

No. 20-56174

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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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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*,

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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)

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**PLAINTIFFS-APPELLANTS' REPLY BRIEF**

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## INTRODUCTION

In *District of Columbia v. Heller*, the Supreme Court held that a ban that prevents law-abiding citizens from accessing “an entire class of ‘arms’ that is overwhelmingly chosen by American society for [self-defense]” is palpably unconstitutional “[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights.” 554 U.S. 570, 628–29 (2008). And in *Duncan v. Becerra*, this Court likewise held 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” and is unconstitutional. 970 F.3d 1133, 1157 (9th Cir. 2020). The restrictions challenged here amount to just such a law. Under CAL. PENAL CODE § 27510, an ordinary, law-abiding 18-to-20-year-old adult *cannot purchase*, from *any source*, any semi-automatic centerfire rifle—an entire class of arms, commonly used for self-defense. The Second Amendment takes such a blanket restriction on common arms “off the table.” *Heller*, 554 U.S. 636.

Accordingly, California can defend the challenged restrictions only by showing that the 18-to-20-year-olds those restrictions target are not protected by the Second Amendment. It completely fails to do so. The historical record conclusively shows that 18-to-20-year-olds were understood to be part of the militia at the Founding, and since the Second Amendment was adopted for the express purpose of

“prevent[ing] elimination of the militia,” *id.* at 599, that means that 18-to-20-year-olds necessarily must fall within the Amendment’s protective scope.

18-to-20-year-old adults thus have a Second Amendment right to purchase and acquire firearms, and Section 27510’s flat ban prohibiting them from purchasing an entire class of common firearms must, at a minimum, satisfy strict scrutiny. It cannot satisfy even intermediate scrutiny.

The district court erred in failing to preliminarily enjoin California’s unconstitutional age-based restrictions, and this Court should reverse.

### **ARGUMENT**

Plaintiffs have satisfied the traditional factors governing the grant of a preliminary injunction. *Roman v. Wolf*, 977 F.3d 935, 940 (9th Cir. 2020). Plaintiffs are likely to succeed under the “two-step inquiry” governing their Second Amendment claims, *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013): (I) text, history, and precedent all establish that 18-to-20-year-old adults have a Second Amendment right to acquire firearms; and (II) the challenged restrictions on that right fail any level of heightened constitutional scrutiny. Moreover (III), the remaining equitable factors favor preliminary injunctive relief. Finally, Appellees’ challenge to the Court’s Article III jurisdiction over three of the Plaintiffs fails because the remaining Plaintiffs indisputably have standing to raise the claims at issue.

**I. The Second Amendment protects the right of 18-to-20-year-olds to acquire firearms.**

California does not dispute that the long-guns the challenged restrictions bar 18-to-20-year-olds from purchasing are “arms” protected by the Second Amendment. 1-ER-7 (Opinion at 6). Nor does it dispute that the Second Amendment protects the right “to *acquire* [these] arms.” *Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017) (en banc) (emphasis added). Accordingly, Appellees stake their case on the proposition that “age-based restrictions” that prevent ordinary 18-to-20-year-olds from engaging in this constitutionally protected conduct are outside “the ambit of the Second Amendment.” Appellees’ Answering Br., Doc. 24 at 22 (Jan. 20, 2021) (“Appellees’ Br.”). That proposition is false.

The unadorned text of the Second Amendment—which protects the right of “the *people*,” without qualification, “to keep and bear Arms,” U.S. CONST. amend. II—is alone sufficient to defeat this proposition. California has *no response* to this argument. Indeed, although California’s brief cites the out-of-circuit decision in *NRA v. BATFE* so many times it does not even try to tally them all in its Table of Authorities, it does not quote or cite the Second Amendment *a single time*. Nor does the State offer *any response whatsoever* to *Heller*’s teaching that the right to keep and bear arms “belongs to all Americans” and cannot be limited to “an unspecified subset.” 554 U.S. at 580, 581.

One of California’s amici seeks to make a different use of *Heller*, suggesting that the Court’s reference to the Second Amendment “right of law-abiding, *responsible* citizens” establishes that minors “fall outside the core” of the Amendment. Br. of *Amici Curiae* Giffords Law Center *et al.*, Doc. 29 at 11 (Jan. 26, 2020) (“Giffords Amicus”). But *Heller*, by using the word “responsible,” plainly did not seek to set an age limit on the right to keep and bear arms. And even if it did, it does not even hint that 18-to-20-year-old *adults* would be on the wrong side of the constitutional line.

Founding-Era history confirms that 18-to-20-year-olds are fully protected by the Second Amendment. That follows from two propositions. First, at the time the Second Amendment was ratified, 18-to-20-year-olds were *uniformly understood* to be part of the “militia”—that is, the pool of “all able-bodied men” from whom the government had the authority to “organize the units that will make up an effective fighting force” (a force known as the “organized militia”). *Heller*, 554 U.S. at 596. As shown in our Opening Brief, when the Second Amendment was adopted *every State* considered 18-year-olds to be part of the unorganized militia, 8-ER-1403, and the federal government likewise adopted 18 years as the minimum age in a bill passed mere months after the Second Amendment’s ratification, 1 Stat. 271. California cannot dispute any of this evidence, and it does not try.

Second, whoever *else* it might protect, the Second Amendment at a bare minimum *must* protect all those who were members of the militia at the Founding. After all, “the purpose for which the right was codified” was “to prevent elimination of the militia,” *Heller*, 554 U.S. at 599—a purpose the Amendment would have utterly failed to serve if it did not even extend to all those who were members of the militia. Once again, California completely fails to engage with this argument.

The State argues that “Plaintiffs mistake the age for military service with the separate question of the age at which society can draw a line at the sale of firearms to minors,” and that we “cite no authority or historical records suggesting that the Founders . . . saw these questions as linked.” Appellees’ Br. 27. California’s demand for “historical records” showing that membership in the militia and Second Amendment protection were “linked” is difficult to fathom, given that *the text of the Second Amendment itself* expressly “links” them by announcing the preservation of the militia as “the reason th[e] right [to keep and bear arms] . . . was codified in a written Constitution.” *Heller*, 554 U.S. at 599. There is no more conclusive “authority . . . suggesting that the Founders . . . saw these questions as linked.” Appellees’ Br. 27.

Because the Second Amendment applies to 18-year-olds, it also necessarily protects them from being subjected to laws banning the sale of protected firearms to them. *Id.* That is so, first, as a logical matter: if the Second Amendment protects the

right to *acquire* firearms, and if the Amendment applies to 18-to-20-year-olds, then it obviously protects the right of 18-to-20-year-olds to acquire firearms. And as explained in our Opening Brief, historical sources also lead to the same conclusion. For the members of the Founding-Era militia, when called into service, were not *provided with* the arms they were to keep and bear. They were expected and obligated to *acquire those arms themselves*, from private sources. *See* 1 Stat. 271 (1792 Militia Act); *see also* 8-ER-1381–82 (state militia laws). The notion that membership in the militia and restrictions on “the sale of firearms” were not understood to be “linked” by the Founders, Appellees Br. 27, is again unsupportable.

One of California’s amici disputes this point, citing an exchange during the congressional debate over the 1792 Militia Act concerning who would furnish minors in the militia with arms. Br. of Amicus Curiae Everytown for Gun Safety, Doc. 30-1 at 15 (Jan. 26, 2021) (“Everytown Amicus”). *See* 2 ANNALS OF CONG. 1853–56 (1790) (Joseph Gales ed., 1834). There is no suggestion in the debate that 18-to-20-year-olds were barred in any State from acquiring arms, Everytown does not claim that any State imposed such a restriction, and in fact a proposal that the government furnish arms to minors was *voted down*, apparently because the House concluded that “[t]here are so few freemen in the United States who are not able to provide themselves with arms and accoutrements, that any provision on the part of

the United States is unnecessary and improper.” *Id.* at 1854 (remarks of Rep. Sherman).

Everytown also cites a handful of state militia laws that “*required* the parents of militia members who were minors to provide firearms to their children.” Everytown Amicus 17; *see* Add. to Everytown Amicus, Doc. 30-2 at ADD0345–47 (Jan. 26, 2021) (2 ANNALS OF CONGRESS (1834)). But of the seven States it identifies as having such laws, *only two*—out of the *fourteen* then-admitted States—had such a law at the time the Second Amendment was ratified. *Id.* And both of those States had required 18-to-20-year-olds to enroll in the militia for *decades* before directing their parents to furnish them arms. 8-ER-1418; 8-ER-1422. At any rate, *requiring* parents to acquire firearms for their children is a far cry from *preventing* those children from acquiring firearms themselves.

Appellees next argue that militia membership cannot entail Second Amendment protection because some “sources . . . during the founding era” suggest that “persons as young as 15 could be impressed into militia service.” Appellees’ Br. 28 n.4; *see also* Everytown Amicus 15. Wrong again. While there was some early variation in minimum ages, around the time of the Second Amendment’s ratification the States and Congress quickly coalesced around 18 as the standard. “At the time of the Second Amendment’s passage, or shortly thereafter, the minimum age for militia service in every state became eighteen.” *NRA v. BATFE* (“*NRA*”), 714 F.3d

334, 340–41 (5th Cir. 2013) (Jones, J., dissenting from denial of reh’g en banc). The historical evidence thus demonstrates the Founders’ constitutional judgment, contemporaneous with the Amendment’s ratification, that 18 years should be the lower limit on its protective scope. *See also Sentiments on a Peace Establishment* (May 2, 1783), *reprinted in* 26 THE WRITINGS OF GEORGE WASHINGTON 389 (John C. Fitzpatrick, ed. 1938).

Nor do Appellees make any more headway with their argument that “the age of majority” at the Founding “was 21.” Appellees’ Br. 26. As California *concedes* just two pages later—the Founders hewed to a variety of different age requirements “for different purposes.” *Id.* at 28 (quoting 1 BLACKSTONE COMMENTARIES \*463). And as the evidence surveyed above conclusively shows, the ability of a law-abiding adult to serve in the militia—and to “provide himself with a good musket or firelock” to use during militia service, 1 Stat. 271—was *not* limited by a 21-year minimum.

Unable to come up with any persuasive historical evidence of its own, California (like the district court) principally relies on the decisions of “other federal court[s].” Appellees’ Br. 26. But those decisions have authority in this Court only to the extent they are persuasive. And *McCraw*, *Hirschfeld*, *Powell*, and *Mitchell* (like the district court) all did little more than cite and reproduce the reasoning in *NRA*. *See Nat’l Rifle Ass’n of Am. v. McCraw*, 719 F.3d 338, 347 (5th Cir. 2013); *Mitchell v. Atkins*, 2020 WL 5106723, at \*4 (W.D. Wash. Aug. 31, 2020); *Hirschfeld v.*

*BATFE*, 417 F. Supp. 3d 747, 756 (W.D. Va. 2019); *Powell v. Tompkins*, 926 F. Supp. 2d 367, 386–89 (D. Mass. 2013), *aff’d on other grounds*, 783 F.3d 332 (1st Cir. 2015).

California’s argument from the authority of “every federal court decision to have considered the question” thus reduces to an argument from the authority of one decision: the Fifth Circuit’s decision in *NRA*. Our Opening Brief cataloged at length and in detail the serious historical and analytical errors that deprive that opinion of any persuasiveness, Opening Br. of Pls.-Appellants, Doc. 17 at 25–34 (Dec. 4, 2020) (“Opening Br.”); *see also NRA*, 714 F.3d at 336–44 (Jones, J., dissenting from denial of reh’g en banc), and California does not even try to rehabilitate *NRA*’s flawed reasoning.

Finally, Appellees argue that even if there is no Founding-Era support for the proposition that age-based restrictions *themselves* are constitutional, “a regulation can be deemed ‘longstanding’ even if it cannot boast a precise founding-era analogue.” Appellees’ Br. 26. The Supreme Court’s recent clarification that the value of post-ratification historical evidence is limited to “mere confirmation” of “the public understanding in 1791 of the right codified by the Second Amendment,” *Gamble v. United States*, 139 S. Ct. 1960, 1975–76 (2019), casts serious doubt on the notion that restrictions as historically unsupported as the ones challenged here could somehow be shown to be outside the Second Amendment’s scope based on

nothing more than the existence of similar “early twentieth century regulations.” Appellees’ Br. 27.

Amicus Everytown ups the ante on this argument, citing dicta from three out-of-circuit cases for the proposition that “the most relevant time period for purposes of historical analysis begins around 1868, when the Fourteenth Amendment was ratified and made the Second Amendment fully applicable to the States.” Everytown Amicus 6–7; *but see Gould v. Morgan*, 907 F.3d 659, 669 n.3 (1st Cir. 2018) (“It is not at all clear to us that the scope of the Second Amendment should be different when analyzing a federal law than when analyzing a state law.”). This Court has not adopted such an approach, and with good reason: it is flatly contrary to *McDonald*, which held that the Second Amendment “guarantee is fully binding on the States” and expressly rejected “the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version” of the Second Amendment as contrary to the settled rule that the federal government “and the States must be governed by a single, neutral principle.” *McDonald v. City of Chicago*, 561 U.S. 742, 785–86, 788 (2010) (plurality); *id.* at 805 (Thomas, J., concurring); *see also Ramos v. Louisiana*, 140 S. Ct. 1390, 1397 (2020) (“[I]ncorporated provisions of the Bill of Rights bear the same content when asserted against States as they do when asserted against the federal government.”); *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019).

In any event, both Appellees and the district court have *failed to identify* any “longstanding” regulations that might support the constitutionality of the present limits, apart from the smattering of late-nineteenth-century laws cited by *NRA*, 700 F.3d 185, 202–03 (5th Cir. 2012); *see also* Everytown Amicus 11–12. And those scattered, late-breaking restrictions are not up to the task for the reasons explained in our Opening Brief (at 34)—reasons Appellees decline to address.

Plaintiffs are thus likely to demonstrate that “the challenged law burdens conduct protected by the Second Amendment.” *Chovan*, 735 F.3d at 1136.

## **II. The challenged restrictions fail any level of heightened constitutional scrutiny.**

Plaintiffs are also likely to demonstrate that the challenged age-based restrictions fail “the appropriate level of scrutiny.” *Id.* at 1138.

### **A. Strict scrutiny applies.**

1. “A law that implicates the core of the Second Amendment right and severely burdens that right warrants strict scrutiny.” *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016). California acknowledges that the “core” of the Second Amendment, under this Court’s precedent, encompasses “the right to keep and carry [firearms] ‘in defense of hearth and home.’ ” Appellees’ Br. 30 (quoting *Heller*, 554 U.S. at 634). And since the restrictions challenged here limit 18-to-20-year-olds’ ability to *even obtain* firearms for use in home defense, they “implicate[ ] the core of the Second Amendment,” *Silvester*, 843 F.3d at 821, by the State’s own definition.

California responds that its limits “do[ ] not regulate possession or use,” Appellees’ Br. 9, but one can *possess or use* a firearm only if one *is able to acquire it in the first place*. See *Teixeira*, 873 F.3d at 677 (“[T]he core Second Amendment right to keep and bear arms for self-defense wouldn’t mean much without the ability to acquire arms.” (quotation marks omitted)).

The State also notes that the other federal decisions discussed above “applied intermediate scrutiny” to restrictions that “affect only the discrete category” of 18-to-20-year-olds. Appellees’ Br. 31 (quotation marks omitted). But those courts chose not to apply strict scrutiny based principally on the same flawed historical analysis discussed above. See *NRA*, 700 F.3d at 205–06; *Mitchell*, 2020 WL 5106723, at \*5. This Court ought not follow those decisions into error.

2. Strict scrutiny applies if the challenged restrictions burden 18-to-20-year-olds’ Second Amendment rights “in a substantial way.” *Duncan v. Becerra*, 970 F.3d 1133, 1152 (9th Cir. 2020). They unquestionably do.

That conclusion is most obvious with respect to semi-automatic centerfire rifles. Under Section 27510, this class of arms is unavailable for 18-to-20-year-olds to purchase *even if they comply* with the pointless hunter-safety-course requirement (discussed below). Where a law “bans an ‘entire class of arms’ that is commonly used for self-defense,” the substantial burden on the Second Amendment is clear. *Id.* at 1156 (quoting *Heller*, 554 U.S. at 628).

California protests that this restriction does “not substantially burden” Second Amendment rights because “[t]here are ample other options—popular options—available.” Appellees’ Br. 51, 52. This type of reasoning gets things exactly backwards, for in this context the Court is required to “look to what a restriction *takes away* rather than what it leaves behind.” *Duncan*, 970 F.3d at 1157; *see also Heller*, 554 U.S. at 629.

The arms that the challenged age ban “leaves behind,” *id.*, are doubly incapable of justifying the challenged restrictions because they are particularly ill-suited to self-defense. Whatever their utility as “hunting rifles,” Appellees’ Br. 52, single-shot guns that must be manually reloaded after each round, or underpowered, rimfire “.22s” are widely seen as poor self-defense firearms. *See* DAVID STEIER, GUNS 101 13 (2011); BRAD FITZPATRICK, SHOOTER’S BIBLE GUIDE TO CONCEALED CARRY 33 (2013); Opening Br. 47–48. And while Appellees may think shotguns are “preferable . . . for home-defense purposes,” Appellees’ Br. 53, “the Second Amendment limits the state’s ability to second-guess the people’s choice of arms if it imposes a substantial burden on the right to self-defense.” *Duncan*, 970 F.3d at 1161. Relegating 18-to-20-year-olds to using these inferior self-defense firearms does just that.

3. Respondents assert that the sources we have cited describing these categories of firearms should be “disregarded in [their] entirety” because we “did

not submit” them to the district court. Appellees’ Br. 53; *see also id.* 39–40, n.5. There is nothing to this.

Courts, including this Court, regularly rely on information outside the district court record when scrutinizing laws subject to a constitutional challenge. *See, e.g., Citizens United v. FEC*, 558 U.S. 310, 338–39 (2010); *Stenberg v. Carhart*, 530 U.S. 914, 923 (2000); *Chovan*, 735 F.3d at 1140–41; *see also Carhart v. Gonzales*, 413 F.3d 791, 799–800 (8th Cir. 2005), *rev’d on other grounds, Gonzales v. Carhart*, 550 U.S. 124 (2007) (describing practice of relying on extra-record information to determine “legislative facts”); *Dunagin v. City of Oxford, Miss.*, 718 F.2d 738, 748, n.8 (5th Cir. 1983) (en banc) (plurality) (collecting cases). The reason that the Court need not restrict itself to the record is that facts about the law’s burden, the government’s interests, and a law’s tailoring to that interest are “legislative facts” for which the record never closes. *See* Opening Br. at 15–16.

California does not dispute that the facts at issue in this appeal are “legislative facts,” but it nevertheless seeks to invoke clear error review, Appellees’ Br. 18. Although this Court has not joined the numerous other circuits that have expressly rejected “clear error” review for “legislative facts,”<sup>1</sup> its precedents compel de novo

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<sup>1</sup> *See, e.g., Carhart*, 413 F.3d at 799–800 (Eighth); *Dunagin*, 718 F.2d at 748, n.8 (Fifth); Opening Br. 15–16 (collecting precedents from First, Second, and Seventh); *see also United States v. Miller*, 982 F.3d 412, 430 (6th Cir. 2020) (dictum taking as given that “legislative facts” are not subject to clear error review); *Don’s*

review of the factual determinations underlying a facial constitutional challenge. *See, e.g., Chovan*, 735 F.3d at 1131 (in context of Second Amendment challenge that triggered means-end scrutiny, holding “[w]e review de novo the constitutionality of a statute.”). The State underscores its category error by criticizing Appellants for not seeking “judicial notice” of the facts reflected in the sources we cite, Appellees’ Br. 53, even though the Federal Rules of Evidence expressly exclude “legislative fact” from the judicial notice process. FED. R. EVID. 201(a).

The Court can and should consider Appellees’ sources demonstrating the substantial burden imposed by Section 27510.

4. Appellees next attempt to justify the challenged restrictions by pointing to a grab-bag of other exceptions that purportedly “leave open alternative channels” for 18-to-20-year-olds to engage in effective self-defense. Appellees’ Br. 31. But none of the exceptions it touts diminishes the substantial burden imposed by the challenged restrictions.

The State principally relies on the “hunting license exemption” that allows those 18-to-20-year-olds who obtain a hunting license to purchase some types of long guns. *See* CAL. PENAL CODE § 27510(b)(1). The reliance is misplaced for

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*Porta Signs, Inc. v. City of Clearwater*, 829 F.2d 1051, 1053 n.9 (11th Cir. 1987) (rejecting “clear error” standard for reviewing tailoring in commercial speech cases).

multiple reasons. Most importantly, this hunting license exception *does not apply* to semi-automatic centerfire rifles, so it is incapable of rescuing the challenged restrictions’ unconstitutionality for the reasons discussed above. *Supra* Part II.A.2.

Moreover, the requirement that 18-to-20-year-olds obtain a hunting license before purchasing other long guns unconstitutionally burdens their Second Amendment rights. License applicants have to pay fees and endure an 8-10-hour Hunter Safety Course, *see* 1-ER-14 (Opinion at 13); 13-ER-2481, and they may have to wait a month or more to even find a course that has open seats available, 13-ER-2482. *See also License Items and Fees*, CA.GOV, <http://bit.ly/2MKFwhc> (last visited Feb. 8, 2021). California disputes this, but its own evidence tells much the same story. *See* 2-ER-251–59 (of 30 courses in the coming month throughout the entire State, 19 were closed or filled to capacity); 2-ER-261–66 (only course within the next month in the San Diego area, as of December 10, 2019, was 43 miles away and already over half full). Bizarrely, the State argues that the fact that the number of hunting licenses issued over the last decade has remained constant shows that “Section 27510’s restrictions have [not] had any significant impact on the ability of [18-to-20-year-olds] to obtain the requisite hunter education to secure a valid hunting license.” Appellees’ Br. 46–47 (citing 2-ER-268–69). To the contrary, the lack of an increase after the challenged restrictions went into effect shows *either* (1) that 18-to-20-year-olds who wish to acquire firearms but would not otherwise obtain

a hunting license are not using the hunting license route to acquire a firearm, *or* (2) that California’s hunter training and licensing apparatus is maxed out. Otherwise, these numbers are completely meaningless, since they do not break license applicants down by age, and do not distinguish first-time license applicants from repeat applicants.

The hunting license requirement is also pointless, for an 18-to-20-year-old who wishes to obtain a firearm for self-defense—not hunting. The bulk of the Hunter Safety Course is devoted to topics—such as wildlife management—that are completely irrelevant to someone interested only in self-defense. 13-ER-2482–83. And the portions that actually *do* concern firearm safety are “entirely duplicative” of the firearms safety training program that California law ordinarily requires before the purchase of “any firearm.” CAL. PENAL CODE § 31615(a)(1); *see* 13-ER-2485. California resists this point, but it largely relies on the say-so of a 2013 committee report—which itself *acknowledged* that the Hunter Safety Course “does not cover all aspects included by the safety certificate education component.” 2-ER-240.<sup>2</sup>

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<sup>2</sup> The State claims that the Hunter Safety Course includes an “in-person training component” that would not otherwise be required. Appellees’ Br. 44. But apart from a three-hour “review” session, the only “in-person” component of the Hunter Safety Course is “a student demonstration of safe firearm handling.” 4-ER-550. And as California concedes, the regular firearm safety training program *also requires* an in-person “safe handling demonstration.” Appellees’ Br. 44; *see* CAL. PENAL CODE § 26860.

California next points to the statutory exceptions allowing 18-to-20-year-olds to acquire firearms from parents or spouses. Appellees’ Br. 8–10; *see also* Giffords Amicus 11. But the ability to obtain a firearm from a spouse through “transmutation of property,” Appellees’ Br. at 10, is obviously of no value to the majority of 18-to-20-year-olds who are unmarried. (The ability to *inherit* a firearm from a spouse who dies is, fortunately, an even less viable path for the average 18-year-old, for obvious reasons.) Moreover, the ability to obtain firearms from spouses or parents is limited by whatever firearms one’s spouse or parent happens to already possess—if any at all—since California law independently bars those family members from engaging in “straw purchases” for the benefit of their child or spouse. CAL. PENAL CODE § 27515. And most fundamentally, these exceptions in effect amount to a requirement that an 18-year-old adult obtain *spousal or parental consent* before obtaining a self-defense firearm—something that would be unthinkable in the context of any other constitutional right. *Cf. Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 893–97 (1992).

The statutory exception allowing 18-to-20-year-olds to borrow firearms is illusory for similar reasons. This exception, too, requires these adults to find a family member who *has a suitable firearm and is willing to loan it*. And as California acknowledges, the conditions of the loan are strictly limited. CAL. PENAL CODE. §§ 27880–81, 27885. These provisions may allow 18-to-20-year-olds to temporarily

obtain firearms for target shooting or hunting outings, but they fall far short of adequately “leav[ing] open alternative channels for self-defense.” Appellees Br. 31 (quoting *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 961 (9th Cir. 2014)).<sup>3</sup>

Appellees assert that 18-to-20-year-olds “have made ample use of the exemptions” just discussed, using one exception or another to obtain “3,789 long guns” in the year after Section 27510’s limitations on long-guns took effect at the beginning of 2019. Appellees’ Br. 46. Given that there are over 1,500,000 18-to-20-year-olds currently residing in California,<sup>4</sup> the State’s data *actually* demonstrates that *less than 0.3 percent of them* are able to successfully navigate the challenged regime and obtain a firearm each year—a startlingly low number, given that the

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<sup>3</sup> The remaining avenues held out by California for acquiring firearms require little discussion. The State notes that 18-to-20-year-olds “who are licensed hunters may be loaned firearms, other than a handgun, for the entirety of a hunting season.” Appellees’ Br. 11; *see* CAL. PENAL CODE § 27950. Since this exception requires a hunting license, it is simply a *more-limited* version of the hunting license exception. Finally, the State touts the ability of 18-to-20-year-olds to borrow firearms from a gun range for target shooting. Appellees’ Br. 11–12; *see* CAL. PENAL CODE § 27910. But as California is ultimately forced to acknowledge, this exception inexplicably *does not apply* to the many gun ranges that—like Plaintiffs PWGG, North County Shooting Center, and Beebe Family Arms and Munitions, *see* 3-ER-363–64; 3-ER-366–68; 13-ER-2677–78—are also licensed to *sell* firearms. *See* Appellees’ Br. 11; CAL. PENAL CODE § 27510(a). And in all events, the ability to borrow a firearm “on the premises of a target facility,” *id.* § 27910, obviously provides *no* avenue for 18-year-old “law-abiding, responsible citizens to use arms in defense of hearth and home,” *Heller*, 554 U.S. at 635.

<sup>4</sup> *ACS 1-Year Estimates-Public Use Microdata Sample*, U.S. CENSUS BUREAU (2019), <http://bit.ly/3p10dlZ>.

average rate of gun ownership nationwide is estimated to be at least 30 percent.<sup>5</sup> Moreover, California neglects to mention that *before* the challenged restriction took effect, adults in the relevant age group acquired, on average, *over three times* as many long guns each year. *See* 2-ER-79 (reporting a total of 76,290 transfers from 2014 to 2019, or an average of 12,715 per year). The 3,789 transfers touted by California thus, in reality, *refute* the notion that the challenged restrictions allow “ample” avenues for 18-to-20-year-olds to obtain firearms.

California also argues that the “temporary nature of the burden reduces its severity,” the theory apparently being that an 18-year-old need only wait three years to reach 21 and finally be free of the challenged restrictions. Appellees’ Br. 32 (quoting *NRA*, 700 F.3d at 207). But California could not forbid 18-to-20-year-olds from obtaining abortions, or suspend all voting, free-speech, or Fourth Amendment rights for a period of three years or more, and then waive away the obvious constitutional defects of those laws by calling them “temporary.” The Second Amendment should not be treated any differently. *McDonald*, 561 U.S. at 780.

5. Finally, Appellees seek refuge in *Salerno*’s standard that a facial constitutional challenge “must establish that no set of circumstances exists under which the Act would be valid.” *United States v. Salerno*, 481 U.S. 739, 745 (1987);

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<sup>5</sup> Kim Parker, et al., *America’s Complex Relationship With Guns*, PEW RSCH. CENTER, 4 (June 2017), <https://bit.ly/3jzaeFV>.

*see* Appellees’ Br. 47. This *Salerno* gambit also fails. The fact that the challenged restrictions do not apply to *every* 18-to-20-year-old does not save its constitutionality, since “[t]he proper focus of the constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.” *City of Los Angeles, Cal. v. Patel*, 576 U.S. 409, 418 (2015). And where the challenged age-based restrictions *do* apply, they *are* unconstitutional in every circumstance. For *every* 18-year-old who is forced to buy an underpowered rimfire rifle rather than the firearm of her choice, or to go through the pointless and burdensome process of obtaining a hunting license before acquiring a firearm, has had her Second Amendment rights unconstitutionally burdened—and that is true *whether or not* she is able to successfully navigate the gauntlet of restrictions California imposes and ultimately obtain one of the few firearms the State grudgingly allows.

**B. The challenged restrictions fail even intermediate scrutiny.**

The State seeks to shrug off the “demanding” burden it faces under intermediate scrutiny, *United States v. Virginia*, 518 U.S. 515, 533 (1996), insisting that this Court must defer to the district court, which must in turn defer to the California legislature’s judgments, Appellees’ Br. at 34–35. It is wrong on both counts.

As already discussed, facts concerning the fit between regulation and government interest are “legislative facts,” and the Court owes no deference to the

district court’s reading of the statistics or social science laid before it. *See supra* Part II.A.3; *see also Doe v. Prosecutor, Marion Cnty., Ind.*, 705 F.3d 694, 697 n.4 (7th Cir. 2013).

And neither this Court nor the district court is required to accept “[u]nsupported legislative conclusions as to whether particular policies will have societal effects of the sort at issue in this case.” *Latta v. Otter*, 771 F.3d 456, 469 (9th Cir. 2014). This Court “retain[s] an independent constitutional duty to review factual findings where constitutional rights are at stake.” *Id.* (quotation marks and brackets omitted). Appellees’ contrary cases—*Mai v. United States* and *Pena v. Lindley*, Appellees’ Br. at 34—depart from Circuit precedent to apply a standard of review far more deferential than ordinary intermediate scrutiny. *Duncan*, 970 F.3d at 1166–67. As this Court has since recognized, *Heller* forecloses such deference in the Second Amendment context. *Id.*

The procedural posture of this appeal does not alter this Court’s duty to scrutinize the evidence, except in this way: because the State bears the burden under intermediate scrutiny, the Court must *presume* that Plaintiffs have shown a likelihood of success on the merits. Opening Br. at 40. The State may overcome the presumption only by providing sufficient evidence to satisfy *this Court* (not just the district court) that the restrictions are “narrowly tailored to serve a significant

government interest” and advance that interest in a “material” way. *Duncan*, 970 F.3d at 1165. Appellees fall well short of the mark.

First, the tailoring of the challenged restrictions is wildly off. Appellees’ brief simply regurgitates statistical and social science evidence that 18-to-20-year-olds have weaker impulse control and commit more violent crimes on average than the population as a whole, without addressing the ways in which the challenged restrictions are both over-inclusive (burdening the overwhelming majority of 18-to-20-year-old adults who do not commit violent crimes) and under-inclusive (exempting the neighboring age cohort that presents as great a threat by the State’s own measures). Opening Br. at 41–42, 49–51. It is inconceivable that the Court would permit the State to exclude *any other demographic group* from exercise of a constitutional right on such a showing. Opening Br. at 43.

The only answer the State offers is to complain that Plaintiffs rely on more up-to-date versions of the statistics the State submitted below. Appellees’ Br. at 39–40, n.5. (As already noted, resort to extra-record evidence is appropriate, as demonstrated by Appellees’ leading authority, in which the Fifth Circuit relied on the very type of evidence the State seeks to exclude from this Court’s consideration—the most recent FBI arrest data—even though that evidence, too, came from outside the record. *NRA*, 700 F.3d at 210.) In any event, the State’s own statistics tell the same story: although the version of the 2017 arrest data submitted

below cuts off at 21 years of age, 2-ER-0089, the full report shows that 21-to-24-year-olds account for *higher* shares of violent crime arrests than do 18-to-20-year-olds. *Crime in the United States 2017, Table 38: Arrests by Age*, FBI, <https://bit.ly/2LfopU2> (last visited Feb. 8, 2021).

Second, Appellees do not show that the challenged restrictions will advance their objectives in a material way. Opening Br. at 43–44.

Begin with the firearms that 18-to-20-year-olds may purchase if they are willing to jump through the bureaucratic hoops and make the financial outlay to acquire a hunting license they may not want: Even accepting the Legislature’s judgment that the firearm safety component of the hunting education course is more intensive than the safety certification education component, Appellees’ Br. at 44—which the Court need not do, *see* 13-ER-2483—the State offers no evidence that the marginal training gain will counteract the alleged control deficits or violent propensities of youth. The only *conceivable* mechanism by which the State reduces violence with these firearms, then, is by making the burden of obtaining them so great that fewer 18-to-20-year-olds “keep and bear” them. A law that reduces the negative “secondary effects” of constitutionally protected conduct merely by reducing the frequency of that conduct in the same proportion cannot survive intermediate scrutiny. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47–51 (1986).

The near-categorical ban on acquiring semi-automatic centerfire rifles fares no better. The State at times seems to conflate firearms in this category with “assault weapons.” California bans possession of “assault weapon[s]” altogether, CAL. PENAL CODE § 30605(a), so the question here is whether prohibiting 18-to-20-year-olds from purchasing semi-automatic centerfire rifles *other than* those defined as “assault weapons,” *id.* §§ 30510, 30515, materially advances the State’s legitimate interests. The State focuses its case on mass shootings. Appellees’ Br. 50. It cites a study that 74% of a group of “mass shootings” catalogued by *Mother Jones* “involved firearms the shooter procured legally.” *Id.* at 49. It does not follow, however, that any purchase restriction—much less the one at issue in this case—will decrease incidents of mass shootings. Even on its own terms, the State’s argument falters. Filtering the *Mother Jones* data by age reveals that in only five incidents has it been determined that an 18-to-20-year-old shooter obtained his firearm(s) legally. Mark Follman, et al., *US Mass Shootings, 1982–2020*, MOTHER JONES (updated Feb. 26, 2020), <https://bit.ly/3rfRWfK>. Of these, three are described as involving firearms that would be unlawful under provisions of California law not subject to challenge here (“AK-47-style rifle”; “One rifle (assault)”), and one is described as involving firearms other than semi-automatic centerfire rifles (“.22-caliber sawed-off rifle; 12-gauge pump-action shotgun”), leaving only the Parkland shooting the State discusses in its brief. *Id.*; Appellees’ Br. at 49. It is difficult to tell from news reports whether

the firearm in question would have been legal in California, but there is reason to believe otherwise. *See* Bart Janson, *Florida shooting suspect bought gun legally, authorities say*, USA TODAY (Feb. 15, 2018), <https://bit.ly/36RFV8c> (describing firearm as a “Smith & Wesson M&P 15 .223”); *State Compliance*, SMITH & WESSON, <https://bit.ly/39Xs0zB> (last visited Feb. 8, 2021) (identifying no “semi-automatic rifle” compliant with California law).

Finally, Appellees’ only answer to the public safety *costs* of the challenged regulations, Opening Br. 46–48, is to argue that Plaintiffs who are willing and able to obtain a hunting license may use other long arms for self-defense, Appellees’ Br. at 51–53. As already discussed, this response is legally flawed and leaves 18-to-20-year-old adults’ self-defense compromised. *See supra* Part II.A.

### **III. The remaining equitable factors favor injunctive relief.**

The balance of the equities strongly favors enjoining California’s likely unconstitutional restrictions during the pendency of this litigation. California argues that “[s]peculative injury does not constitute irreparable injury,” Appellees’ Br. 56, but there is nothing speculative about the ongoing burdens imposed on Plaintiffs by the challenged provisions—which are in effect and being enforced *now*. It also cites an out-of-circuit case for the proposition that “Constitutional harm is not necessarily synonymous with the irreparable harm necessary for issuance of a preliminary injunction,” *Id.* (quoting *Hohe v. Casey*, 868 F.2d 69, 73 (3d Cir. 1989)), but this

Court takes a different view, *see Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012).

The State, like the court below, also relies on the “delay” between the filing of Plaintiffs’ complaint and their motion for a preliminary injunction, claiming that Plaintiffs “waited more than nine months after SB 1100 took effect to claim that they required speedy relief to avoid irreparable harm.” Appellees’ Br. 58. What Appellees do not mention is that Plaintiffs filed the preliminary injunction motion on appeal here only *four weeks*—*not* nine months—after the October 11, 2019 enactment of SB 61, the legislation that completely banned 18-to-20-year-olds from purchasing semi-automatic centerfire rifles. *See* California Senate Bill No. 61; 14-ER-2919. And even Plaintiffs’ (later withdrawn) first motion for a preliminary injunction was filed only two months after the then-operative complaint (and only three months after the initial complaint). *See* 13-ER-2916–17; 1-ER-18. These delays are hardly the mark of a plaintiff “sleeping on its rights.” Appellees’ Br. 58 (quoting *Lydo Enters. v. Las Vegas*, 745 F.2d 1211, 1213–14 (9th Cir. 1984)).

Finally, the remaining equitable factors also favor injunctive relief. Appellees do not dispute that “it is always in the public interest to prevent the violation of a party’s constitutional rights.” *Melendres*, 695 F.3d at 1002. California invokes “the serious public interest in avoiding firearm violence,” but as explained above, there is *zero* evidence that the restrictions challenged here do anything whatsoever to

further that public interest. The State’s interest in public safety obviously does not weigh against preliminarily enjoining an unconstitutional age ban that *does nothing to further that goal*.

**IV. The Court indisputably has jurisdiction over this appeal, so it need not, and should not, reach Appellees’ mootness argument.**

Finally, Appellees argue that the Court “no longer has jurisdiction to provide relief or render a decision as to individual plaintiffs Matthew Jones, Thomas Furrh, or Kyle Yamamoto, as they have each reached the age of 21 and their claims are now moot,” eliminating any “live case or controversy” with respect to those three Plaintiffs. Appellees’ Br. 3, 61. Appellees’ mootness argument is entirely irrelevant, given the presence of multiple other Appellants with undisputed standing, so the Court need not—and should not—reach the issue. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 (1997) (“Mootness has been described as the doctrine of standing set in a time frame” (quotation marks omitted)).

The Second Amendment claims in this case are brought not only by Plaintiffs Jones, Furrh, and Yamamoto, but also by three firearm retailers (PWGG, North County Shooting Center, and Beebe Family Arms and Munitions) and four associations (Firearms Policy Coalition, Firearms Policy Foundation, the California Gun Rights Foundation, and the Second Amendment Foundation). 14-ER-2843–53. These Plaintiffs have standing to challenge California’s age-based restrictions. *See Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977) (association

has standing on behalf of its members); *Craig v. Boren*, 429 U.S. 190, 193–97 (1976) (vendor has standing to raise constitutional claims on behalf of its customers); *Teixeira*, 873 F.3d at 678. California does not dispute the standing of any of these Plaintiffs; indeed, it acknowledges that “the District Court had subject matter jurisdiction over the action” and that “this Court has jurisdiction to review the denial of Plaintiffs’ preliminary injunction motion.” Appellees’ Br. 3.

Where “one plaintiff ha[s] standing to bring the suit, the court need not consider the standing of the other plaintiffs.” *Laub v. U.S. Dep’t of Interior*, 342 F.3d 1080, 1086 (9th Cir. 2003); *see also Bowsher v. Synar*, 478 U.S. 714, 721 (1986). Indeed, the Supreme Court recently held that the Third Circuit “erred by inquiring” into the standing of other plaintiffs after it had assured itself that “at least one party . . . demonstrate[d] Article III standing for each claim of relief.” *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2379 n.6 (2020). Addressing Appellees’ mootness argument as to three of the ten Plaintiffs here is thus both unnecessary and inappropriate.

### CONCLUSION

This Court should reverse the district court’s decision denying a preliminary injunction.

Dated: February 9, 2021

Respectfully submitted,

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FOR THE NINTH CIRCUIT

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Dated: February 9, 2021

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