NO. 12-10091

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NATIONAL RIFLE ASSOCIATION OF AMERICA, INCORPORATED; REBEKAH JENNINGS; BRENNAN HARMON; ANDREW PAYNE,

Plaintiffs-Appellants,

v.

STEVEN C. MCCRAW, in his official capacity as Director of the Texas Department of Public Safety,

Defendant-Appellee.

On Appeal from United States District Court for the Northern District of Texas
Civil Case No. 5:10-cv-00141-C (Honorable Sam Cummings)

PETITION FOR REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. National Rifle Association of America, Inc. ("NRA"), Plaintiff-Appellant. The NRA has no parent corporations. It has no stock, and therefore no publicly held company owns 10% or more of its stock.
2. Rebekah Jennings, Brennan Harmon, and Andrew Payne, Plaintiffs-Appellants.
3. Cooper & Kirk, PLLC, Counsel for Plaintiffs-Appellants (Charles J. Cooper, David H. Thompson, Howard C. Nielson, Jr., Peter A. Patterson).
4. Law Offices of Fernando M. Bustos, P.C., Counsel for Plaintiffs-Appellants (Fernando M. Bustos).
5. Brian S. Koukoutchos, Counsel for Plaintiffs-Appellants.
6. Brady Center to Prevent Gun Violence, Amicus Curiae.
7. International Brotherhood of Police Officers, Amicus Curiae.
8. Graduate Student Assembly and Student Government of the University of Texas at Austin, Amicus Curiae.
9. Mothers Against Teen Violence, Amicus Curiae.

10. Students for Gun-Free Schools in Texas, Amicus Curiae
11. Texas Chapters of the Brady Campaign to Prevent Gun Violence, Amicus Curiae.
12. Texas Civil Rights Project, Counsel for Amici Curiae (Scott C. Medlock).
13. Hogan Lovells US LLP, Counsel for Amici Curiae (Jonathan L. Diesenhaus, S. Chartey Quarcoo).
14. Brady Center to Prevent Gun Violence, Legal Action Project, Counsel for Amici Curiae (Jonathan E. Lowy, Daniel R. Vice).

Dated: June 3, 2013

Respectfully submitted,

s/ Charles J. Cooper
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RULE 35(b)(1) STATEMENT

At stake in this case is whether the Constitution permits the State of Texas to ban law-abiding, civilian 18-20-year-old adults from exercising their fundamental Second Amendment right to carry a handgun in public. This is an issue of exceptional importance that merits consideration by the full court.

En banc consideration is also merited because the panel's decision affirming Texas's carry ban conflicts with decisions of the United States Supreme Court, *see, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), *Craig v. Boren*, 429 U.S. 190 (1976), and with authoritative decisions of other United States Courts of Appeals, *see, e.g.*, *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012).

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STATEMENT OF THE ISSUES

1. Whether the Second Amendment's protection of the fundamental right to keep and bear arms extends to law-abiding, 18-20-year-old adults.

2. Whether the fundamental right to keep and bear arms includes the right to bear arms in public.

3. Whether heightened scrutiny may be satisfied by loose-fitting generalities regarding the behavior of a targeted group of citizens.

4. Whether Texas's ban on law-abiding, civilian 18-20-year-old adults carrying handguns in public violates the Second Amendment and the Equal Protection Clause.

STATEMENT OF THE CASE

I. INTRODUCTION.

Resolution of this case turns on the answer to two questions: (1) whether law-abiding, 18-20-year-old adults have Second Amendment rights, and (2) whether the Second Amendment protects the right to bear arms in public. If the answer to both questions is yes—and it emphatically is—Texas's ban on civilian 18-20-year-old adults carrying handguns in public must fall—*period*. The Supreme Court's decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), make clear that the Constitution simply takes "off the table" for the States any policy choice, like the

one at issue in this case, that directly and broadly bans law-abiding citizens from exercising their Second Amendment right to bear arms. *Heller*, 554 U.S. at 636.

The panel's decision contravenes these fundamental principles. Indeed, the panel stopped short of holding that 18-20-year-olds are unprotected by the Second Amendment and did not deny that the Second Amendment protects the right to bear arms in public. Yet the panel *still* upheld Texas's carry ban, applying a toothless form of intermediate scrutiny resembling the barest rationality review. The panel insisted that its holding was mandated by *National Rifle Association of America, Inc.* ("*NRA*") *v. Bureau of Alcohol, Tobacco, Firearms, & Explosives* ("*BATF*"), 700 F.3d 185 (5th Cir. 2012), *see* Op. 1, but even that fundamentally flawed decision does not support the wholesale restriction of Second Amendment rights entailed by the carry ban at issue in this case. The full Court should correct the panel's decision by granting rehearing en banc and striking down Texas's carry ban.

II. CHALLENGED PROVISIONS.

In Texas,

> [a] person commits an offense if the person intentionally, knowingly, or recklessly carries on or about his or her person a handgun . . . if the person is not: (1) on the person's own premises or premises under the person's control; or (2) inside of or directly en route to a motor vehicle or watercraft that is owned by the person or under the person's control.

TEX. PENAL CODE § 46.02(a). While there are exceptions for certain public officials (*e.g.*, peace officers, *see id.* § 46.15(a)(1)), and for certain activities (*e.g.* hunting, *see id.* § 46.15(b)(3)), these exceptions provide no relief to Texans who wish to carry a handgun for self-defense.

There is, however, one exception that permits most law-abiding adults to carry a handgun for self-defense: the prohibition does not apply when one possesses "a valid license issued under Subchapter H, Chapter 411, Government Code, to carry a concealed handgun." TEX. PENAL CODE § 46.15(b)(6). But to obtain a Texas Concealed Handgun License ("CHL") a person must be "at least 21 years of age" unless he or she is in the military or has been honorably discharged from the military (this latter class of persons can obtain a CHL upon turning 18). TEX. GOV'T CODE §§ 411.172(a)(2), (a)(9), (g).

The net effect of these laws is that an 18-20-year-old civilian in Texas who carries a handgun for self-protection outside of the home, motor vehicle, or watercraft is guilty of a crime punishable by imprisonment for up to a year and a fine of up to $4,000. *See* TEX. PENAL CODE §§ 46.02(b) & 12.21.

III. COURSE OF PROCEEDINGS.

This suit was filed in district court on September 8, 2010, and it challenges Texas's ban on 18-20-year-olds carrying handguns in public on both Second Amendment and equal protection grounds. On May 16, 2011, Plaintiffs and Texas

filed cross-motions for summary judgment. *See* USCA5 372, 480. On January 19, 2012, the district court denied Plaintiffs' motion for summary judgment, granted Texas's motion for summary judgment, and entered judgment for Texas. *See* USCA5 970, 985.

On May 20, 2013, a panel of this Court affirmed the district court's ruling on the merits. (The panel reversed the district court's holding that Plaintiffs lack standing to challenge one of the laws at issue here.) The panel reasoned that it "must hold that the state scheme withstands [Plaintiffs'] challenge, because we are bound by a prior panel opinion of this court, *NRA v.* [*BATF*]." Op. 1

The panel applied *BATF*'s "two-step inquiry" to determine whether Texas's carry ban violates the Second Amendment. *Id.* at 9. "The first question is whether the challenged conduct is even within the scope of the Second Amendment right." *Id*. at 10. Citing *BATF*'s doubts about 18-20-year-olds' Second Amendment rights, the panel reasoned that "the Texas scheme likely 'falls outside the Second Amendment's protection.' " *Id*.

As in *BATF*, however, the panel declined to rest its decision on this ground and proceeded to step two, which involves selecting and applying an "appropriate level of scrutiny." *Id*. at 11. Again invoking *BATF*, the panel held that intermediate scrutiny was the appropriate standard: "[E]ven if 18-20-year-olds' gun rights are at the core of the Second Amendment," the panel reasoned, "we

cannot say that . . . the Texas scheme burdens those rights to any greater degree than the federal law challenged in *BATF*." *Id*. at 12.

The panel concluded that Texas's carry ban satisfies intermediate scrutiny:

> Texas determined that a particular group was generally immature and that allowing immature persons to carry handguns in public leads to gun violence. Therefore, it restricted the ability of this particular group to carry handguns outside their vehicles in public. This means is substantially related to . . . Texas's stated goal of maintaining public safety, and it still allows 18-20-year-olds to have handguns in their cars and homes and to apply for concealed handgun licenses as soon as they turn 21. The Texas scheme thus survives intermediate scrutiny . . . .

Id. at 14.

In light of its Second Amendment holding, the panel applied rational basis review to Plaintiffs' equal protection claim, and the panel held that Texas's carry ban satisfies that standard. *Id*. at 14-15.

STATEMENT OF THE FACTS

At the time they joined this suit, the individual Plaintiffs were all between the ages of 18 and 20. While two have since turned 21, the third, Andrew Payne, has not and thus remains ineligible for a CHL. But for the challenged laws, Mr. Payne would carry a handgun in public for self-defense. *See* Decl. of Andrew Payne ¶¶ 7-9, USCA5 451. In addition, Plaintiffs will soon be filing a motion to add a nineteen-year-old woman as a plaintiff to alleviate the risk of this case becoming moot when Mr. Payne turns 21.

The National Rifle Association ("NRA") is also a plaintiff. The NRA has hundreds of members in Texas between the ages of 18 and 20. *See* Decl. of Robert Marcario ¶¶ 5-6, USCA5 437.

ARGUMENT

I. THE PANEL'S CONCLUSION THAT THE BURDEN IMPOSED BY TEXAS'S BAN "LIKELY" FALLS OUTSIDE THE SCOPE OF THE SECOND AMENDMENT CANNOT BE SQUARED WITH *HELLER*.

Following *BATF*, the panel stopped just short of holding that 18-20-year-old adults lack Second Amendment rights, reasoning that "the conduct burdened by the Texas scheme likely 'falls outside the Second Amendment's protection' " in light of a purportedly 'longstanding tradition' of laws aimed at "safeguard[ing] the public using age-based restrictions on access to and use of firearms." Op. 10. But as Judge Jones has demonstrated, the conclusion that 18-20-year-olds enjoy anything less than the full protection of the Second Amendment is wholly ahistorical and cannot be squared with *Heller*. Under *Heller*, "the original meaning of the Second Amendment, understood largely in terms of germane historical sources contemporary to its adoption, is paramount." *NRA v. BATF*, 714 F.3d 334, 338 (5th Cir. 2013) (Jones, J., dissenting) (hereinafter, "*BATF* Dissent"). And germane historical sources demonstrate that it "is *inconceivable* . . . that 18-to 20-year olds were not considered, at the time of the founding, to have full rights

regarding firearms." *Id.* at 342. Judge Jones's critique fully applies to the panel's decision in this case.

II. *BATF* DOES NOT MANDATE APPLICATION OF INTERMEDIATE SCRUTINY IN THIS CASE, AND *HELLER* AND *MCDONALD* FORBID IT.

Claiming its hands were tied by *BATF*, the panel held that "even if 18-20-year-olds' gun rights are at the core of the Second Amendment," Op. 12, Plaintiffs' challenge to Texas's carry ban must be evaluated under intermediate scrutiny. *See id.* ("[W]e must follow our decision in *BATF* and apply intermediate scrutiny to the Texas laws."). This conclusion is erroneous.

First, *BATF* cannot possibly stand for the proposition that *all* Second Amendment claims must be resolved by application of a two-step, tiers-of-scrutiny analysis, for *Heller* and *McDonald* both eschewed any such exercise. As even courts that have adopted a "two-step" approach similar to *BATF* have recognized, *Heller* and *McDonald* at a minimum stand for the proposition that some laws are so antithetical to Second Amendment rights that they are flatly unconstitutional. *See Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011) ("Both *Heller* and *McDonald* suggest that broadly prohibitory laws restricting the core Second Amendment right . . . are categorically unconstitutional."); *Kachalsky v. City of Westchester*, 701 F.3d 81, 89 n.9 (2d Cir. 2012) ("*Heller* stands for the rather unremarkable proposition that where a state regulation is entirely inconsistent with the protections afforded by an enumerated right . . . it is an exercise in futility to

apply means-ends scrutiny."). The Seventh Circuit, for example, recently struck down Illinois's "flat ban on carrying ready-to-use guns outside the home" without relying on a "degrees of scrutiny" analysis, explaining that "the Supreme Court made clear in *Heller* that it wasn't going to make the right to bear arms depend on casualty counts." *Moore v. Madigan*, 702 F.3d 933, 939-41 (7th Cir. 2012).

While our position is that levels-of-scrutiny analysis is out of bounds in *all* Second Amendment cases, *see* Pls. Br. 13-16; *Heller v. District of Columbia*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting); *Houston v. City of New Orleans*, 675 F.3d 441, 448 (Elrod, J., dissenting) (5th Cir. 2012), *opinion withdrawn and superseded on rehearing on other grounds*, 682 F.3d 361 (5th Cir. 2012), at a minimum it does not apply to regulations, like the Texas laws at issue here, that broadly prohibit a discrete class of law-abiding, responsible citizens from exercising their fundamental right to bear arms.

Second, the panel erred in concluding that it could not "say that . . . the Texas scheme burdens [18-20-year-olds' Second Amendment] rights to any greater degree than the federal law challenged in *BATF*." Op. 12. The federal law challenged in *BATF* prohibits federally licensed firearm dealers from selling handguns to 18-20-year-olds. *BATF* thus concluded that the law "resemble[s] 'laws imposing conditions and qualifications on the commercial sale of arms,' which *Heller* deemed 'presumptively lawful,' " and emphasized that federal law

leaves 18-20-year-olds free to "possess and use handguns for self-defense, hunting, or any other lawful purpose." *BATF*, 700 F.3d at 206-07. While we agree with Judge Jones that *BATF* did not properly assess the burden imposed by the federal sales ban, *see BATF* Dissent, 714 F.3d at 344-46, the contrast between the sales ban and Texas's carry ban is plain. The Texas ban operates directly on 18-20-year-olds, and it does not leave their legal right to possess and use handguns for self-defense unrestricted. To the contrary, it broadly prohibits their exercise of the right to carry a handgun in public.

Given the effect of Texas's ban on 18-20-year-olds' carry rights, it can be upheld under *Heller* only if the Second Amendment's protection does not extend outside the home. And the panel's decision certainly reflects the view that Second Amendment rights lack much weight outside the home. *See* Op. 12 (discounting the severity of the burden imposed by Texas's carry ban because, among other things, it "restricts only the ability to carry handguns in public" and "does not prevent those under 21 from using guns in defense of hearth and home"). (While *BATF* includes similar language, that case in no way turned on any distinction between the right to arms in the home and in public, for the federal sales ban affects in-home and public possession of firearms equally.)

But the view that there is a sharp distinction between the Second Amendment's protection inside the home and its protection outside the home is

belied by the Amendment's text and history and is inconsistent with *Heller*. *See* Pls. Br. 19-31; Pls. Reply 16-19; *Moore*, 702 F.3d at 935-37.

The Second Amendment protects "the right of the people to keep and bear arms." Unlike other provisions of the Bill of Rights, it does not specifically mention the home. *See* U.S. CONST. amends. III, IV. And absent application outside the home, the express inclusion of the right to bear arms makes little sense, for the right to keep arms, standing alone, is sufficient to protect possession in the home. At any rate, "[t]o speak of 'bearing' arms within one's home would at all times have been an awkward usage." *Moore*, 702 F.3d at 936. "A right to bear arms thus implies a right to carry a loaded gun outside the home." *Id*.

Furthermore, as the Supreme Court has held, the right to bear arms "guarantee[s] the individual right to . . . carry weapons in case of confrontation." *Heller*, 554 U.S. at 592. The core purpose of the Second Amendment, in other words, is protecting the right to carry weapons for the purpose of self-defense—*not* simply for the purpose of self-defense *within the home*, but for the purpose of self-defense, *period*. *See McDonald*, 130 S. Ct. at 3026 ("[I]n *District of Columbia v. Heller*, . . . we held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense, *and* we struck down a District of Columbia law that banned the possession of handguns in the home.") (controlling opinion of Alito, J.) (emphasis added); *see also, e.g.*, *Heller*, 554 U.S. at 599 ("self-defense . .

. was the *central component* of the right itself"); *id.* at 628 ("the inherent right of self-defense has been central to the Second Amendment right"); *id.* at 630 ("the District's requirement . . . that firearms in the home be rendered and kept inoperable at all times . . . makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional"); *McDonald*, 130 S. Ct. at 3036 ("Self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in *Heller*, we held that individual self-defense is 'the *central component*' of the Second Amendment right."); *id.* ("we concluded [in *Heller* that] citizens must be permitted 'to use [handguns] for the core lawful purpose of self-defense' "); *id.* at 3047 (*Heller* "stressed that the right was also valued because the possession of firearms was thought to be essential for self-defense. As we put it, self-defense was 'the *central component* of the right itself.' ") (controlling opinion of Alito, J.). Indeed, in founding-era "America a distinction between keeping arms for self-defense in the home and carrying them outside the home would . . . have been *irrational*." *Moore*, 702 F.3d at 937 (emphasis added). And it continues to be the case that "the interest in self-protection is as great outside as inside the home." *Id*. at 941.

Further supporting the existence of a general right to carry firearms outside the home is *Heller*'s indication that some restrictions on the manner of carrying firearms or on the carrying of firearms in particularly sensitive places may be

consistent with the historical understanding of the right to bear arms. *See Heller*, 554 U.S. at 626. Identifying these exceptions makes sense only against the backdrop of a general right to carry arms in public. And, in contrast to these types of laws, *Heller* classified laws that barred both the open and concealed carrying of handguns as among the most restrictive "in the history of our Nation." *Id*. at 629.

For these reasons, *BATF* does not mandate application of intermediate scrutiny to Texas's carry ban, and *Heller* and *McDonald* forbid it. Indeed, to the extent that responsible, law-abiding, civilian 18-20-year-old adults have a right to bear arms (and the panel in this case did not hold otherwise), Texas's attempt to broadly prohibit their exercise of this fundamental right is flatly and categorically unconstitutional. And it is no answer that Texas's carry ban applies only to 18-20-year-old adults and not other adults. "[T]he Second Amendment right is exercised *individually* and belongs to *all* Americans." *Heller*, 554 U.S. at 581 (emphasis added). Texas cannot pick and choose who is permitted to exercise this fundamental right.

III. TEXAS'S CARRY BAN FAILS INTERMEDIATE SCRUTINY.

Even if it were appropriate to apply intermediate scrutiny in this case, the panel erred by holding that Texas's carry ban satisfies it. Following *BATF*, *see* Op. 12-13, the panel credited the State's determination that 18-20-year-olds are "generally immature and that allowing immature persons to carry handguns in

public leads to gun violence." *Id*. at 14. But, as in *BATF*, the panel's analysis amounts to little more than "parroting the government's legislative intentions," rather than the "[r]eal scrutiny" intermediate scrutiny demands. *BATF* Dissent, 714 F.3d at 346. And *BATF*'s statistical analysis, invoked by the panel here, *see* Op. 12, "does not square with *Craig v. Boren*, 429 U.S. 190 [(1976)]," *BATF* Dissent, 714 F.3d at 346. Indeed, while *Craig* condemned the use of "statistically measured but loose-fitting generalities" under intermediate scrutiny, 429 U.S. at 209, the statistical support for Texas's carry ban is even more tenuous than that for the Oklahoma law struck down in *Craig*. *See BATF* Dissent, 714 F.3d at 346-47; Pls. Br. 51-53.

While these criticisms apply equally to *BATF*, the panel's application of intermediate scrutiny here is even more fundamentally flawed and thus is not mandated by *BATF*. For unlike the federal sales ban, Texas's carry ban contains an exception for 18-20-year-olds who are members of the armed forces or who have been discharged from the armed forces under honorable conditions. *See* TEX. GOV'T CODE § 411.172(g). This exception eviscerates the rationale that 18-20-year-olds as a group are simply too immature to carry a handgun in public, for Texas deems some 18-20-year-olds mature enough to carry. And Texas has not even asserted, let alone demonstrated, that 18-20-year-old members and former members of the military are as a class more mature than all other 18-20-year-old

adults. Indeed, the military exception may extend to individuals discharged for, among other things, failing drug or alcohol rehabilitation. *See* Pls. Reply 26-27.

IV. TEXAS'S CARRY BAN VIOLATES THE EQUAL PROTECTION CLAUSE.

The panel's equal protection holding is infected by its Second Amendment holding. Indeed, the panel recognized that "[e]qual protection analysis requires strict scrutiny of a legislative classification . . . when the classification impermissibly interferes with the exercise of a fundamental right . . . ." Op. 15. But the panel applied rational basis review rather than strict scrutiny because its faulty Second Amendment analysis led it to conclude that Texas's carry ban does not impermissibly interfere with the exercise of Second Amendment rights. Thus, a proper Second Amendment analysis would trigger strict scrutiny under the Equal Protection Clause, and the panel does not suggest that Texas's ban can meet this demanding standard.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' petition for rehearing en banc.

Dated: June 3, 2013

Respectfully submitted,

s/ Charles J. Cooper

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CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system, which will send notice of such filing to the following registered CM/ECF users:

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CERTIFICATE OF COMPLIANCE WITH FILING STANDARD A(6)

I hereby certify that:

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June 3, 2013

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REVISED May 21, 2013

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
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Clerk

No. 12-10091

NATIONAL RIFLE ASSOCIATION OF AMERICA, INCORPORATED; REBEKAH JENNINGS; BRENNAN HARMON; ANDREW PAYNE,

Plaintiffs - Appellants

v.

STEVEN C. MCCRAW, in his official capacity as Director of the Texas Department of Public Safety,

Defendant - Appellee

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

Before HIGGINBOTHAM, CLEMENT, and HAYNES, Circuit Judges.

EDITH BROWN CLEMENT, Circuit Judge:

This case presents a constitutional challenge to Texas's statutory scheme, which does not allow 18-20-year-old adults to carry handguns in public. We must hold that the state scheme withstands this challenge, because we are bound by a prior panel opinion of this court, *NRA v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185 (5th Cir. 2012) (hereinafter *BATF*).

FACTS AND PROCEEDINGS

Statutory Framework

In 1871, the State of Texas first prohibited individuals from carrying handguns in public. The current version of this proscription, codified in 1973, provides that a "person commits an offense if the person intentionally, knowingly, or recklessly carries on or about his or her person a handgun . . . if the person is not: (1) on the person's own premises or premises under the person's control; or (2) inside of or directly en route to a motor vehicle or watercraft that is owned by the person or under the person's control." TEX. PENAL CODE § 46.02(a). This crime is punishable by imprisonment for up to a year and a fine of up to $4,000. *Id.* § 46.02(b); *see id.* § 12.21.

In 1995, Texas created an exception to this general criminal prohibition when it enacted the concealed licensing program. The program allows persons who acquire concealed carry licenses to carry concealed handguns in public. TEX. GOV'T CODE § 411.172(a). Licenses cost $140 each and applicants must submit their fingerprints and their criminal, psychiatric treatment, and drug treatment histories. *Id.* § 411.174. They must also successfully complete a 10-hour course, which includes both a written exam and a practical component to demonstrate proficiency. *Id.* § 411.174(a)(7); *see id.* § 411.188. Moreover, in order to qualify for a license, an applicant must, among other things, be "at least 21 years of age" and "fully qualified under applicable federal and state law to purchase a handgun."[1] *Id.* § 411.172(a).

During legislative debate on the concealed licensing program, several legislators advocated for the 21-year-old minimum-age requirement because they believed that younger individuals were generally not mature enough to carry

[1] Under a federal statute recently upheld as constitutional by this court, 18 U.S.C. § 922(b)(1), federally licensed firearms dealers may not sell handguns to persons under 21. *BATF*, 700 F.3d at 212. Texas law, however, permits those 18 and over to buy handguns.

and handle handguns in public. In 2005, Texas relaxed the licensing requirements to allow persons under 21 who had military training to apply for concealed handgun licenses, *id.* § 411.172(g), because this group's "extensive training in handling weapons" mitigated the legislature's concern that persons under 21 generally were not sufficiently mature to handle guns responsibly. Nevertheless, Texas's statutory scheme in effect prohibits the majority of 18-20-year-olds from carrying a handgun in public: the general criminal provision sets as the default rule that Texans may not carry a handgun in public, and the civil licensing law makes 18-20-year-olds ineligible for the concealed handgun license exception to this default rule.[2]

Procedural Background

Three individual plaintiffs, ages 18-20, and the National Rifle Association ("NRA"), on behalf of its 18-20-year-old members, brought this constitutional challenge to Texas's constructive ban on 18-20-year-olds carrying handguns in public. Each of the three individual plaintiffs claim that they wish to carry a handgun in public for self-defense but are unable to apply for one solely because of their age. While this appeal was pending, however, two of them, Rebekah Jennings and Brennan Harmon, turned 21. The third, Andrew Payne, will not turn 21 until July 2013.

Following discovery, the parties filed cross-motions for summary judgment. The district court denied plaintiffs' motion and granted the state's motion. The court first addressed the question of standing. It concluded that the individual plaintiffs had standing to challenge the licensing law, because they had presented evidence that, except for their age, they qualified for concealed handgun licenses. Moreover, they had each alleged that, but for their inability to get a license, they would carry a handgun in public for self-defense.

[2] For clarity, we refer to § 46.02 as the "general criminal provision," § 411.172 as the "licensing law" or "licensing program," and the two statutes, working together, as the "Texas scheme."

But the court held that plaintiffs lacked standing to challenge the general criminal provision because they had not alleged that they wanted to carry handguns without a license, which the court concluded was necessary to show the credible threat of prosecution under the law required for Article III standing. The court recognized that it need not address whether the NRA had associational standing, since "[o]nce a court has determined that at least one plaintiff has standing, it need not consider whether the remaining plaintiffs have standing to maintain the suit."

Turning to the merits, the district court upheld the handgun licensing law on the ground that "the Second Amendment does not confer a right that extends beyond the home." Thus, a prohibition on carrying a handgun in public did not infringe on plaintiffs' Second Amendment rights. And, because neither age nor non-military status is a suspect classification, the court applied rational basis scrutiny to the Texas law and rejected plaintiffs' equal protection claim. Plaintiffs appeal.

STANDARD OF REVIEW

This court reviews questions of standing *de novo*. *NAACP v. City of Kyle, Tex.*, 626 F.3d 233, 236 (5th Cir. 2010). The parties seeking access to federal court bear the burden of establishing their standing. *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630, 635 (5th Cir. 2012). The court "review[s] a district court's grant of summary judgment *de novo*, applying the same standard as did the district court." *Stults v. Conoco, Inc.*, 76 F.3d 651, 654 (5th Cir. 1996). We "may affirm summary judgment on any legal ground raised below, even if it was not the basis for the district court's decision." *Performance Autoplex II Ltd. v. Mid-Continent Cas. Co.*, 322 F.3d 847, 853 (5th Cir. 2003). We examine *de novo* the constitutionality of state statutes. *Ortiz v. Quarterman*, 504 F.3d 492, 496 (5th Cir. 2007).

DISCUSSION

Plaintiffs appeal the district court's decision that they lack standing to challenge Texas's general criminal provision barring persons from carrying handguns in public. They also claim that the district court erred in ruling that the Texas scheme regulating persons carrying handguns in public does not violate the Second Amendment rights of, or deny equal protection to, non-military or non-veteran 18-20-year-olds. Plaintiffs contend that 18-20-year-olds have full Second Amendment rights and that the fundamental right to carry a handgun for self-defense extends to carrying a handgun in public. Texas opposes these contentions and also alleges that plaintiffs Jennings's and Harmon's claims are moot because they are now 21 years old.

A. Mootness

Although all parties agree that the claims raised by Payne are not moot, Texas argues that the court should dismiss Jennings's and Harmon's claims as moot because both are now 21.[3]

If a claim is moot, it "presents no Article III case or controversy, and a court has no constitutional jurisdiction to resolve the issues it presents." *Goldin v. Bartholow*, 166 F.3d 710, 717 (5th Cir. 1999). A claim becomes moot when "the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). "Mootness in this context is the doctrine

[3] The parties also agree that the district court was correct that it need not address the NRA's associational standing because *Massachusetts v. EPA* holds that "[o]nly one of the petitioners needs to have standing to permit us to consider the petition for review." 549 U.S. 497, 518 (2007); *see also Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (holding that because it was clear that union members had standing, the Court need not consider the standing issue as to the Union or Members of Congress who were parties to the case). Plaintiffs contend that the court need not address Jennings's and Harmon's standing for the same reason. We disagree. While *EPA* and *Bowsher* give courts license to *avoid* complex questions of standing in cases where the standing of others makes a case justiciable, it does not follow that these cases permit a court that *knows* that a party is without standing to nonetheless allow that party to participate in the case. *Cf. Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth.*, 389 F.3d 491, 501 n.18 (5th Cir. 2004) ("[W]hen one of multiple co-parties raising the same claims and issues properly has standing, we do not need to *verify* the independent standing of the other co-plaintiffs." (emphasis added)).

of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Goldin*, 166 F.3d at 717 (citation and quotation marks omitted).

Our court's recently issued opinion in *BATF* controls this issue. In that case, the same plaintiffs appealing here brought constitutional challenges against a federal law prohibiting federally licensed firearms dealers from selling handguns to persons under 21 years of age.[4] *BATF*, 700 F.3d at 188. Addressing the standing of the now-21-year-old plaintiffs Jennings and Harmon, the court held that, "[b]ecause they have aged out of the demographic group affected by the ban at bar, the issues on appeal are moot as to them." *Id.* at 191. The court then concluded that "Payne and the NRA, on behalf of its under-21 members, have standing." *Id.* We reach the same conclusion. Jennings's and Harmon's claims are moot, as these two plaintiffs have aged out of the 18-20-year-old range.

B. Standing

Although the remaining plaintiffs continue to have the requisite personal interest to pursue their claims, their claims must also satisfy the injury requirement for Article III standing. The district court determined that plaintiffs had such standing to challenge the concealed handgun licensing law, but concluded that plaintiffs lacked standing to challenge the general criminal provision banning carrying a handgun in public. It came to this conclusion based on the fact that plaintiffs did not allege "that they desire to carry a handgun openly (as opposed to concealed), concealed without a license, or in a manner inconsistent with the limitations governing licensed concealed carry."

[4] Because the statute challenged in *BATF* was a federal statute, the plaintiffs brought their claims directly under the Second Amendment and through the equal protection component of the Fifth Amendment.

According to the court, "because the possession of a validly issued [license] excepts the license holder from prosecution . . . , Plaintiffs have not demonstrated a credible threat of prosecution" necessary to show injury. Both plaintiffs and the state argue that the court erred in this conclusion.

"A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979). When asking a federal court to engage in pre-enforcement review of a criminal statute, a plaintiff need not violate the statute; he may meet this injury requirement by showing "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and . . . a credible threat of prosecution thereunder." *Id.*

The district court erred in its standing analysis. Plaintiffs maintain that "Texas must permit them *some manner* of exercising their fundamental right to carry a handgun."[5] The criminal provision forbids them from carrying a handgun altogether. The licensing program declines to grant their age group, specifically, a limited exception in the form of a concealed handgun license from this alleged burden on their Second Amendment rights. Thus, both laws, as part of a statutory scheme, combine to deprive plaintiffs of their alleged constitutional rights. While striking down the age restriction in the concealed handgun licensing law would grant the plaintiffs the relief they seek – some

[5] Texas argues that "plaintiffs' sole contention" is that they are constitutionally entitled to apply for concealed handgun licenses. Although the state concedes that plaintiffs have standing, it asserts that "plaintiffs' failure to support their constitutional challenge to section 46.02's prohibitions on unlicensed or exposed handgun carriage should lead the Court to reject their claims on the merits" after the court determines that the plaintiffs do have standing to challenge the criminal provision. Texas's understanding, however, is plainly refuted by plaintiffs' Second Amended Complaint, in which they allege that the licensing provision and criminal provision, in concert, "prohibit law-abiding adults between the ages of eighteen and twenty, who are not or have not been in the United States armed forces, *from carrying a handgun outside the person's own premises or automobile*." (Emphasis added.) Plaintiffs are clearly contending that the two statutes unconstitutionally prevent them from carrying a handgun in public, not merely that the licensing provision bars them from applying for a license.

manner in which to legally carry a handgun in public – and lift the threat of prosecution, so would invalidation of the general criminal provision alone, because then plaintiffs could carry guns openly, even if they could not obtain a license to carry them concealed. Plaintiffs, therefore, have standing to challenge both laws together, because together they bar 18-20-year-olds from carrying handguns in public in Texas.

C. Second Amendment claim

Plaintiffs contend that the district court erred in upholding this Texas scheme, because such a bar violates the Second Amendment. They argue that a scheme that bans 18-20-year-olds from carrying handguns in public, either openly or concealed, is an unconstitutional infringement on 18-20-year-olds' right to use handguns in self-defense. Texas responds that its scheme is the type of longstanding prohibition that the Supreme Court recognized as lawful in *District of Columbia v. Heller*, 554 U.S. 570 (2008).

The Second Amendment states that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.[6] In *Heller*, the Supreme Court struck down a D.C. law that banned handgun possession and required all firearms in the home to be kept in an inoperable state, because the statute violated this amendment. 554 U.S. at 635. After conducting an analysis "of both text and history," *id.* at 595, the Court recognized that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation," *id.* at 592. The "*central component* of [this] right" is self-defense. *Id.* at 599. Because the law at issue in *Heller* "bann[ed] from the home the most preferred firearm in the nation to keep and use for protection of one's home and

[6] The Supreme Court has held that the Second Amendment right is fully applicable to the states through the Fourteenth Amendment. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026 (2010). As Texas notes, the Fourteenth Amendment itself references the age of twenty-one, not eighteen. *See* U.S. CONST. amend. XIV, § 2.

family, [it] fail[ed] constitutional muster." *Id.* at 628-29 (citation and quotation marks omitted).

Despite holding that the statute before it was unconstitutional, the Court expressly noted that "the right was not unlimited, just as the First Amendment's right of free speech was not." *Id.* at 595. It recounted that, historically, "[f]rom Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 626. For example, the Court said, "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." *Id.* It went on to make clear that "nothing in our opinion should be taken to cast doubt on [such] longstanding prohibitions." *Id.* It then "identif[ied several more of] these presumptively lawful regulatory measures [] as examples," which included "prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626-67 & n.26.

Following *Heller* and *McDonald v. City of Chicago*, this circuit adopted a two-step inquiry to evaluate whether a firearms regulation comports with the Second Amendment:

> [T]he first inquiry is whether the conduct at issue falls within the scope of the Second Amendment right. . . . If the challenged law burdens conduct that falls outside the Second Amendment's scope, then the law passes constitutional muster. If the law burdens conduct that falls within the Second Amendment's scope, we then proceed to apply the appropriate level of means-ends scrutiny. We agree with the prevailing view that the appropriate level of scrutiny depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right.

BATF, 700 F.3d at 194-95 (citations and quotation marks omitted). We proceed to evaluate the Texas scheme according to this test.

1. Step one

The first question is whether the challenged conduct is even within the scope of the Second Amendment right. Here, the Texas statutes collectively prohibit carrying a handgun in public by 18-20-year-olds. This court has held that statutes enacted to safeguard the public using age-based restrictions on access to and use of firearms are part of a succession of "longstanding prohibitions," *Heller*, 554 U.S. at 626, that are likely outside the scope of the Second Amendment, because such restrictions are "consistent with" both the "longstanding tradition of targeting select groups' ability to access and to use arms for the sake of public safety" and the "longstanding tradition of age- and safety-based restrictions on the ability to access arms," *BATF*, 700 F.3d at 203. In *BATF*, the court held that a federal law that restricted 18-20-year-olds' access to and use of firearms by prohibiting federally licensed firearms dealers from selling handguns to those under 21 was consistent with these traditions, because Congress had passed the law to deter violent crime by restricting the ability of minors under 21, who were relatively immature, to buy handguns. *Id.* The Texas scheme restricts the same age group's access to and use of handguns for the same reason. Therefore, under circuit precedent, we conclude that the conduct burdened by the Texas scheme likely "falls outside the Second Amendment's protection." *Id.*

2. Step two

Notwithstanding this conclusion, we face the same concern about the "institutional challenges in conducting a definitive review of the relevant historical record," *id.* at 204, that the court faced in *BATF*. This concern leads us to proceed to the second step of the analysis, just as the *BATF* court did.

In the second step, we initially determine which level of scrutiny to apply. "[T]he appropriate level of scrutiny depends on [1] the nature of the conduct being regulated and [2] the degree to which the challenged law burdens the right." *Id.* at 195 (citation and quotation marks omitted). "A law that burdens the core of the Second Amendment guarantee – for example, 'the right of law-abiding, responsible citizens to use arms in defense of hearth and home,' – would trigger strict scrutiny." *Id.* at 205 (quoting *Heller*, 554 U.S. at 635). "[A] less severe law" only "requires the government to show a reasonable fit between the law and an important government objective." *Id.*

This court held that the age-based federal statute challenged in *BATF* "[u]nquestionably" triggered nothing more than the latter, intermediate scrutiny. *Id.* The court first concluded that the federal statute does not burden the core of the Second Amendment based on (1) the fact that the law is "not a salient outlier in the historical landscape of gun control" and, (2) "unlike the D.C. ban in *Heller*, this ban does not disarm an entire community, but instead prohibits commercial handgun sales to 18-to-20-year-olds – a discrete category." *Id.* Furthermore, the court observed, "[t]he Second Amendment, at its core, protects 'law-abiding, *responsible*' citizens," and Congress had determined that persons under 21 tend to be irresponsible and emotionally immature, and can be thrill-bent and prone to criminal behavior. *Id.* at 206 (quoting *Heller*, 554 U.S. at 635) (emphasis added in *BATF*).

The court also gave three reasons why, even if the Second Amendment rights of 18-20-year-olds come within the core of the amendment, the degree to which the federal statute burdens those rights is not severe: (1) the law affects only handgun sales, rather than completely banning handgun possession and use; (2) the law does not prevent 18-20-year-olds from possessing and using guns in defense of hearth and home; and (3) the law's age qualification has only a temporary effect that ends as soon as the person turns 21. *See id.* at 206-07.

Because the federal law does not burden the core of the Second Amendment right and, even if it does, the degree of burden is not severe, the *BATF* court held that the law warranted intermediate scrutiny.

The *BATF* court's rationales for why an age-based restriction on gun possession and use does not burden the core of the Second Amendment right apply equally to the state's age-based restriction here. Moreover, we cannot say that, even if 18-20-year-olds' gun rights are at the core of the Second Amendment, the Texas scheme burdens those rights to any greater degree than the federal law challenged in *BATF*. As in *BATF*, the restriction here has only a temporary effect. And, because it restricts only the ability to carry handguns in public, it does not prevent those under 21 from using guns in defense of hearth and home. Finally, it is not a complete ban on handgun use; it bans such use only outside a home or vehicle. Therefore, we must follow our decision in *BATF* and apply intermediate scrutiny to the Texas laws.

In order to withstand intermediate scrutiny, the Texas scheme must be reasonably adapted to achieve an important government interest. *Id.* at 207. Furthermore, "[t]he justification must be genuine, not hypothesized or invented *post hoc* in response to litigation," or relying "on overbroad generalizations." *United States v. Virginia*, 518 U.S. 515, 533 (1996).

The Texas laws advance the same important government objective as the one upheld in *BATF* under the intermediate scrutiny standard, namely, advancing public safety by curbing violent crime. *BATF*, 700 F.3d at 209 ("'The legitimate and compelling state interest in protecting the community from crime cannot be doubted.'" (quoting *Schall v. Martin*, 467 U.S. 253, 264 (1984))). Evidence in the record shows that curbing gun violence by keeping handguns out of the hands of immature individuals was in fact the goal of the state legislature in enacting the licensing provision. And historical analysis in the record

indicates that Texas implemented the general criminal provision to keep its public spaces safe. Federal statistics also back up this rationale. *Id.* at 208-10.

Texas's handgun carriage scheme is substantially related to this important government interest in public safety through crime prevention. The discussion in *BATF* and the record in this case emphasize that those under 21 years of age are more likely to commit violent crimes with handguns than other groups. Nevertheless, plaintiffs argue that the laws are ill-adapted to promote public safety because they are overbroad and, in any event, will not further the state's proffered goal. Plaintiffs contend that the Texas scheme is too broad because it amounts to a total ban on carrying handguns in public by 18-20-year-olds. They further challenge the breadth of the Texas scheme by arguing that the laws assume that all 18-20-year-olds are too immature to carry a handgun in public. The number of modifiers plaintiffs must use by itself undermines both these arguments: the Texas laws prohibit (1) 18-20-year-olds from (2) publicly carrying (3) handguns. First, the Texas laws have a similarly "narrow ambit" as the federal law in *BATF*. *Id.* at 205. Both the state scheme and the federal laws target the "discrete category" of 18-20-year-olds. *Id.* Second, the state scheme is in some ways more related to Texas's public safety objective that the law in *BATF*, because the state laws only regulate those persons who carry guns in public. Third, the Texas scheme restricts only the carrying of one type of gun – handguns. It is true, as plaintiffs claim, that Texas could have taken other, less restrictive approaches, such as allowing 18-20-year-olds to get a license if they demonstrate a particularly high level of proficiency and responsibility with guns. But the state scheme must merely be reasonably adapted to its public safety objective to pass constitutional muster under an intermediate scrutiny standard. Texas need not employ the least restrictive means to achieve its goal. Given the substantial tailoring of the Texas scheme, plaintiffs overbreadth argument is unpersuasive.

Plaintiffs next argue that Texas's scheme will not promote public safety. They first contend that the scheme "assumes that 18-20-year-olds who *are* disposed toward violent criminal behavior will refrain from carrying a handgun if doing so is unlawful." That assumption would be far-fetched, since it is not clear why those disposed to violent criminal behavior would refrain from violating the statutory ban on publicly carrying handguns. But Texas is not necessarily making such an assumption. The state may also wish to have a way to take 18-20-year-olds who are disposed to violence off the street before they commit such violence. Convicting them of carrying a gun in public would accomplish this goal. Second, plaintiffs note that 18-20-year-olds are at greater risk of harm by violent offenders than older persons. They do not, however, say who perpetrates such harm or where it occurs. If members of the 18-20-year-old age cohort are at greater risk of harm from peers with guns, then the Texas scheme may reduce the risk. And if the harm occurs in the home, the laws, while not reducing this risk, will not prevent the 18-20-year-olds from defending themselves in their residences.

Texas determined that a particular group was generally immature and that allowing immature persons to carry handguns in public leads to gun violence. Therefore, it restricted the ability of this particular group to carry handguns outside their vehicles in public. This means is substantially related to the Texas's stated goal of maintaining public safety, and it still allows 18-20-year-olds to have handguns in their cars and homes and to apply for concealed handgun licenses as soon as they turn 21. The Texas scheme thus survives intermediate scrutiny, and we affirm the district court's conclusion that it does not violate the Second Amendment.

D. Equal protection claim

Plaintiffs argue that the Texas scheme denies them equal protection of the laws because it burdens their fundamental right to bear arms. They contend

that the state scheme cannot survive the strict scrutiny it must withstand for burdening such a fundamental right. Whether or not Texas's scheme satisfies the strict scrutiny standard is not the question presented by this appeal.

"'Equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class.'" *Id.* at 211-12 (quoting *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976)). If a law does not implicate such a protected right or class, then it need only be rationally related to a legitimate government interest to survive an equal protection challenge. *Id.* at 212. And for such laws, plaintiffs "'bear[] the burden of proving the facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.'" *Id.* (quoting *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 84 (2000)).

Because the state scheme does "not impermissibly interfere with Second Amendment rights," *id.* at 212, or disadvantage a protected class,[7] it does not trigger strict scrutiny. We evaluate the Texas statutes merely to determine that they rationally relate to a legitimate government interest. Plaintiffs did not attempt to carry their burden by showing that the state scheme is irrational in the district court or on appeal. Moreover, we concluded in the previous section that the scheme survives the more stringent intermediate scrutiny. Therefore, we affirm the district court's decision to uphold the Texas scheme against plaintiffs' equal protection challenge.

CONCLUSION

Because plaintiffs Jennings and Harmon are now 21, we REMAND their claims to the district court with instructions to dismiss them as moot. We also

[7] As the district court noted, neither age nor military status is a suspect classification. Plaintiffs do not argue that they are members of or that the laws discriminate on the basis of any other suspect classification.

REVERSE the district court's ruling that the remaining plaintiffs do not have standing to challenge Texas's general criminal provision barring persons from carrying handguns in public. Finally, with respect to the general criminal provision, we RENDER, and with respect to the licensing law we AFFIRM the district court, holding that the Texas scheme does not violate the Second Amendment or the Equal Protection Clause.