BFAM and Beebe Family Arms and Munitions ("BFAM") is a nongovernmental corporate party organized and existing under the laws of California with a principal place of business in Fallbrook, California. BFAM has no parent corporation, and no publicly held corporation, owns 10% or more of its stock.

Plaintiff-Appellant Firearms Policy Coalition, Inc. ("FPC") is a nongovernmental corporate party organized and existing under the laws of Delaware with a principal place of business in Sacramento, California. FPC has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Plaintiff-Appellant Firearms Policy Foundation ("FPF") is a nongovernmental corporate party organized and existing under the laws of Delaware with a principal place of business in Sacramento, California. FPF has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Plaintiff-Appellant The California Gun Rights Foundation ("CGF") is a nongovernmental corporate party organized and existing under the laws of California with a principal place of business in Sacramento, California. CGF has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Plaintiff-Appellant Second Amendment Foundation ("SAF") is a nongovernmental corporate party organized and existing under the laws of the State of Washington, with its principal place of business in Bellevue, Washington. SAF has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

The Second Amendment "right to possess and carry weapons in case of confrontation" presumptively "belongs to all Americans," not "an unspecified subset." *District of Columbia v. Heller*, 554 U.S. at 570, 580, 581, 592 (2008). Upon reaching the age of 18, the Plaintiffs in this case were deemed adults for almost all purposes and certainly for the purpose of exercising constitutional rights. They are allowed by law to vote, enter into contracts, and get married. Indeed, at age 18 they became eligible to serve or be conscripted into the military—to fight and die by arms for the country. Yet the California statute challenged in this case, CAL. PENAL CODE § 27510, categorically bars them from purchasing or acquiring *all* semi-automatic centerfire rifles based solely on their age. Taken in combination with existing state and federal laws barring 18-to-20-year-olds from acquiring handguns, the result of the challenged provision is that the *vast majority of firearms*—including the firearms most useful for self-defense—are now off-limits to law-abiding Californians in this age bracket. That age-based firearm ban must be enjoined, for the Second Amendment takes such a draconian infringement of the right to keep and bear arms "off the table." *Heller*, 554 U.S. at 636.

The text and history of the Second Amendment right leaves no doubt that it extends to typical, law-abiding 18-to-20-year-olds. On its face, the right to keep and bear arms belongs to "the people" as a whole, U.S. CONST. amend. II, not the subset

of the people who have attained the age of 21. And the history and tradition of the right to keep and bear arms leaves no doubt that it fully vests by age 18. Indeed, just months after ratification of the Second Amendment, Congress enacted the Militia Act of 1792, which required all able-bodied men to enroll in the militia and to arm themselves upon turning 18. 1 Stat. 271 (1792). This Act reflected the widespread understanding that citizens reached the age for militia membership by 18—an understanding that simply cannot be squared with the notion these able-bodied 18-year-olds were outside the Second Amendment's protective scope. After all, "the threat that the new Federal Government would destroy the citizens' militia by taking away their arms" was the *very* "*reason that right [to keep and bear arms] was codified in a written Constitution*." *Heller*, 554 U.S. at 599 (emphasis added). The district court's conclusion that California's age ban "does not burden the Second Amendment," 1-ER-12 (Opinion at 11), could not have been more mistaken.

Once it is seen that Section 27510's age-based restrictions impinge upon Second Amendment, the result is clear, for—though strict scrutiny, at a minimum, should apply—those restrictions cannot pass even intermediate scrutiny. There is no reliable evidence that they will reduce gun violence; they endanger an already vulnerable population by depriving them of the most reliable means of self-defense still available to them; and they burden significantly more conduct than is necessary

to advance the State's stated goal of ensuring that individuals with firearms receive proper training.

The Supreme Court's decision in *Heller* makes clear that when the government bars law-abiding citizens from accessing "an entire class of 'arms' that is overwhelmingly chosen by American society for [self-defense]," that "severe restriction" necessarily "fails constitutional muster" "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights." 554 U.S. at 628–29. That description precisely captures the effect of Section 27510. Plaintiffs are likely to succeed in their constitutional challenge to that provision of California law, and it should be preliminarily enjoined.

JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343 because this case involves a constitutional challenge to CAL. PENAL CODE § 27510 and seeks relief under 42 U.S.C. §§ 1983 and 1988. The District Court denied Appellants' motion for a preliminary injunction on November 3, 2020, 1-ER-20, and Appellants filed a timely notice of appeal on November 6, 14-ER-2912. This Court has jurisdiction over the denial of a preliminary injunction under 28 U.S.C. § 1292(a)(1).

ISSUES PRESENTED

1. Whether the provisions of California law banning virtually all 18-20-year-old law-abiding adults from acquiring most firearms violate the Second Amendment to the United States Constitution, as incorporated against the State of California under the Fourteenth Amendment.

2. Whether the district court erred in failing to preliminarily enjoin California's restrictions on 18-20-year-olds acquiring firearms.

PERTINENT RULES

All pertinent rules are set forth in the addendum.

STATEMENT OF THE CASE

The purchase or other acquisition of a firearm in California is restricted by a complex web of state and federal provisions, the overall effect of which is to prohibit *all* typical 18-to-20-year-old adults from acquiring *any* operable handgun, and most long-guns, from *any* commercial firearm retailer or private source. Under California's scheme, law-abiding 18-to-20-year old adult citizens who wish to exercise their Second Amendment right to keep arms are effectively limited to obtaining a single-shot rifle, shotgun, or a .22—arms generally well suited for hunting, but not self-defense—and even those they can only acquire after graduating from a state-mandated hunter training course. Those ordinary law-abiding 18-to-20-

year-olds who, like Plaintiffs, have no interest in hunting but wish to obtain a firearm suitable for purposes of self-defense are flatly prohibited from doing so.

I. California's restrictions on the acquisition of firearms

The California statute at issue in this case, CAL. PENAL CODE § 27510(a), provides that a firearm dealer licensed in California "shall not sell, supply, deliver, or give possession or control of a firearm to any person who is under 21 years of age." Violations of the ban are punishable as either a felony or misdemeanor, with sentences of up to four years' imprisonment, a fine up to $1,000, or both. *See* CAL. PENAL CODE § 27590. The ban is subject to a number of minor exceptions, for acquisitions by law-enforcement officers, military personnel, and the like, but these exceptions obviously do not allow typical 18-to-20-year-olds to obtain firearms from licensed dealers. *See* CAL. PENAL CODE § 27510 (b)(2)–(b)(3).

Instead, the only exception to Section 27510's scope that even arguably allows the ordinary 18-to-20-year-old Californian to obtain a firearm from a dealer is set forth in subsection (b)(1), which exempts the sale or delivery "of a firearm that is not a handgun or semiautomatic centerfire rifle to a person 18 years of age or older who possesses a valid, unexpired hunting license issued by the Department of Fish and Wildlife." CAL. PENAL CODE § 27510(b)(1). This exception applies to three

types of firearms: (1) single-shot rifles,[1] (2) shotguns, and (3) semi-automatic "rimfire" rifles (principally, small-caliber ".22" rifles commonly used for shooting small varmints).[2] Most of these firearms are ill-suited to self-defense—where the low "stopping power" of a .22 is clearly insufficient, and the time needed to re-load a single-shot firearm after the first round can prove fatal. *See infra*, Part I.B.2.ii. And of course, to take advantage of even this emaciated exception, a law-abiding 18-to-20-year old must obtain a hunting license—a time-consuming, pointless endeavor for someone who has no interest in hunting but *does* have an acute interest in defending themselves, their families, or their homes. *See infra*, p. 39.

California law includes independent limits on access to firearms for individuals who are considered unsafe, mentally unstable, or otherwise incapable of safely operating a firearm. For instance, a firearm generally may not be purchased

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[1] A *single-shot* firearm "must be reloaded each time the firearm is fired." 13-ER-2507. By contrast, when a *semi-automatic* firearm is discharged, "the case of the cartridge or shotshell is ejected automatically, and the chamber is reloaded automatically." *Id.* Both single-shot and semi-automatic firearms fire "only one shot with each pull of the trigger" and are thus distinct from *fully automatic* firearms, which "fire[ ] repeatedly with a single pull of the trigger." *Staples v. United States*, 511 U.S. 600, 602 n.1 (1994).

[2] In contrast to centerfire firearms, which fire ammunition where "the primer is located in the center of the casing base," rimfire firearms fire ammunition that "has the primer contained in the rim of the ammunition casing." 13-ER-2504. Because "[r]imfire ammunition is limited to low-pressure loads," *id.*, it generally comes in calibers of .22 (or smaller), which have "poor stopping power" and are generally used for "hunting small game, killing pets and varmints," DAVID STEIER, GUNS 101 13 (2011).

or possessed, under California law, by **(1)** any individual who has ever been convicted of a felony, *see* CAL. PENAL CODE §§ 27500, 29800; **(2)** individuals convicted of certain misdemeanor offenses involving violence or domestic abuse, *id.* §§ 273.5, 27500, 29805; **(3)** individuals addicted to a controlled substance, *id.* § 29800(a)(1); **(4)** minors under the age of 18, *id.* § 27505(a); or **(5)** individuals who have been adjudicated mentally defective or are committed to a mental institution, CAL. WELF. & INST. CODE §§ 8100, 8103.

Moreover, California law also requires that any individual who desires to purchase or acquire a firearm of any kind must first obtain a Firearms Safety Certificate, CAL. PENAL CODE §§ 26840, 31615, which requires completion a safety training program and final written exam covering various topics of firearm safety such as safe storage, "[i]ssues associated with bringing a firearm into the home," and California's regulatory scheme, *id.* § 31640. The Safety Certificate requirement applies to *all* firearm acquisitions, *id.* § 31615—such that an 18-to-20-year-old who wishes to obtain a single-shot long-gun for purposes of self-defense under the "hunting exception" in Section 27510(b)(1) must take *two* training courses and exams: one course actually focused on firearm safety, as required by Section 31610 *et seq.*, and a second, utterly pointless course focused on *hunter* training and safety, as required by Section 27510.

Subject to the hunting exception, Section 27510 applies to *all* firearms—both handguns and long guns. Prior to 2019, the provision applied only to handguns, but SB 1100, enacted on September 28, 2018, extended Section 27510's restrictions to long guns as well. Of course, California law continues to strictly limit the purchase and possession of handguns by 18-to-20-year-olds. *See* CAL. PENAL CODE §§ 27505, 27510, 29610. And independent provisions of federal law also already significantly constrain the right of adult citizens under the age of 21 to purchase a handgun— the "quintessential self-defense weapon" which is "the most popular weapon chosen by Americans for self-defense in the home." *Heller*, 554 U.S. at 629. Under 18 U.S.C. § 922(b)(1), a federally licensed firearm dealer may not sell a handgun to any individual under the age of 21. As amended by SB 1100, Section 27510 has the effect of closing off most 18-to-20-year-old's ability to obtain any *long gun*, as well, virtually eclipsing the Second Amendment right to keep and bear arms altogether.

California law also tightens the existing federal limits by expanding the scope of transferors to whom the limits apply. Federal law only restricts transfers conducted by federally-licensed firearm dealers engaged in "the business of . . . dealing in firearms." *See* 18 U.S.C. § 922(a)(1)(A). By contrast, California law provides, save for a handful of exceptions, that "[n]o person shall sell, lease, or transfer firearms" without a license. CAL. PENAL CODE § 26500; *see also id.* §§ 26520, 26582. And even transfers pursuant to most of the exceptions must be

completed "through a licensed firearms dealer," *id.* § 27545; *see also id.* § 28050—a dealer who, of course, is barred by Section 27510 from completing the transaction if the transferee is under the age of 21. This requirement, too, is subject to minor exceptions, including an exception for transfers from a minor's parent or legal guardian. *Id.* § 27945. A parent or guardian transferring a firearm pursuant to this exception, however, remains subject to restrictions on "straw purchases." *Id.* § 27515. California's restrictions—including Section 27510's age ban—thus apply to virtually *all* firearm purchases, acquisitions, or transfers within the State.

II. The effect on Plaintiffs

Plaintiffs Jones, Furrh, and Yamamoto, are ordinary, law-abiding California adult citizens who, at the time the preliminary injunction motion was filed, were under the age of 21. 3-ER-351, 3-ER-354, 3-ER-358. Plaintiffs have not been convicted of a felony, adjudicated mentally incompetent, and are not otherwise prohibited under California or Federal law from purchasing, acquiring, and possessing operable firearms. 3-ER-351, 3-ER-354, 3-ER-358. Each plaintiff wished to acquire a firearm for self-defense and other lawful purposes but was barred from doing so by Section 27510's age ban. 3-ER-351–52, 3-ER-354–55. 3-ER-358–59. Indeed, each plaintiff attempted to purchase a firearm in California before this lawsuit was filed but were refused sale solely because of their age. 3-ER-351–52, 3-ER-354–55, 3-ER-358–59. And Plaintiffs Firearms Policy Coalition, Inc., Firearms

Policy Foundation, the California Gun Rights Foundation, and Second Amendment Foundation each have numerous 18-to-20-year-old members in California who, like the individual plaintiffs here, are otherwise eligible to purchase or acquire firearms and would, but for Section 27510's age ban. *See* 4-ER-375–76, 6-ER-953–54.

Finally, Plaintiffs PWGG, L.P., North County Shooting Center, Inc., and Beebe Family Arms and Munitions, LLC are likewise injured by Section 27510. All three Plaintiffs are licensed firearm dealers in California who have been forced to forgo numerous firearm sales to 18-to-20-year-old adults solely because of Section 27510. 3-ER-362–63, 3-ER-366–67, 3-ER-371, 13-ER-2676. And these Plaintiffs have also ceased offering various firearm training courses to any customer under the age of 21, since those courses would require giving the student "possession or control of a firearm," CAL. PENAL CODE § 27510(1), as part of the training process, 3-ER-363–64, 3-ER-366–68, 13-ER-2677–78.

III. Proceedings below

Plaintiffs filed suit on July 1, 2019, challenging Section 27510's age-ban as unconstitutional under the Second Amendment, as applied to California via the Fourteenth Amendment. 14-ER-2879. They moved for a preliminary injunction restraining the enforcement of the challenged law on November 12. 3-ER-347–49. The district court denied that motion, without holding argument or a hearing, on November 3, 2020. 1-ER-2, 1-ER-20.

The district court concluded that Plaintiffs' challenge to Section 27510 was not likely to succeed. Conducting the "two-part test" dictated by this Court's precedents, the court first asked "whether the challenged law burdens conduct protected by the Second Amendment." 1-ER-6 (Opinion at 5). It concluded that the semiautomatic long guns Section 27510 bars 18-to-20-year-olds from acquiring are "arms" protected by the Second Amendment, but that "age-based restrictions like the one in section 27510 are longstanding, and presumptively Constitutional." 1-ER-7, 1-ER-10 (Opinion at 6, 9).

While the court held that the challenged age ban thus "do[es] not burden the Second Amendment," it nonetheless inquired "in an abundance of caution" whether it "survives strict or intermediate scrutiny." 1-ER-11 (Opinion at 10). It rejected Plaintiffs' contention that strict scrutiny should apply, reasoning that Section 27510 "is not a complete ban," because 27510(b)(1)'s hunting exception provides a pathway for 18-to-20-year-olds to obtain at least *some* types of firearms. 1-ER-12–13 (Opinion at 11–12). And it held that the age-ban passes intermediate scrutiny, based solely on (1) legislative history from a federal law passed more than half a century ago, and (2) its assertion, unsupported by any evidence or authority, that "it remains commonly understood that Young Adults may require additional safeguards to ensure proper training and maintenance of firearms." 1-ER-15–16 (Opinion at 14–15). The court did not mention that the Firearms Safety Certificate and training

program—independently required by Section 31615 for *all* firearm transfers—*already* provides instruction in "proper training and maintenance of firearms," 1-ER-16 (Opinion at 15), that is *more expansive* than the training provided as part of obtaining a hunting license. *See* 13-ER-2480–87.

Finally, the district court held that Plaintiffs were not likely to "suffer irreparable harm in the absence of a preliminary injunction" and that "[t]he potential harm of enjoining a duly-enacted law designed to protect public safety outweighs Young Adults' inability to secure the firearm of their choice without proper training." 1-ER-18, 1-ER-19 (Opinion at 17, 18).

SUMMARY OF THE ARGUMENT

I. Plaintiffs' constitutional challenge to Section 27510's age ban is likely to succeed, and the district court erred in concluding otherwise. The text and history of the Second Amendment make clear beyond any doubt that it protects the right of law-abiding 18-to-20-year-olds to acquire operable firearms. As the federal courts have repeatedly held, the right to *keep and bear* arms must include the right *to acquire them in the first place* if it is to have any meaning at all. And by the Second Amendment's plain text, these protections extend to "the people" *as a whole*, U.S. CONST. amend. II, not "an unspecified subset," *Heller*, 554 U.S. at 580.

History confirms that the Second Amendment's text means what it says. The Amendment's "prefatory clause" explains that its operative right was meant, in part,

"to prevent elimination of the militia." *Id.* at 599. And Founding-era history—from every State as well as the federal Militia Act adopted just months after the Second Amendment's ratification—confirms that 18-to-20-year-olds were understood to be part of the militia. While *Heller* holds that the enumerated purpose or securing the militia does not *exhaust* the Second Amendment's aims, "[l]ogic demands that there be a link between the stated purpose and the command." *Id.* at 577. And it logically cannot be that the Framers enumerated the Second Amendment right for the express purpose of ensuring an armed militia but simultaneously understood its scope to be limited in a way that failed to protect *the militia's own members*. The district court's conclusion, in the teeth of this evidence, that Section 27510 "does not burden the Second Amendment," 1-ER-12 (Opinion at 11), is deeply flawed—as is the Fifth Circuit's in *National Rifle Ass'n Inc. v. BATFE*, 700 F.3d 185 (5th Cir. 2012), which the court below principally relied upon.

Since California's ban significantly burdens an entire class of law-abiding citizens' right to obtain firearms for self-defense, the Court should at a minimum apply strict scrutiny. Nevertheless, Section 27510 cannot withstand even intermediate scrutiny. There is no evidence in the record (or elsewhere) that Section 27510 will advance the State's public-safety objectives of reducing gun violence. There is, however, substantial evidence that it will hinder public safety by depriving individuals who are disproportionately at risk of facing violence of their preferred

means of self-defense. In any event, the law burdens substantially more conduct than is necessary to advance the stated goal of ensuring that individuals with firearms receive proper training, and for that reason alone, it is unconstitutional.

II. Institutional Plaintiffs and their members and customers will suffer irreparable harm if Section 27510 is not enjoined. This Court has held, across a wide variety of constitutional provisions, that the unlawful infringement of a plaintiff's constitutional rights constitutes *per se* irreparable harm. Here, Section 27510 inflicts the irreparable and ongoing injury of unconstitutionally restricting Institutional Plaintiffs' 18-to-20-year-olds' ability to acquire firearms to defend themselves, their families, and their homes.

III. The remaining equitable factors likewise favor immediate injunctive relief. Section 27510's failure to pass even intermediate scrutiny shows that enjoining it is not likely to cause any harm to the Government's interest in public safety. And the public always benefits when the Government is ordered to cease unconstitutional conduct.

ARGUMENT

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Roman v. Wolf*, 977 F.3d 935, 940 (9th Cir. 2020) (*quoting*

Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008)). The latter two factors merge when the Government is a party to the case. *Id.* at 940–41. This Court "review[s] a district court's decision to grant or deny a preliminary injunction for abuse of discretion," which entails reviewing "the district court's legal conclusions de novo and its factual findings for clear error." *Id.* at 941.

The facts relevant to the constitutional arguments in this case—such as whether the challenged provision will promote public safety—are legislative facts, not adjudicative facts. "Adjudicative facts are simply the facts of the particular case. Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body." Advisory Committee Note, Fed. R. Evid. 201. "Because the determination of legislative facts is thus a component of fashioning a rule of law, the clearly erroneous standard of Rule 52(a) does not apply to review of a federal court's findings concerning legislative facts." *In re Asbestos Litig.*, 829 F.2d 1233, 1252 n.11 (3d Cir. 1987) (Becker, J., concurring); *see also Lockhart v. McCree*, 476 U.S. 162, 169 n.3 (1986); *Perry v. Brown*, 671 F.3d 1052, 1075 (9th Cir. 2012), *vacated and remanded on other grounds by Hollingsworth v. Perry*, 570 U.S. 693 (2013); *Landell v. Sorrell*, 382 F.3d 91, 135 n. 24 (2d Cir. 2004), *rev'd and remanded on other grounds by* 548 U.S. 230 (2006); *United States v. Singleterry*, 29 F.3d 733, 739–40 (1st Cir.

1994); *Menora v. Illinois High Sch. Ass'n*, 683 F.2d 1030, 1036 (7th Cir. 1982). *But see Ass'n of New Jersey Rifle and Pistol Clubs v. Att'y Gen. of New Jersey*, 910 F.3d 106, 114, n. 13 (3d Cir. 2018). For that reason, the Supreme Court routinely addresses legislative facts without according deference to lower-court findings. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 540–46 (1996); *Dunagin v. City of Oxford, Miss,* 718 F.2d 738, 748 n.8 (5th Cir. 1983) (en banc) (collecting cases).

"Likelihood of success on the merits is a threshold inquiry and is the most important factor," *Environmental Prot. Info. Ctr. v. Carlson*, 968 F.3d 985, 989 (9th Cir. 2020), but this Court applies a "sliding scale" approach dictating that " 'where there are only serious questions going to the merits—that is, less than a likelihood of success on the merits—a preliminary injunction may still issue so long as the balance of hardships tips sharply in the plaintiff's favor and the other two factors are satisfied.' " *Ramos v. Wolf*, 975 F.3d 872, 888 (9th Cir. 2020) (quoting *Short v. Brown*, 893 F.3d 671, 675 (9th Cir. 2018)). Here, resort to the "sliding scale" is unnecessary because all of the injunction factors strongly favor the grant of preliminary relief.

I. Plaintiffs are likely to succeed on the merits.

This Court has adopted a "two-step" inquiry for challenges raised under the Second Amendment, which "(1) asks whether the challenged law burdens conduct protected by the Second Amendment and (2) if so, directs courts to apply an

appropriate level of scrutiny." *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013).[3] Here, text, history, and tradition uniformly show that the Second Amendment squarely protects the right of 18-to-20-year-olds to acquire firearms for lawful purposes such as self-defense. And California's law banning that conduct cannot survive any level of heightened constitutional scrutiny.

A. The Second Amendment protects the right of 18-to-20-year-old law-abiding adults to acquire firearms.

Because the challenged provision bans the ability of virtually all 18-to-20-year-olds from acquiring firearms for self-defense and other lawful purposes, whether it "burdens conduct protected by the Second Amendment," *Chovan*, 735 F.3d at 1136, depends on whether the Second Amendment (1) protects the right to acquire operable firearms for self-defense, and (2) applies to law-abiding 18-to-20-year-old citizens.[4] The answer to both questions is yes.

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[3] Plaintiffs reserve the right to argue for categorical per se invalidation in subsequent proceedings. *See Heller v. District of Columbia*, 670 F.3d 1244, 1271–85 (D.C. Cir. 2011) (*Heller II*) (Kavanaugh, J., dissenting).

[4] The district court correctly found that the long guns restricted by Section 27510 are "arms" within the meaning of the Second Amendment and are not "dangerous and unusual," since they are "commonly used by law abiding citizens for lawful purposes such as hunting, target practice, and self-defense." 1-ER-7 (Opinion at 6).

1. The Second Amendment protects the right to acquire an operable firearm.

The Second Amendment "protect[s] an individual right to use arms for self-defense," taking "off the table" any "absolute prohibition of handguns held and used for self-defense in the home." *Heller*, 554 U.S. at 616, 636. As federal courts have repeatedly recognized, that unassailable "right to possess firearms for protection implies . . . corresponding right[s]" without which "the core right wouldn't mean much." *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011) (addressing right to train with firearms). And the right to keep and bear arms would mean little indeed without the corresponding right *to acquire arms in the first place*. Indeed, if the core right to possess a firearm "operable for the purpose of immediate self-defense," *Heller*, 554 U.S. at 635, "is to have any meaning," *Radich v. Guerrero*, 2016 WL 1212437, at *7 (D. N. Mar. I., Mar. 28, 2016), it necessarily "must also include the right to *acquire* a firearm"—making the right of acquisition the "*most fundamental* prerequisite of legal gun ownership," *Illinois Ass'n of Firearms Retailers v. City of Chicago*, 961 F. Supp. 2d 928, 930, 938 (N.D. Ill. 2014). Accordingly, generally "prohibiting the commercial sale of firearms . . . would be untenable under *Heller*." *United States v. Marzzarella*, 614 F.3d 85, 92 n.8 (3d Cir. 2010).

These conclusions are consistent with the traditional understanding and practices of the People of this Nation, as "[t]he right to keep arms, necessarily involves the right to purchase them . . . and to purchase and provide ammunition

suitable for such arms." *Andrews v. State*, 50 Tenn. 165, 178 (1871); *Heller*, 554 U.S. at 583 n.7 ("What law forbids the veriest pauper, if he can raise a sum sufficient for the purchase of it, from mounting his Gun on his Chimney Piece . . . ?" (quoting SOME CONSIDERATIONS ON THE GAME LAWS 54 (1796)). There can thus be no doubt that the Second Amendment generally protects the right to purchase an operative firearm.

2. The Second Amendment extends to 18-to-20-year-old adults.

The text and history of the Second Amendment make equally clear that the rights it protects—including the right to acquire operable firearms for self-defense and other lawful purposes—fully vest by age 18.

i. The Second Amendment protects "the right *of the people* to keep and bear Arms," U.S. CONST. amend. II (emphasis added), and the "people" referred to in the Bill of Rights have always been understood to be "the whole people," THOMAS MCINTYRE COOLEY, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 267–68 (1880); *see also Heller*, 554 U.S. at 580. *Heller* accordingly held that "the Second Amendment right is exercised individually and belongs to all Americans" and cannot be limited to "an unspecified subset." *Id.* at 580, 581. " 'The right of the whole people, *old and young, men, women and boys, and not militia only*, to keep and bear arms of every description, and not such merely as are used by the militia, shall not be infringed, curtailed, or broken in upon, in the

smallest degree.' " *Id.* at 612–13 (quoting with approval *Nunn v. Georgia*, 1 Ga. 243, 250 (1846) (emphasis added)).

ii. Founding-era history and tradition confirm that 18-to-20-year-old adult citizens fall squarely within the Second Amendment's protective sphere. To be sure, the rights of actual *children* may be restricted in ways that adults' may not. *See Planned Parenthood v. Danforth*, 428 U.S. 52, 72-75 (1976). But Founding-era history demonstrates that 18-to-20-year-olds are not to be treated as children for purposes of the Second Amendment.

The strongest historical evidence on this point comes from the Founding-era understanding of militia service. Although the Second Amendment's prefatory clause cannot be read to "limit or expand the scope of the operative clause," "[l]ogic demands that there be a link between the stated purpose and the command." *Heller*, 554 U.S. at 577, 578. The prefatory clause—"A well regulated Militia, being necessary to the security of a free State"—"announces the purpose for which the right was codified: to prevent elimination of the militia." *Heller*, 554 U.S. at 599. Therefore, the Framers' understanding of the militia is highly probative in determining whether 18-to-20-year-olds enjoy Second Amendment rights. After all, if this class of adult citizens were originally understood to be *capable* of keeping and bearing arms—and were in fact *required by law to do so* as part of their militia service—it necessarily follows that these 18-to-20-year-old citizens also *enjoyed a*

Second Amendment right to engage in this conduct. *See A Pennsylvanian*, THE PENNSYLVANIA GAZETTE (Philadelphia, Feb. 20, 1788), *reprinted in* LES ADAMS, THE SECOND AMENDMENT PRIMER 121 (1996). For it would simply make no sense to enumerate a constitutional right to arms for the purpose of ensuring an armed militia if that right did not protect *the militia's own members*.

There is no doubt that 18-to-20-year-olds were understood to be part of the militia at the time the Second Amendment was adopted. This is apparent from Congress's initial exercise of its power to "provide for organizing, arming, and disciplining, the militia." U.S. CONST. art. I, § 8. On May 8, 1792, mere months after ratification of the Second Amendment, Congress passed an Act providing that "every free able-bodied white male citizen . . . *who is or shall be of the age of eighteen years*, and under the age of forty-five years (except as is herein after excepted) shall severally and respectively be enrolled in the militia." 1 Stat. 271 ("Militia Act") (emphasis added). Because the term " 'militia' means the same thing in Article I and the Second Amendment," Congress's authority over the militia under Article I, Section 8 extends *only* to the same "body" or "pool" of Americans who constitute the militia for purposes of the Second Amendment—and who hence are among those entitled to keep and bear arms: namely, "all able-bodied men." *Heller*, 554 U.S. at 596.

As a contemporaneous act of Congress, the Militia Act provides extraordinarily powerful evidence that Second Amendment rights vest by age 18. "[M]any of the members of the Second Congress were also members of the First, which had drafted the Bill of Rights. But more importantly, they were conversant with the common understanding of both the First Congress and the ratifying state legislatures as to what was meant by 'Militia' in the Second Amendment." *Parker v. District of Columbia*, 478 F.3d 370, 387 (D.C. Cir. 2007), *aff'd by Heller*, 554 U.S. 570.

The legislative history of the Militia Act lends further support. In 1790, Secretary of War Henry Knox submitted a militia plan to Congress providing that "all men of the legal military age should be armed," and that "[t]he period of life in which military service shall be required of the citizens of the United States [was] to commence at eighteen." 2 ANNALS OF CONGRESS 2146 (Joseph Gales ed., 1834). Acknowledging that "military age has generally commenced at sixteen," Secretary Knox instead drew the line at 18 because "the youth of sixteen do not commonly attain such a degree of robust strength as to enable them to sustain without injury the hardships incident to the field." *Id*. at 2153. Representative Jackson explained "that from eighteen to twenty-one was found to be the *best* age to make soldiers of." *Id*. at 1860 (emphasis added).

Eighteen is also the age that George Washington recommended for beginning militia enrollment. In an enclosure to a 1783 letter to Alexander Hamilton, General Washington—who as President signed the 1792 Militia Act into law—wrote that "the Citizens of America . . . from 18 to 50 Years of Age should be borne on the Militia Rolls" and "so far accustomed to the use of [Arms] that the Total strength of the Country might be called forth at a Short Notice on any very interesting Emergency." *Sentiments on a Peace Establishment* (May 2, 1783), *reprinted in* 26 THE WRITINGS OF GEORGE WASHINGTON 389 (John C. Fitzpatrick, ed. 1938).

State militia laws enacted around the time of the Second Amendment provide additional evidence. Minimum enrollment ages ranged from 16 to 18. *See* 8-ER-1403–50. There was thus a consensus in the States that, by age 18, individuals were able to, and hence entitled to, bear arms. This followed colonial practice: "From the earliest times the duty to possess arms was imposed on the entire colonial populace, with actual militia service contemplated for every male of 15, 16, or 18 through 45, 50, or 60 (depending on the colony)." Don B. Kates Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, *in* GUN CONTROL AND THE CONSTITUTION 66, 77 n.46 (Robert J. Cottrol ed., 1994). The frequent renewals of these Colonial and early state militia laws—with each renewal retaining a minimum-age requirement no higher than 18—further confirms that 18-year-olds were uniformly understood to have a duty, and therefore a right, to bear arms. *See* 6-ER-

964. Plaintiffs are unaware of even a single State that exempted 18-to-20-year-olds from militia service at the time the Second Amendment was ratified. Indeed, a comprehensive survey of over 250 separate state and colonial provisions enacted from the seventeenth through the end of the eighteenth century found that the minimum "age for militia duty" was most commonly either 16 or 18, "and never higher (except for one 19-year period in Virginia [between 1738 and 1757])." 8-ER-1403.

The Supreme Court has recognized that *militia membership presupposed firearm possession*, because "when called for service these men were expected to appear bearing arms supplied by *themselves*." *United States v. Miller*, 307 U.S. 174, 179 (1939) (emphasis added). This is illustrated by the Militia Act, which required each enrollee, regardless of age, to "provide himself with a good musket or firelock." 1 Stat. 271. Numerous state laws contained similar provisions. 8-ER-1381–82. These requirements confirm the Founders' shared understanding that Second Amendment rights vest at 18, because they demonstrate that, by that age, individuals not only (i) were entrusted with using firearms in connection with organized militia activities, but also (ii) were expected to *keep and maintain those arms as private citizens*.

Numerous other laws in place at or near the adoption of the Second Amendment also required able-bodied 18-to-20-year-olds to keep and carry firearms for certain non-militia purposes. At common law, for example, "all able-bodied men

from 15 or 16 to 60 were obliged to join in the 'hue and cry' (*hutesium et clamor*) to pursue fleeing criminals." 8-ER-1403. They were likewise obligated to serve in the *posse comitatus* to "assist in keeping the peace" or "suppress[ing] a riot." *See id.* ("The traditional minimum age for posse service was 15 or 16 years . . . ."). Indeed, James Wilson stated in 1790 that "No man above fifteen and under seventy years of age, ecclesiastical or temporal, is exempted from this service." See James Wilson, *Lectures on Law*, in 2 COLLECTED WORKS OF JAMES WILSON 1017 (Kermit L. Hall & Mark David Halls eds., 2007). Again, if 18-to-20-year-olds were *legally required* to keep and bear arms for these purposes, they plainly were understood to *have a right to do so*.

By contrast to this bulk of historical evidence that law-abiding 18-to-20-year-old citizens were understood at the Founding to be part of "the people" for purposes of the Second Amendment's protections, Defendants and the district court did not identify, and we are not aware of, *any evidence whatsoever* of colonial or Founding-era laws prohibiting the acquisition or possession of firearms by adults aged 18 or over because of their age. *See* 6-ER-958, 6-ER-971–72; 8-ER-1455.

iii. Without meaningfully engaging in this wealth of historical evidence, the district court nonetheless concluded that "age-based firearm restrictions such as California Penal code 27510 are longstanding, do not burden the Second

Amendment, and are therefore presumptively Constitutional." 1-ER-11 (Opinion at 10). That was error.

The court below *simply ignored* the great bulk of the historical evidence discussed above. It briefly attempted to dismiss the overwhelming evidence that 18-to-20-year-olds were uniformly understood to be part of the militia by noting that "[m]ilitias were well regulated by each state in the Founding Era," by requirements to "meet regularly for weapons inspection and registration" and comply "with accountability and maintenance regulations." 1-ER-11 (Opinion at 10). But that is an utter non-sequitur. These types of state militia regulations might conceivably provide historical support for general firearm safety regulations—such as California's requirements, not challenged here, that *all* firearm owners or purchasers (*including* those aged 18-to-20) obtain a Firearms Safety Certificate or purchase safety devices such as trigger locks or guns safes, CAL. PENAL CODE §§ 23635, 26840, 31615. They lend *no support whatsoever* to a *blanket prohibition* forbidding *an entire class* of law-abiding citizens from purchasing most kinds of common firearms, including those most suited to individual self-defense.

Rather than conducting any meaningful historical analysis of its own, the district court principally supported its conclusion by simply parroting the Fifth Circuit's conclusion that federal limits on the sale of handguns to 18-to-20-year-olds were " 'consistent with a longstanding historical tradition' and therefore . . . did not

burden the Second Amendment's protections." 1-ER-8 (Opinion at 7) (quoting *National Rifle Ass'n of America, Inc., v. BATFE*, 700 F.3d 185, 196 (5th Cir. 2012) ("*NRA*")); *see also* 1-ER-9 (Opinion at 8) (also citing *Hirschfeld v. BATFE*, 417 F. Supp. 3d 747, 755 (W.D. Va. 2019), and *Mitchell v. Atkins*, 2020 WL 5106723 (W.D. Wash. Aug. 31, 2020)), which likewise merely parrot the Fifth Circuit's reasoning in *NRA*). But the Fifth Circuit's opinion in *NRA* does not support California's age-ban for multiple independent reasons.

As an initial matter, the decision in *NRA* is plainly distinguishable here. As the Fifth Circuit was at pains to emphasize, the federal law challenged there was "[f]ar from a total prohibition," since it did not restrict the ability of 18-to-20-year-olds to acquire any sort of long-gun and, even as to handguns, left them free to obtain those firearms from private sellers. *NRA*, 700 F.3d at 190, 206, 207. Section 27510, by contrast, imposes a far more severe constraint on the ability of ordinary 18-to-20-year-olds to acquire any sort of firearm. *See supra*, pp. 5–9.

Moreover, the Fifth Circuit's opinion in *NRA* is deeply flawed and unpersuasive. The Fifth Circuit's conclusion that the challenged federal restriction was "consistent with a longstanding tradition of targeting select groups' ability to access and to use arms for the sake of public safety," *NRA*, 700 F.3d at 203, was based on four types of historical evidence: (1) Founding-era "gun safety regulations," (2) a handful of laws "that targeted particular groups for public safety

reasons," (3) the fact that at the time of the Founding the "age of majority . . . was 21," and (4) the appearance, starting in the second half of the 19th century, of State laws "restricting the ability of persons under 21 to purchase or use particular firearms." *Id.* at 200, 201, 203. None of these meager scraps of evidence comes close to supporting the Fifth Circuit's general conclusion that modern age-based restrictions—much less California's expansive ban—are outside the scope of the Second Amendment.

The first two categories of evidence—the only restrictions cited by the Fifth Circuit that date to the time of the Second Amendment's ratification, and thus the only pieces of evidence that provide significant "insight into its original meaning," *Heller*, 554 U.S. at 614—are woefully insufficient. While "laws regulating the storage of gun powder," "administering gun use in the context of militia service," and "prohibiting the use of firearms on certain occasions and in certain places," *NRA*, 700 F.3d at 200, may provide historical support for similarly marginal "time, place, and manner" regulations on the books today, they plainly cannot support blanket restrictions preventing large numbers of law-abiding adults from acquiring most firearms. Indeed, *precisely the same* set of safety regulations were cited in *Heller* in support of the District of Columbia's ban, and the Supreme Court made short work of them, explaining that they "provide no support for the severe restriction" imposed by D.C., since "they do not remotely burden the right of self-defense as much as an

absolute ban on handguns." 554 U.S. at 632. The fact that the Fifth Circuit, without any apparent sense of irony, staked its historical analysis on *the very pieces of evidence rejected as irrelevant in Heller* calls the entirety of its historical conclusions into question.

Similarly, the Founding-era laws "disarming certain groups" for "public safety reasons"—such as "law-abiding slaves, free blacks, and Loyalists"—obviously come up short. *NRA*, 700 F.3d at 200. Racist laws targeting enslaved and free African Americans hardly constitute the type of historical evidence we should look to in determining the Second Amendment's scope. *See McDonald v. City of Chicago*, 561 U.S. 742, 771–78 (2010) (discussing the Fourteenth Amendment's repudiation of racist gun-control restrictions). And laws disarming loyalists who maintained allegiance to a hostile foreign power that at the time *was literally invading the American homeland* hardly provide support for draconian restrictions on law-abiding 18-to-20-year-olds. *See Folajtar v. Attorney General of the United States*, 2020 WL 6879007, at *14 (3d Cir. Nov. 24, 2020) (Bibas, J., dissenting).

Moreover, these anti-loyalist laws only confiscated weapons owned by loyalists on an *individual basis* after a showing that they "refused to swear an oath of allegiance to the state or to the nation" during wartime. 8-ER-1460–61. Section 27510, on the other hand, strips all 18-to-20-year-olds of their Second Amendment

right with a broad brush without any individual showing that the person in question is insufficiently trained or a threat to public safety.

Nor do more-recent laws restricting "criminals" or "the mentally imbalanced" from accessing firearms fill the gap. *NRA*, 700 F.3d at 201. Those laws are arguably supported by the Founding-era understanding "that the legislature may disarm those who have demonstrated a proclivity for violence or whose possession of guns would otherwise threaten the public safety." *Kanter v. Barr*, 919 F.3d 437, 454 (7th Cir. 2019) (Barrett, J., dissenting). But the notion that *all 18-to-20-year-olds* fall into that category—*solely by virtue of their age*—is completely insupportable. Felons and the mentally ill are prohibited from possessing firearms only after they have *individually* been adjudicated—through procedures complying with due process—as belong in the relevant group. California law affords no such individualized determination to its 18-to-20-year-old citizens before stripping their Second Amendment rights. *See id.* at 465 ("The government could quickly swallow the [Second Amendment] right if it had broad power to designate any group as dangerous and thereby disqualify its members from having a gun.").

The Fifth Circuit's third piece of evidence—that "[t]he age of majority at common law was 21," *NRA*, 700 F.3d at 201—likewise does not advance the ball. To be sure, at the Founding the common-law "age of majority" for some legal purposes was 21, rather than the modern standard of 18. But it is important to

understand that in the Founding Era (as is still true today), age requirements were "different for different purposes." 1 BLACKSTONE COMMENTARIES *463. At age 14, for example, individuals were deemed capable of discerning right from wrong and could be "capitally punished for any offense." *Id*. at *463-64. Likewise, even though 18-to-20-year-olds would have been considered "minors" for *some* purposes at the Founding, the historical evidence surveyed above leaves no doubt that the purpose of keeping and bearing arms *was not one of them*. To the contrary, adults aged 18 and up would contemporaneously have been *affirmatively required*, by statutes enacted by colonial, state and federal legislatures, to keep and bear arms *that they themselves acquired* so that they could fulfill their obligatory militia duties. *See supra*, Part I.A.2.ii. In other words, at the Founding, 18-to-20-year-olds, even when considered to be *under the age of majority* under common law, *still had the right to keep and bear arms*. The fact that 18 years old is now considered the legal age of adulthood only bolsters the Second Amendment right of such citizens.

The Fifth Circuit's discussion of Founding-era evidence all suffers from the same fallacy: it is conducted at the wrong level of generality. The Fifth Circuit proceeded as follows: (1) it carefully tweezed from the historical record a few isolated examples of particular gun-control measures—none of which are remotely analogous to modern age-based restrictions (and certainly not analogous to Section 27510's ban); (2) it then abstracted from these individual restrictions a general

"Founding-Era Attitude[ ]" of accepting "sensible gun safety regulation"; and (3) it then concluded that because the law before appeared sufficiently "sensible," it was, ergo, "outside the Second Amendment's protection." *NRA*, 700 F.3d at 200, 203.

That palpably superficial historical analysis borders on parody of the careful historical inquiry mandated by *Heller*. *See National Rifle Ass'n, Inc. v. BATFE*, 714 F.3d 334, 337 (5th Cir. 2013) (Jones, J., dissenting from denial of rehearing en banc) (explaining that *Heller* requires "a meticulous textual and historical review" "[r]ather than generalizing about 'founding era attitudes,' as the panel did"). The Fifth Circuit itself acknowledged that the history of the Second Amendment supported age-based restrictions only "[a]t a high level of generality." *NRA*, 700 F.3d at 203. But under that approach, *any* gun-control measure that strikes a court as sufficiently "sensible" is automatically *exempt from constitutional scrutiny* under the purported Second Amendment exception for "sensible gun safety regulation." *NRA*, 700 F.3d at 200. *Heller* expressly disclaimed such an approach. *See* 554 U.S. at 634–35 ("Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.").

The Fifth Circuit also erred, like the court below in this case, by failing to meaningfully engage with the evidence, discussed above, affirmatively establishing that 18-year-olds were uniformly understood to fall within the Second Amendment's

scope at the Founding. The court "relegate[d] militia service to a footnote," *National Rifle Ass'n, Inc.*, 714 F.3d at 339 (Jones, J., dissenting from denial of rehearing en banc), and even that footnote got the historical record *wrong*. *Compare NRA*, 700 F.3d at 204 n.17 (citing a single 1779 New Jersey statute as "setting [the militia-service] minimum age at 21"), *with* 6-ER-964–65 (explaining that the 1779 law merely supplemented New Jersey's general militia act, and expressly preserved the ability of militia officers to enlist males "between the Age of sixteen and twenty-one years").

Unable to provide any Founding-era support for age-based firearm restrictions, the Fifth Circuit turned to a fourth category of evidence: the age-based limits that some States began to enact in the late nineteenth century. This final type of evidence is no more persuasive than the preceding ones. As an initial matter, the earliest law cited by the court dated to 1856—over a half-century after the Second Amendment's enactment. Because of the late date of these restrictions, they necessarily "do not provide as much insight into its original meaning as earlier sources." *Heller*, 554 U.S. at 614. After all, "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them"—not the scope they came to bear five decades later. *Id.* at 634–35. Because there is no *Founding*-era tradition of age-based restrictions on acquiring firearms, a handful of laws that began to pop up two generations later can prove nothing. Indeed, as the

Supreme Court confirmed in *Gamble v. United States*, 139 S. Ct. 1960 (2019), the relevant inquiry is "the public understanding in 1791 of the right codified by the Second Amendment," and 19th-century sources cited by *Heller* "were treated as mere confirmation of what the Court thought had already been established." *Id*. at 1975–76.

Moreover, even if the late-nineteenth-century laws cited by the Fifth Circuit are taken at face value, the provide no persuasive grounding for modern age-based restrictions. The vast majority of those statutes applied only to certain types of weapons—predominantly concealable arms such as pistols or Bowie knives. *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, 137–42 (2018) (compiling laws); *see also* 8-ER-1455–59. By the turn of the 20th century, less than half of the States had adopted such laws—and several, moreover, contained "exceptions for self-defense, hunting, or home possession." *Id.* at 142; 8-ER-1456. These limited laws—adopted by less than half of the country beginning more than five decades after the Founding—do not come close to showing that blanket restrictions banning 18-to-21-year-olds from acquiring most firearms "do not burden the Second Amendment." 1-ER-11 (Opinion at 10).

B. California's age ban fails any level of heightened constitutional scrutiny.

Because Section 27510's age ban burdens conduct protected by the Second Amendment, this Court's precedent requires it "to determine the appropriate level of scrutiny to apply." *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016). Since California's ban significantly burdens an entire class of law-abiding citizens' right to obtain firearms for self-defense, the Court should at a minimum apply strict scrutiny. Section 27510's draconian limits cannot pass that test—indeed, they flunk even intermediate scrutiny.[5]

1. Strict scrutiny applies.

In "ascertaining the appropriate level of scrutiny," the Court "consider[s]: (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." *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 960–61 (9th Cir. 2014) (quotation marks omitted). "A law that implicates the core of the Second Amendment right and severely burdens that right warrants strict scrutiny." *Silvester*, 843 F.3d at 821. That is the case here.

"*Heller* tells us that the core of the Second Amendment is 'the right of law-abiding, responsible citizens to use arms in defense of hearth and home.' " *Chovan*,

[5] Plaintiffs reserve the right to argue in subsequent proceedings that strict scrutiny is *always* required when a challenged law impinges upon Second Amendment rights. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973); *McDonald*, 561 U.S. at 768, 778.

735 F.3d at 1138 (quoting *Heller*, 554 U.S. at 635). Section 27510, in conjunction with the rest of California's regulatory scheme, comes close to eclipsing this right entirely for an entire class of "law-abiding, responsible citizens": 18-to-20-year-olds. Those citizens are already barred by state and federal law from acquiring handguns—"the most popular weapon chosen by Americans for self-defense in the home." *Heller*, 554 U.S. at 570. Section 27510 extends that disability to *all* semiautomatic centerfire rifles.

The severity of the burden inflicted by Section 27510 is underscored by its embracive scope. It applies to *all* typical 18-to-20-year-olds—even those who have a spotless record and who passed the State's required safety-training course with flying colors. And importantly, it applies to virtually *all* transfers within the state, given California's requirement that even private firearm transfers (except those from a parent or pursuant to other minor exceptions) must be completed through a licensed dealer subject to Section 27510's age ban. *See* CAL. PENAL CODE §§ 27545, 28050.

These considerations alone require strict scrutiny, at a minimum, under binding precedent. The square teaching of *Heller* is that where the government effectively prohibits "an entire class of 'arms' that is overwhelmingly chosen by American society for [self-defense]," such a ban constitutes a "severe restriction" on Second Amendment rights. 554 U.S. at 628. This Court's decision in *Duncan v. Becerra* is in accord—expressly holding that "a law that takes away a substantial

portion of arms commonly used by citizens for self-defense imposes a substantial burden on the Second Amendment." 970 F.3d 1133, 1157 (9th Cir. 2020). Section 27510 does just that. It bars law-abiding 18-to-20-year-old adults from acquiring "an entire class" of firearms that constitute "a substantial portion of arms"—all semi-automatic centerfire rifles—from virtually any source. "Few laws in the history of our Nation have come close to the severe restriction of [California's] ban." *Heller*, 554 U.S. at 629.

Heller also makes clear that the Government cannot diminish the severity of such a law by pointing to the continued availability of *other* types of firearms. The Supreme Court could not have been clearer: "*It is no answer* to say . . . that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.,* long guns) is allowed." *Id.* (emphasis added). Section 27510's age ban on most long guns constitutes a "severe restriction," *id.*, under this reasoning *a fortiori*, for the class of firearms that remained available under the District of Columbia's ban—*all long guns*—is orders of magnitude more expansive than the narrow categories of arms 18-to-20-year-old citizens must now resort to in California: (1) single-shot rifles, (2) shotguns, and (3) semi-automatic "rimfire" rifles.[6]

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[6] The district court's suggestion that, in addition to ability to obtain one of these types of firearms through the "hunting exception," Section 27510's severity is

Even setting aside *Heller*'s binding (and dispositive) reasoning, the continued availability of those narrow options does little to lessen Section 27510's severity. Already barred by state and federal law from obtaining handguns—"the quintessential self-defense weapon," *Heller*, 554 U.S. at 629—a typical, law-abiding 18-to-20-year-old in California is now forced to resort to a few narrow types of firearms principally comprised of low-powered squirrel guns and single-shot rifles that she must spend precious seconds reloading after each shot, either of which would put her at a severe disadvantage in any self-defense situation. *See infra*, Part I.B.2.ii. The Second Amendment protects the right to keep and bear arms "for the core lawful purpose of self-defense." *Id.* at 630. By definition, a restriction that strips law-abiding citizens of the ability to obtain the firearms most useful—and most commonly used—for self-protection constitutes a severe burden on that right.

Further still, the continued availability of these leftover categories of firearms is *also* limited by the requirement that an 18-to-20-year-old who wishes to acquire one must first obtain a hunting license. CAL. PENAL CODE § 27510(b)(1). That is a burdensome and utterly pointless endeavor. The court below opined that hunter

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meaningfully mitigated by the exceptions for "members of law enforcement" or the Armed Forces, 1-ER-13 (Opinion at 12), is so palpably flawed as to require little response. The Second Amendment protects "the right *of the people* to keep and bear Arms," U.S. CONST. amend. II (emphasis added), not the right of police officers or members of the military. *See Heller*, 554 U.S. at 580 (Second Amendment's reference to "the people" "unambiguously refers to all members of the political community, not an unspecified subset").

training courses "are widely available," but it did not mention the record evidence showing the contrary. *See* 13-ER-2481–82 (explaining that "in approximately a two-month period, only two Hunter's Education courses were offered [in all of San Diego County] and the courses were filled to capacity). And even if an 18-to-20-year-old were able to obtain a seat in one of these required courses, he will then be forced to endure 8-to-10 hours of instruction, which is primarily focused on such matters as "wildlife identification," "game care," and "wilderness survival," and which, to the limited extent it covers firearm safety, is *wholly duplicative* of the more-extensive safety training program he must *independently* complete under CAL. PENAL CODE § 31610 *et seq. See* 13-ER-2481, 13-ER-2484–87.

Contrary to the district court's conclusion, Subsection (b)(1)'s hunting exception does *nothing* to mitigate the severity of Section 27510's age ban. Strict scrutiny is required.

2. The challenged ban fails even intermediate scrutiny.

To survive intermediate scrutiny, a restriction must be "substantially related to the achievement" of the government's objective. *United States v. Virginia*, 518 U.S. 515, 533 (1996). Specifically, a government defending a law challenged as a violation of the Second Amendment (i) "must supply actual, reliable evidence to justify" the restriction, (ii) "cannot get away with shoddy data or reasoning," and (iii) will suffer an injunction against the law if the government's "empirical support

for an ordinance [is] too weak." *Ezell*, 651 F.3d at 709 (citations and quotation marks omitted) (collecting First Amendment precedents). "The burden of justification is demanding, and it rests entirely on the State." *Virginia*, 518 U.S. at 533. Thus, this Court must presume that Plaintiffs have shown a likelihood of success on the merits, even when applying intermediate scrutiny. *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1116 (9th Cir. 2011), *overruled on other grounds by Bd. of Trustees of Glazing Health & Welfare Trust v. Chambers*, 941 F.3d 1195 (9th Cir. 2019).

To be sure, the State's asserted interest in promoting public safety is an important objective, but the State has not come close to carrying its "demanding" burden to show that Section 27510 "directly and materially advance[s]" that objective by reducing gun violence in general and mass shootings in particular. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488 (1995).

i. The State's presentation below focused on social science research purportedly demonstrating that 18-to-20-year-olds have weaker impulse control and commit a disproportionate share of violent crimes.

To begin, the social science relied on by the State does not provide any evidence of the difference in impulse control between 18-to-20-year-old adults and those 21 and over. In fact, the science relied on by the State shows that the brain continues to develop "well into the third decade of life." 2-ER-221. There is no

actual analysis showing that a 20-year-old has significantly less impulse control than a 21-year-old.

The State's explanations simply do not justify singling out 18-to-20-year-olds due to their age. As a factual matter, FBI statistics indicate that in 2019, individuals in the 18, 19, and 20-year-old age brackets accounted for a marginally *smaller* share of violent crime arrests nationwide than arrestees in the 21-year-old bracket.[7] The evidence is even weaker when it comes to mass shootings: According to multiple studies, the average age of mass shooters over the past approximately two decades was approximately 33 years, 12-ER-2259, 12-ER-2431. And according to a study by the U.S. Secret Service, the average age of school shooters between 2008 and 2018 was 15 years, 14-ER-2801. Thus, even on its own terms, the State's reasoning does not support differentiating 18-to-20-year-olds from individuals in neighboring age groups.

More importantly, even if it were true that 18-to-20-year-olds disproportionately contributed to gun violence when compared to their neighboring

[7] The 18-, 19-, and 20-year-old brackets accounted for 3%, 3%, and 2.9% of violent crime arrests, respectively. FBI, *Crime in the United States 2019*, Table 38: Arrests by Age, https://bit.ly/3logBfv. The 21-year-old bracket accounts for 3.1%. *Id.* Nor were the incidences of arrest higher *proportionally*, for these groups: census data estimates that in 2019, the 18, 19, 20, and 21-year-old age brackets each contained roughly the same number of individuals. *See* U.S. Census Bureau, *Annual Estimates of the Resident Population by Single Year of Age and Sex for the United States: April 1, 2010 to July 1, 2019*, https://bit.ly/3krgpL7 (18: 4,255,827; 19: 4,330,439; 20: 4,269,683; 21: 4,278,323).

age groups, that alone could not be sufficient legal reason to block *the entire population* of 18-to-20-year-olds from exercising their Second Amendment rights. Only a minuscule fraction of 18-to-20-year-olds engage in criminal violence. FBI and Census Bureau data report that only 1/4 of 1% of 18-to-20-year-olds were arrested for violent crimes in 2019.[8] Section 27510 thus strips *all* 18-to-20-year-olds of their Second Amendment rights because of the sins of a very, very few. Such a result would be unthinkable in the context of any other constitutional right. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975) ("deeply etched in our law [is the theory that] a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand") (emphasis added); *Hodgson v. Minnesota*, 497 U.S. 417, 446-47 (1990) (" 'The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition.' "). It can be no more permissible under the Second Amendment. *McDonald*, 561 U.S. at 780.

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[8] FBI statistics record 32,119 arrests in 2019 of individuals aged 18 to 20 for violent crimes. *See* FBI, *Crime in the United States 2019*, Table 38: Arrests by Age, https://bit.ly/3logBfv. 2019 census statistics estimate that there are 12,855,949 individuals aged 18 to 20 in the United States. *See* U.S. Census Bureau, *Annual Estimates of the Resident Population*, *supra*, https://bit.ly/3krgpL7. 32,119 / 12,855,949 = .0025, or .25%.

Indeed, if that reasoning were sound, then the government could disarm other demographic groups simply because some number of that cohort commits crimes with handguns at a higher rate than the general population. The most obvious examples might be differentially higher gun-violence rates by males or by the poor. Could these entire groups therefore be disarmed? To ask the question is to answer it. *See, e.g.*, *Craig v. Boren*, 429 U.S. 190, 191, 201–02 (1976) (statistics showing that 18-to-20-year-old men were over ten times more likely than their female counterparts to be arrested for "alcohol-related driving offenses" "hardly can form the basis for employment of a gender line as a classifying device").

In any event, the State's presentation below focused on only one side of the equation: the (purported) threat presented by 18-to-20-year-olds. The State offered no evidence that Section 27510 will meaningfully mitigate that threat—and that is the proposition the State must support. *See Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993) (in analogous commercial speech context, government's "burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a [challenged restriction] must demonstrate that the harms it recites are real *and that its restriction will in fact alleviate them to a material degree*."). Against this silence, Appellants submitted a comprehensive study of social science research that found *no reliable evidence* that age-based restrictions on the possession or

purchase of firearms reduce crime rates, 10-ER-1851, and the district court made no finding to the contrary, 1-ER-15–16 (Opinion at 14–15).

Instead, the district court simply accepted the State's assertions that its public safety objectives would be furthered by "ensuring that Young Adults with access to certain firearms have additional safety training" and that semi-automatic centerfire rifles "remain in the hands of those with proper training." 1-ER-15 (Opinion at 14). Despite the district court's ipse dixit that "it remains commonly understood that Young Adults may require additional safeguards to ensure proper training and maintenance of firearms," 1-ER-16 (Opinion at 15), these arguments do not withstand intermediate scrutiny for four reasons.

First, for a significant portion of long guns (namely, semiautomatic centerfire rifles), the State does not merely limit possession "to those with proper training": it prevents *all* 18-to-20-year-olds from acquiring them (except from a parent or a legal guardian, who again remain subject to straw-purchase restrictions).

Second, for the portion of long guns that remain available to 18-to-20-year-olds, there is at best a loose fit between the State's ultimate objective of reducing gun violence and its intermediate mechanism of ensuring that those with firearms have proper training: insufficient training generally contributes to *accidents*, not to the violent crimes paraded to support the passage of California's constellation of age-based laws. The State's cognitive evidence concerning 18-to-20-year-olds'

impulse control—which evidently makes them more prone to indulge in violence—offers no support for the proposition that adults in this age group require an extra measure of training to grasp the fundamentals of firearm safety. (If anything, the plasticity of their brains should make them quicker studies.)

Third, Section 27510 does not meaningfully *advance* the State's objective of ensuring that individuals who possess firearms receive proper training because individuals in every age group are already required to obtain a Firearm Safety Certificate before acquiring *any* firearm. The Hunter's Education Course required of 18-to-20-year-olds does not add anything of substance to the training others must complete, and in fact, it is possible to pass the final exam of a Hunter's Education Course with a failing score on the (duplicative) firearm safety elements. 13-ER-2483–84.

Finally, the lower court's analysis assumes that Section 27510 will succeed in restricting access to guns by those who jeopardize public safety. The same dynamic that explains (at least in part) why purchase restrictions do not decrease crime rates is likely to thwart the State's training objective: individuals bent on misusing firearms remain able to obtain them through unlawful or unregulated means. U.S. Bureau of Justice Statistics surveys of state and federal prisoners who possessed a firearm during the offense for which they are serving time consistently reveal that only a small portion—approximately 10% in the most recent survey—obtained their

firearm from a retail source. 12-ER-2257–58. Retail restrictions thus do not present a meaningful barrier; to the contrary, they may drive the very individuals the law stereotypes as volatile and irrational into underground markets frequented by criminals, where they will not be required to present even a Firearm Safety Certificate.

ii. Even if the challenged limits on 18-to-20-year-old citizens' right to acquire firearms arms *could* be shown likely to marginally increase public safety (and they cannot), that would still not end the matter, because any such public-safety *benefits* would need to be weighed against the public-safety *costs* of preventing these law-abiding adults from engaging in effective self-defense. And those costs are substantial. Although the number of defensive gun uses is difficult to measure, the leading study on the issue, the National Self-Defense Survey, "indicate[s] that each year in the U.S. there are about 2.2 to 2.5 million [defensive uses of guns] of all types by civilians against humans." Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense With a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 164 (1995). "At least 19 other surveys have resulted in [similar] estimated numbers of defensive gun uses." NATIONAL RESEARCH COUNCIL, *Firearms and Violence* 103 (2005). What is more, "[a]lmost all national survey estimates indicate that defensive gun uses by victims are at least as common as offensive uses by criminals." INSTITUTE OF MEDICINE AND NATIONAL RESEARCH

COUNCIL, PRIORITIES FOR RESEARCH TO REDUCE THE THREAT OF FIREARM-RELATED VIOLENCE 15 (2013), http://goo.gl/oO6oRp (citation omitted). The public-safety costs of hindering the ability of law-abiding 18-to-20-year-olds to engage in these acts of self-defense are difficult to overstate. *See, e.g.*, 14-ER-2686 (18-20-year-olds are disproportionately victimized by violent crime).

The continued, limited availability of a few narrow types of long guns through Section 27510(b)(1)'s hunting exception does little to stem the damage. As noted above, the firearms that 18-to-20-year-olds may continue to purchase by obtaining a hunting license are limited to three types: (1) single-shot rifles, (2) shotguns, and (3) semi-automatic "rimfire" rifles. Most of these leftover types of firearms are uniquely ill-suited to personal self-defense. Rimfire rifles—generally, low-powered ".22s"—have "poor stopping power" and are thus "not recommended" for self-defense. STEIER, GUNS 101, *supra*, at p. 13; *see also, e.g.*, BRAD FITZPATRICK, SHOOTER'S BIBLE GUIDE TO CONCEALED CARRY 33 (2013) (".22s are great practice guns, fun, and economical, but they are largely regarded as too small for self-defense.").

The self-defense shortcomings of single-shot firearms are obvious: criminals are *not* likely to confine themselves to single-shot firearms, so while a victim is forced to spend several precious seconds reloading after each shot, his assailant will be able to continue to press the attack. The problem is further exacerbated if—as is commonly the case—the victim is facing multiple attackers. *See* BUREAU OF JUSTICE

STATISTICS, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2008 STATISTICAL TABLES tbl.37 (2010), https://bit.ly/391OteT (17.4% of all violent crimes committed in 2008 involved multiple offenders, and nearly 250,000 incidents involved four or more offenders). As for shotguns, while many Americans use these firearms for self-defense, they suffer from several well-known weaknesses as self-defense firearms. *See, e.g.*, Jeremy Stafford, *Pros and Cons of a Home-Defense Pump Shotgun*, GUNS & AMMO (Mar. 20, 2018), https://bit.ly/3336cic; Richard Douglas, *The Complete Guide to Home Self Defense Guns: Our Top 5*, The National Interest (Oct. 13, 2019), https://bit.ly/2IKZG8X. If the Supreme Court's decision in *Heller* stands for anything, it is surely that the Government may not *compel* an entire class of law-abiding citizens to choose this particular type of firearm for self-protection—or none at all. *See* 554 U.S. at 629 ("It is no answer to say . . . that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.,* long guns) is allowed. . . . Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.").

Any realistic appraisal of existing social-scientific data thus leads inexorably to the conclusion that the challenged ban cannot be shown to benefit the public safety—but it may well harm it.

iii. Finally, even if Section 27510 *does* advance public safety, it burdens far more constitutionally protected conduct than necessary in the process. Even under intermediate scrutiny, a challenged restriction cannot burden substantially more constitutionally protected conduct than necessary to achieve the State's interest. *McCullen v. Coakley*, 573 U.S. 464, 495 (2014). In *McCullen*, for example, the U.S. Supreme Court struck down a Massachusetts "buffer zone" law forbidding certain types of speech outside of abortion clinics, reasoning that the State had failed to show that measures substantially less restrictive than such an extreme prophylactic measure were not just as "capable of serving its interests." *Id.* at 494. Massachusetts' law, the Court noted, was "truly exceptional," and the State was able to "identify no other [ ] law" that was comparable, raising the "concern that the Commonwealth has too readily forgone options that could serve its interests just as well." *Id.* at 490. And even in the context of intermediate scrutiny, the Court concluded, the State must "show[ ] that it seriously undertook to address the problem with less intrusive tools readily available to it," or at the least, "that it considered different methods that other jurisdictions have found effective." *Id.* at 494. This requirement, the Court explained, "prevents the government from too readily sacrificing speech for efficiency." *Id.* (cleaned up).

California's age ban flunks intermediate scrutiny under the very same reasoning. As in *McCullen*, there are far less-restrictive means available for

achieving the State's professed goals. No one disputes that California has an interest in keeping firearms out of the hands who genuinely pose a danger, but it is *already* against the law for convicted felons or the mentally infirm, for example, to possess firearms, and California could have focused on more vigorously enforcing those limits rather than imposing an expansive ban on all law-abiding 18-to-20-year-olds. Moreover, while Plaintiffs doubt the efficacy of the hunter training course for the reasons discussed above, at the very least California could have maintained the far less burdensome restriction of conditioning the sale of *all* long guns on completion of that course, rather than banning the transfer of most of them outright.

As in *McCullen*, the unconstitutional over-inclusiveness of the challenged California restriction is demonstrated by the fact that it "is truly exceptional." 573 U.S. at 490. The vast majority of States have concluded that an intrusive, blanket, age-based ban on acquiring most firearms is unnecessary to protect public safety: aside from California, only Florida, Washington, and Hawaii impose such a limit.[9] That casts serious doubt on the assertion that Section 27510 is the least-intrusive manner of serving the State's interest, for California cannot credibly claim that only it and these three outlier States have happened upon the single, necessary means of

[9] *See* Giffords Law Center, *Minimum Age to Purchase & Possess*, https://bit.ly/35QBkTX. Giffords includes Illinois as having a 21-year minimum age requirement, but Illinois's requirement is subject to a broad exception for 18-to-20-year-olds who have parental consent. 430 ILL COMP. STAT. 65/4(a)(2)(ii).

achieving this end. "It would be hard to persuasively say that the government has an interest sufficiently weighty to justify a regulation that infringes constitutionally guaranteed Second Amendment rights if the Federal Government and the states have not traditionally imposed—and even now do not commonly impose—such a regulation." *Heller II*, 670 F.3d at 1294 (Kavanaugh, J., dissenting).

II. Plaintiffs will suffer irreparable harm absent preliminary injunctive relief.

The conclusion that Plaintiffs have a reasonable probability of success on their constitutional claims compels the conclusion that Plaintiffs face irreparable injury in the absence of injunctive relief. "It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)); *see also* 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2948.1 (3d ed. 2020) ("When an alleged deprivation of a constitutional right is involved, such as the right to free speech or freedom of religion, most courts hold that no further showing of irreparable injury is necessary."). The Ninth Circuit has recognized this rule in the context of a variety of constitutional rights. *See, e.g.*, *Melendres*, 695 F.3d at 1002 (Fourth Amendment); *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997) (Equal Protection). Rights under the Second Amendment should be

treated no differently. *McDonald*, 561 U.S. at 780; *Ezell v. City of Chicago*, 651 F.3d 684, 700 (7th Cir. 2011).

The district court's principal reason for concluding that Plaintiffs were not likely to suffer irreparable harm was its earlier determination that Section 27510's exceptions—especially the hunting license exception—left Plaintiffs with an adequate ability to acquire firearms. 1-ER-18 (Opinion at 17). That conclusion was wrong for the reasons discussed above, and it is no more persuasive this time around. The court also gave weight to the fact that Plaintiffs "waited two months after filing the [operative complaint]" to seek preliminary injunctive relief. 1-ER-18 (Opinion at 17). But taking two months to prepare an extensive preliminary injunction filing hardly constitutes the type of "long delay" that "implies a lack of urgency and irreparable harm." *Oakland Tribune, Inc. v. Chronicle Pub. Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985); *cf.* Brief of Appellee the Hearst Corp., *Oakland Tribune Inc.*, No. 84-2535, 1984 WL 566528 (9th Cir. Filed Nov. 2, 1984) (delay of 9–10 months); *Lydo Enterprises, Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984) (delay of five years). And in any event, "delay is but a single factor to consider in evaluating irreparable injury," *Arc of California v. Douglas*, 757 F.3d 975, 990 (9th Cir. 2014)—a factor that, even if it conceivably applied, would be more than outweighed by the significant, ongoing harm Section 27510 inflicts on Plaintiffs' fundamental constitutional rights.

III. The other equitable factors favor issuance of a preliminary injunction.

The public interest and balance of equities likewise favor Plaintiffs. "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres*, 695 F.3d at 1002 (quotation marks omitted); *see also Wrenn v. District of Columbia*, 864 F.3d 650, 667. On the other side of the scale, Defendants will suffer little harm if Section 27510 is enjoined. As explained above, there is no reason to believe that the challenged age ban does anything to advance public safety; and in any event "the government suffers no harm from an injunction that merely ends unconstitutional practices." *Doe v. Kelly*, 878 F.3d 710, 718 (9th Cir. 2017) (quotation marks omitted).

CONCLUSION

For the foregoing reasons, this Court should reverse the District Court's denial of a preliminary injunction.

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Respectfully submitted,

s/ David H. Thompson
David H. Thompson
Peter A. Patterson
John D. Ohlendorf
Haley N. Proctor
COOPER & KIRK, PLLC
1523 New Hampshire Ave., NW
Washington, D.C. 20036
(202) 220-9600
(202) 220-9601 (fax)
dthompson@cooperkirk.com

John W. Dillon
DILLON LAW GROUP, APC
2647 Gateway Road
Suite 105, No. 255
Carlsbad, California 92009
(760) 642-7150
jdillon@dillonlawgp.com

Attorneys for Appellants

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  - ○ a party or parties are filing a single brief in response to a longer joint brief.
- ○ complies with the length limit designated by court order dated ________ .
- ○ is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/David H. Thompson **Date** Dec 4, 2020

(use "s/[typed name]" to sign electronically-filed documents)

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STATUTORY ADDENDUM –

PERTINENT CONSTITUTIONAL

PROVISIONS AND STATUTES

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U.S. CONST. art. I, § 8.

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

U.S. CONST. amend. II.

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

18 U.S.C. § 922. Unlawful acts.

(a) It shall be unlawful--

(1) for any person—

(A) except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce; or

. . .

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

(1) any firearm or ammunition to any individual who the licensee knows or has reasonable cause to believe is less than eighteen years of age, and, if the firearm, or ammunition is other than a shotgun or rifle, or ammunition for a shotgun or rifle, to any individual who the licensee knows or has reasonable cause to believe is less than twenty-one years of age;

CAL. PENAL CODE § 26500. License required to sell, lease, or transfer firearms.

(a) No person shall sell, lease, or transfer firearms unless the person has been issued a license pursuant to Article 1 (commencing with Section 26700) and Article 2 (commencing with Section 26800) of Chapter 2.

(b) Any person violating this article is guilty of a misdemeanor.

CAL. PENAL CODE § 26840. Delivery of firearm; valid firearm safety certificate or unexpired handgun safety certificate requirement.

(a) A dealer shall not deliver a firearm unless the person receiving the firearm presents to the dealer a valid firearm safety certificate, or, in the case of a handgun, an unexpired handgun safety certificate. The firearms dealer shall retain a photocopy of the firearm safety certificate as proof of compliance with this requirement.

(b) This section shall become operative on January 1, 2015.

CAL. PENAL CODE § 27500. Sale or delivery of firearms to persons in prohibited classes.

(a) No person, corporation, or firm shall knowingly sell, supply, deliver, or give possession or control of a firearm to any person within any of the classes prohibited by Chapter 2 (commencing with Section 29800) or Chapter 3 (commencing with Section 29900) of Division 9.

(b) No person, corporation, or dealer shall sell, supply, deliver, or give possession or control of a firearm to anyone whom the person, corporation, or dealer has cause to believe is within any of the classes prohibited by Chapter 2 (commencing with Section 29800) or Chapter 3 (commencing with Section 29900) of Division 9 of this title, or Section 8100 or 8103 of the Welfare and Institutions Code.

CAL. PENAL CODE § 27505. Sale, loan, or transfer of firearm to individual under 21 years of age prohibited; exceptions.

(a) No person, corporation, or firm shall sell, loan, or transfer a firearm to a minor, nor sell a handgun to an individual under 21 years of age.

(b) Subdivision (a) shall not apply to or affect the following circumstances:

(1) The sale of a handgun, if the handgun is an antique firearm and the sale is to a person at least 18 years of age.

(2) The transfer or loan of a firearm, other than a handgun, to a minor by the minor's parent or legal guardian.

(3) The transfer or loan of a firearm, other than a handgun, to a minor by a grandparent who is not the legal guardian of the minor, if the transfer is done with the express permission of the minor's parent or legal guardian.

(4) The loan of a firearm, other than a handgun, to a minor, with the express permission of the minor's parent or legal guardian, if the loan does not exceed 30 days in duration and is for a lawful purpose.

(5) The loan of a handgun to a minor by the minor's parent or legal guardian, if both of the following requirements are satisfied:

(A) The minor is being loaned the firearm for the purposes of engaging in a lawful, recreational sport, including, but not limited to, competitive shooting, or agricultural, ranching, or hunting activity, or a motion picture, television, or video production, or entertainment or theatrical event, the nature of which involves the use of a firearm.

(B) The duration of the loan does not exceed the amount of time that is reasonably necessary to engage in the lawful, recreational sport, including, but not limited to, competitive shooting, or agricultural, ranching, or hunting activity, or a motion picture, television, or video production, or entertainment or theatrical event, the nature of which involves the use of a firearm.

(6) The loan of a handgun to a minor by a person who is not the minor's parent or legal guardian, if all of the following requirements are satisfied:

(A) The minor is accompanied by the minor's parent or legal guardian when the loan is made, or the minor has the written consent of the minor's parent or legal guardian, which is presented at the time of the loan, or earlier.

(B) The minor is being loaned the firearm for the purpose of engaging in a lawful, recreational sport, including, but not limited to, competitive shooting, or agricultural, ranching, or hunting activity, or a motion picture, television, or video production, or entertainment or theatrical event, the nature of which involves the use of a firearm.

(C) The duration of the loan does not exceed the amount of time that is reasonably necessary to engage in the lawful, recreational sport, including, but not limited to, competitive shooting, or agricultural, ranching, or hunting activity, or a motion picture, television, or video production, or entertainment or theatrical event, the nature of which involves the use of a firearm.

(D) The duration of the loan does not, in any event, exceed 10 days.

CAL. PENAL CODE § 27510. Sale, supply, delivery, or giving possession of firearm by licensed person to individual under 21 years of age prohibited; exceptions.

(a) A person licensed under Sections 26700 to 26915, inclusive, shall not sell, supply, deliver, or give possession or control of a firearm to any person who is under 21 years of age.

(b)

(1) Subdivision (a) does not apply to or affect the sale, supplying, delivery, or giving possession or control of a firearm that is not a handgun or a semiautomatic centerfire rifle to a person 18 years of age or older who possesses a valid, unexpired hunting license issued by the Department of Fish and Wildlife.

(2) Subdivision (a) does not apply to or affect the sale, supplying, delivery, or giving possession or control of a firearm that is not a handgun or a semiautomatic centerfire rifle to a person who is 18 years of age or older and provides proper identification of being an honorably discharged member of the United States Armed Forces, the National Guard, the Air National Guard, or the active reserve components of the United States. For purposes of this subparagraph, proper identification includes an Armed Forces Identification Card or other written documentation certifying that the individual is an honorably discharged member

(3) Subdivision (a) does not apply to or affect the sale, supplying, delivery, or giving possession or control of a firearm that is not a handgun to any of the following persons who are 18 years of age or older:

(A) An active peace officer, as described in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, who is authorized to carry a firearm in the course and scope of employment.

(B) An active federal officer or law enforcement agent who is authorized to carry a firearm in the course and scope of employment.

(C) A reserve peace officer, as defined in Section 832.6, who is authorized to carry a firearm in the course and scope of employment as a reserve peace officer.

(D) A person who provides proper identification of active membership in the United States Armed Forces, the National Guard, the Air National Guard, or active reserve components of the United States. For purposes of this subparagraph, proper identification includes an Armed Forces Identification Card or other written documentation certifying that the individual is an active member.

CAL. PENAL CODE § 27545. Sale, loan, or transfer of firearm; completion through licensed dealer.

Where neither party to the transaction holds a dealer's license issued pursuant to Sections 26700 to 26915, inclusive, the parties to the transaction shall complete the sale, loan, or transfer of that firearm through a licensed firearms dealer pursuant to Chapter 5 (commencing with Section 28050).

CAL. PENAL CODE § 27945. Transfer or loan of firearm to minor; application of Section 27545.

Section 27545 does not apply to or affect the following circumstances:

(a) The transfer or loan of a firearm, other than a handgun, to a minor by the minor's parent or legal guardian.

(b) The transfer or loan of a firearm, other than a handgun, to a minor by a grandparent who is not the legal guardian of the minor, if the transfer is done with the express permission of the minor's parent or legal guardian.

(c) The loan of a firearm, other than a handgun, to a minor, with the express permission of the minor's parent or legal guardian, if the loan does not exceed 30 days in duration and is for a lawful purpose.

(d) The loan of a handgun to a minor by the minor's parent or legal guardian, if both of the following requirements are satisfied:

> (1) The minor is being loaned the firearm for the purposes of engaging in a lawful, recreational sport, including, but not limited to, competitive shooting, or agricultural, ranching, or hunting activity, or a motion picture, television, or video production, or entertainment or theatrical event, the nature of which involves the use of a firearm.
>
> (2) The duration of the loan does not exceed the amount of time that is reasonably necessary to engage in the lawful, recreational sport, including, but not limited to, competitive shooting, or agricultural, ranching, or hunting activity, or a motion picture, television, or video production, or entertainment or theatrical event, the nature of which involves the use of a firearm.

(e) The loan of a handgun to a minor by a person who is not the minor's parent or legal guardian, if all of the following requirements are satisfied:

> (1) The minor is accompanied by the minor's parent or legal guardian when the loan is made, or the minor has the written consent of the minor's parent or legal guardian, which is presented at the time of the loan, or earlier.
>
> (2) The minor is being loaned the firearm for the purpose of engaging in a lawful, recreational sport, including, but not limited to, competitive

shooting, or agricultural, ranching, or hunting activity, or a motion picture, television, or video production, or entertainment or theatrical event, the nature of which involves the use of a firearm.

(3) The duration of the loan does not exceed the amount of time that is reasonably necessary to engage in the lawful, recreational sport, including, but not limited to, competitive shooting, or agricultural, ranching, or hunting activity, or a motion picture, television, or video production, or entertainment or theatrical event, the nature of which involves the use of a firearm.

(4) The duration of the loan does not, in any event, exceed 10 days.

CAL. PENAL CODE § 28050. Completion of sale, loan, or transfer of firearm through licensed person; compliance with Section 27545.

(a) A person shall complete any sale, loan, or transfer of a firearm through a person licensed pursuant to Sections 26700 to 26915, inclusive, in accordance with this chapter in order to comply with Section 27545.

(b) The seller or transferor or the person loaning the firearm shall deliver the firearm to the dealer who shall retain possession of that firearm.

(c) The dealer shall then deliver the firearm to the purchaser or transferee or the person being loaned the firearm, if it is not prohibited, in accordance with Section 27540.

(d) If the dealer cannot legally deliver the firearm to the purchaser or transferee or the person being loaned the firearm, the dealer shall forthwith, without waiting for the conclusion of the waiting period described in Sections 26815 and 27540, return the firearm to the transferor or seller or the person loaning the firearm. The dealer shall not return the firearm to the seller or transferor or the person loaning the firearm when to do so would constitute a violation of Section 27500, 27505, 27515, 27520, 27525, 27530, or 27535. If the dealer cannot legally return the firearm to the transferor or seller or the person loaning the firearm, then the dealer shall forthwith deliver the firearm to the sheriff of the county or the chief of police or other head of a municipal police department of any city or city and county, who shall then dispose of the firearm in the manner provided by Sections 18000, 18005, and 34000.

CAL. PENAL CODE § 29610. Minors; possession of pistols, revolvers, or concealable firearms prohibited.

A minor shall not possess a pistol, revolver, or other firearm capable of being concealed upon the person.

CAL. PENAL CODE § 29800. Specified convictions or outstanding warrants; narcotic addiction; restriction on firearm possession; punishment.

(a)

(1) Any person who has been convicted of, or has an outstanding warrant for, a felony under the laws of the United States, the State of California, or any other state, government, or country, or of an offense enumerated in subdivision (a), (b), or (d) of Section 23515, or who is addicted to the use of any narcotic drug, and who owns, purchases, receives, or has in possession or under custody or control any firearm is guilty of a felony.

(2) Any person who has two or more convictions for violating paragraph (2) of subdivision (a) of Section 417 and who owns, purchases, receives, or has in possession or under custody or control any firearm is guilty of a felony.

(b) Notwithstanding subdivision (a), any person who has been convicted of a felony or of an offense enumerated in Section 23515, when that conviction results from certification by the juvenile court for prosecution as an adult in an adult court under Section 707 of the Welfare and Institutions Code, and who owns or has in possession or under custody or control any firearm is guilty of a felony.

(c) Subdivision (a) shall not apply to a person who has been convicted of a felony under the laws of the United States unless either of the following criteria is satisfied:

(1) Conviction of a like offense under California law can only result in imposition of felony punishment.

(2) The defendant was sentenced to a federal correctional facility for more than 30 days, or received a fine of more than one thousand dollars ($1,000), or received both punishments.

CAL. PENAL CODE § 29805. Specified convictions or outstanding warrants; restriction on firearm possession; punishment.

(a) Except as provided in Section 29855, subdivision (a) of Section 29800, or subdivision (b), any person who has been convicted of, or has an outstanding warrant for, a misdemeanor violation of Section 71, 76, 136.1, 136.5, or 140, subdivision (d) of Section 148, subdivision (f) of Section 148.5, Section 171b, paragraph (1) of subdivision (a) of Section 171c, Section 171d, 186.28, 240, 241, 242, 243, 243.4, 244.5, 245, 245.5, 246.3, 247, 273.5, 273.6, 417, 417.6, 422, 422.6, 626.9, 646.9, 830.95, 17500, 17510, 25300, 25800, 30315, or 32625, subdivision (b) or (d) of Section 26100, or Section 27510, or Section 8100, 8101, or 8103 of the Welfare and Institutions Code, any firearm-related offense pursuant to Sections 871.5 and 1001.5 of the Welfare and Institutions Code, Section 487 if the property taken was a firearm, or of the conduct punished in subdivision (c) of Section 27590, and who, within 10 years of the conviction, or if the individual has an outstanding warrant, owns, purchases, receives, or has in possession or under custody or control, any firearm is guilty of a public offense, punishable by imprisonment in a county jail not exceeding one year or in the state prison, by a fine not exceeding one thousand dollars ($1,000), or by both that imprisonment and fine.

(b) Any person who is convicted, on or after January 1, 2019, of a misdemeanor violation of Section 273.5, and who subsequently owns, purchases, receives, or has in possession or under custody or control, any firearm is guilty of a public offense, punishable by imprisonment in a county jail not exceeding one year or in the state prison, by a fine not exceeding one thousand dollars ($1,000), or by both that imprisonment and fine.

(c) Except as provided in Section 29855, any person who is convicted on or after January 1, 2020, of a misdemeanor violation of Section 25100, 25135, or 25200, and who, within 10 years of the conviction owns, purchases, receives, or has in possession or under custody or control, any firearm is guilty of a public offense, punishable by imprisonment in a county jail not exceeding one year or in the state prison, by a fine not exceeding one thousand dollars ($1,000), or by both that fine and imprisonment.

(d) The court, on forms prescribed by the Department of Justice, shall notify the department of persons subject to this section. However, the prohibition in this section may be reduced, eliminated, or conditioned as provided in Section 29855 or 29860.

CAL. PENAL CODE § 31615. Prohibition on purchase or receipt of, or sale, delivery, loan, or transfer of a firearm to a person lacking a valid safety certificate; penalties.

(a) A person shall not do either of the following:

(1) Purchase or receive any firearm, except an antique firearm, without a valid firearm safety certificate, except that in the case of a handgun, an unexpired handgun safety certificate may be used.

(2) Sell, deliver, loan, or transfer any firearm, except an antique firearm, to any person who does not have a valid firearm safety certificate, except that in the case of a handgun, an unexpired handgun safety certificate may be used.

(b) Any person who violates subdivision (a) is guilty of a misdemeanor.

(c) The provisions of this section are cumulative, and shall not be construed as restricting the application of any other law. However, an act or omission punishable in different ways by different provisions of this code shall not be punished under more than one provision.

(d) This section shall become operative on January 1, 2015.

CAL. PENAL CODE § 31640. Written test; contents; warning.

(a) The department shall develop a written objective test, in English and in Spanish, and prescribe its content, form, and manner, to be administered by an instructor certified by the department.

(b) If the person taking the test is unable to read, the test shall be administered orally. If the person taking the test is unable to read English or Spanish, the test may be administered orally by a translator.

(c) The test shall cover, but not be limited to, all of the following:

(1) The laws applicable to carrying and handling firearms, particularly handguns.

(2) The responsibilities of ownership of firearms, particularly handguns.

(3) Current law as it relates to the private sale and transfer of firearms.

(4) Current law as it relates to the permissible use of lethal force.

(5) What constitutes safe firearm storage.

(6) Issues associated with bringing a firearm into the home, including suicide.

(7) Prevention strategies to address issues associated with bringing firearms into the home.

(d) Commencing January 1, 2019, the test shall require the applicant to be provided with, and acknowledge receipt of, the following warning information:

(1) "Firearms must be handled responsibly and securely stored to prevent access by children and other unauthorized users. California has strict laws pertaining to firearms and you can be fined or imprisoned if you fail to comply with them. Visit the website of the California Attorney General at https://oag.ca.gov/firearms for information on firearm laws applicable to you and how you can comply."

(2) "If you decide to sell or give your firearm to someone, you must generally complete a 'Dealer Record of Sale (DROS)' form and conduct the transfer through a licensed firearms dealer. Remember, it is generally a crime to transfer a firearm without first filling out this form. If the police recover a firearm that was involved in a crime, the firearm's previous owner may be prosecuted if the previous owner did not fill out the DROS form. Please make sure you go to a licensed firearms dealer and fill out that form if you want to sell or give away your firearm."

(3) "If you or someone you know is contemplating suicide, please call the national suicide prevention lifeline at 1-800-273-TALK (8255)."

(e)

(1) The department shall update test materials related to this article at least once every five years.

(2) The department shall update the internet website referenced in subdivision (d) regularly to reflect current laws and regulations.

(f) A dealer licensed pursuant to Sections 26700 to 26915, inclusive, or an employee, or a managing officer or partner certified as an instructor pursuant to this article, shall designate a separate room or partitioned area for a person to take the objective test, and maintain adequate supervision to ensure that no acts of collusion occur while the objective test is being administered.

(g) This section shall become operative on June 1, 2020.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 4, 2020. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: December 4, 2020

s/ David H. Thompson
David H. Thompson
Attorney for Plaintiffs-Appellants