ESSAY

ROGUE RETAILERS OR AGENTS OF NECESSARY CHANGE? USING CORPORATE POLICY AS A TOOL TO RESHAPE GUN OWNERSHIP

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INTRODUCTION

The tragedy of the Parkland, Florida high school shooting shocked the nation and sent thousands of student protestors out of the classrooms and into the streets. Sadly, the nation once again found itself asking the increasingly familiar question of how such senseless tragedies can be prevented. As the search for an answer to this question continues, several avenues of response are being explored. Some have focused on a failure of the "system" and take federal and state authorities to task for not heeding the warning signs.[1] Others are considering how society can deal more effectively with the problem of mental illness.[2] Still others are calling for more restrictive gun laws to address this problem.[3] These calls for action are familiar and the likely federal response is equally familiar: nothing. Federal legislative action that puts further significant limitations on gun ownership is

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1 *See, e.g.*, Joel Rose & Brakkton Booker, *Parkland Shooting Suspect: A Story of Red Flags, Ignored*, NPR (Mar. 1, 2018), https://www.npr.org/2018/02/28/589502906/a-clearer-picture-of-parkland-shooting-suspect-comes-into-focus [https://perma.cc/KU85-L33H].

2 *See, e.g.*, Melissa Healy, *What the Florida School Shooting Reveals About the Gaps in Our Mental Health System*, L.A. TIMES (Feb. 26, 2018), http://www.latimes.com/science/sciencenow/la-sci-sn-florida-shooter-psychology-20180226-htmlstory.html [https://perma.cc/5HME-WLLF].

3 *See, e.g.*, Julie Creswell & Michael Corkery, *Walmart and Dick's Raise Minimum Age for Gun Buyers to 21*, N.Y. TIMES (Feb. 28, 2018), https://www.nytimes.com/2018/02/28/business/walmart-and-dicks-major-gun-retailers-will-tighten-rules-on-guns-they-sell.html [https://perma.cc/4WLD-YA5Z].

unlikely in the short term.[4] As a result of legislative inaction, we are now seeing a grassroots response not only from concerned individuals, but from corporations willing to take actions that they hope will lessen the likelihood of another act of gun violence by someone under the age of twenty-one. To accomplish this, retailers such as Walmart, Dick's Sporting Goods (DSG), Kroger, and L.L. Bean have modified store policies across the United States and will no longer sell long guns (shotguns and rifles) or ammunition to those under twenty-one.[5] DSG was one of the first to implement this restriction on February 28, 2018.[6] These actions have already been met with resistance from consumers in Oregon[7] and Michigan[8] who allege that such policies violate state public accommodation laws. While the scope of the public accommodation laws' protections varies among states, Oregon and Michigan are among nineteen jurisdictions that consider age to be a protected class.[9] The first lawsuits in the nation were filed in Oregon against DSG and Walmart by Tyler Watson, a twenty-year-old Oregon resident who was unable to purchase a rifle due to the retailers' newly enacted age restrictions, alleging violation of the public accommodation laws.[10] This Essay explores the merits

4 A recently proposed bipartisan bill, the Age 21 Act, S. 2470, 115th Cong. (2018), sponsored by Senators Dianne Feinstein (D-CA) and Jeff Flake (R-AZ), would increase the age to purchase assault-type rifles from age eighteen to twenty-one. However, it is not expected to garner the necessary support in Congress. *See* Kate Irby, *Congress was Seriously Eying an Age Limit of 21 to Buy Assault Weapons. Not Anymore.*, MCCLATCHY DC BUREAU (Mar. 15, 2018, 10:13 AM), http://www.mcclatchydc.com/news/nation-world/national/article205182984.html [https://perma.cc/ZJJ8-XXLF].

5 Kate Taylor, *Here Are All of the Retailers That Have Stopped Selling Assault-Style Rifles and Changed Firearm Policies Following Gun-Control Activists' Protests*, BUS. INSIDER (Mar. 2, 2018, 9:48 AM), http://www.businessinsider.com/retailers-change-gun-policies-after-gun-control-protests-2018-3 [https://perma.cc/BW52-WKCF].

6 *Media Statements*, Dick's Sporting Goods: Press Room (Feb. 28, 2018), http://pressroom.dicks.com/press-information/media-statements.aspx [https://perma.cc/ME3U-TBMK].

7 A twenty-year-old man brought a claim of age discrimination against DSG under the Oregon Public Accommodation Act. *See* Complaint, Watson v. Dick's Sporting Goods, No. 18CV07671 (Or. Cir. Ct. Jackson Cty. Mar. 5, 2018). The same plaintiff, Tyler Watson, filed a similar case against Walmart in a different Oregon county court. *See* Complaint, Watson v. Walmart, No. 18CV07628 (Or. Cir. Ct. Josephine Cty. Mar. 5, 2018). Mr. Watson's attorney has also filed similar suits on behalf of twenty-year-old Airion Grace against Kroger, see Complaint, Grace v. Kroger Co., No. 18CV09318 (Or. Cir. Ct. Mar. 9, 2018), and Bi-Mart, see Complaint, Grace v. Bi-Mart Corp., No. 18CV09336 (Or. Cir. Ct. Mar. 9, 2018). For ease of reference, only the DSG lawsuit is discussed in this Essay.

8 *See* Verified Complaint, Fulton v. Dick's Sporting Goods, No. 2018-164264-CZ (Mich. Cir. Ct., Mar. 6, 2018).

9 These jurisdictions are: Connecticut, Delaware, Illinois, Louisiana, Maryland, Michigan, Montana, New Hampshire, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, West Virginia, and the District of Columbia. *State Public Accommodation Laws*, NAT'L CONF. ST. LEGISLATURES (July 13, 2016), http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx [https://perma.cc/FZ4P-QQXW].

10 *See supra* note 7.

of this claim using Mr. Watson's case against DSG as the illustration since it is the furthest along procedurally. After explaining why Mr. Watson is likely to prevail in court, this Essay then concludes with a discussion of the implications of this case for other jurisdictions.

I. RETAILER IMPOSED RESTRICTIONS ON GUN SALES WILL TEST THE PROTECTIONS PROVIDED BY PUBLIC ACCOMMODATION LAWS

Mr. Watson filed his lawsuit against DSG on March 5, 2018.[11] The dispute stems from his February visit to one of DSG's Oregon stores for the purpose of purchasing a .22 caliber Ruger rifle.[12] Mr. Watson was informed by the sales clerk that as per new company policy, he could not sell any firearms, including rifles and shotguns, to anyone under age twenty-one.[13] As there are no current federal or Oregon state restrictions on the ability of someone at least eighteen years of age to purchase rifles, other long guns, or long gun ammunition, Mr. Watson alleged the retailer had discriminated against him in violation of Oregon's Public Accommodation Act (OPAA), which provides, in part, that

> all persons within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities and privileges of any place of *public accommodation*, without any distinction, discrimination or restriction on account of race, color, religion, sex, sexual orientation, national origin, marital status, or age if the individual is of age, as described in this section, or older.[14]

A place of public accommodation is defined under Oregon law, in part, as "[a]ny place or service offering to the public accommodations, advantages, facilities or privileges whether in the nature of goods, services, lodgings, amusements, transportation or otherwise."[15] As sellers of goods, DSG and other retail establishments come within the law's purview.

Pending the outcome of the case, Mr. Watson petitioned the court for temporary injunctive relief, seeking to prevent DSG from "illegally discriminating against" customers aged eighteen to twenty at all Oregon

11 *See* Complaint, Watson v. Dick's Sporting Goods, *supra* note 7.

12 *Id.* at 1.

13 *Id.* at 2.

14 OR. REV. STAT. § 659A.403(1) (2017) (emphasis added). The law carves out exceptions to this blanket prohibition against age discrimination for certain goods, such as marijuana and alcohol. *Id.* § 659A.403(2). However, no similar restriction of gun purchases is exempted from the application of the anti-discrimination rule.

15 *Id.* § 659A.400.

locations.[16] Jackson County Circuit Judge Ron Grensky denied Mr. Watson's request for a preliminary injunction and temporary restraining order.[17] According to Mr. Watson's attorney, Max Whittington, Judge Grensky indicated that while the case does have strength on the merits, at this juncture the injunction was denied because the plaintiff was unable to show the irreparable injury needed to support an extraordinary remedy of preliminary injunction.[18] Both sides are now preparing for a lengthy legal battle on the merits of the age discrimination claim.[19]

II. APPLICATION OF THE PUBLIC ACCOMMODATION LAW

On its face, the OPAA prohibits age discrimination in places of public accommodation, except for certain clearly defined exceptions.[20]

Authorities in Oregon, even some who substantively support DSG's policy, have opined that it may run afoul of the OPAA on the merits. The day before Mr. Watson filed his lawsuit against DSG, retired Oregon judge Jim Hargreaves expressed concerns that DSG's new policy restricting long gun sales for those under twenty-one was likely in violation of the state's anti-discrimination laws because "as long as a person is a legal adult, they can't be barred from anything that's available to the public."[21] In Judge Hargreaves's words, "[DSG] can't set their own age limit because the statute has already done that . . . . If you're selling something you have to sell it to anyone who is entitled to buy it by law."[22]

A day after Mr. Watson filed his suit, the Oregon Bureau of Labor and Industries, the state agency that regulates commercial establishments,

16 *See Ex Parte* Motion for Temporary Restraining Order and Preliminary Injunction at 4-5, Watson v. Dick's Sporting Goods, No. 18CV07671 (Or. Cir. Ct. Mar. 19, 2018).

17 *See* Order Denying Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction, Watson v. Dick's Sporting Goods, No. 18VC07671 (Or. Cir. Ct. Apr. 4, 2018) (on file with authors); *see also* Nick Morgan, *Injunction Denied in Under-21 Gun Suit*, MAIL TRIBUNE (Apr. 13), http://www.mailtribune.com/news/20180413/injunction-denied-in-under-21-gun-suit [https://perma.cc/TD9M-TRRL].

18 Miles Furuichi, *Injunction Against Dick's Sporting Goods Denied in Gun Policy Case*, KOBI5 (Mar. 26, 2018), https://kobi5.com/news/injunction-against-dicks-sporting-goods-denied-in-gun-policy-case-74495/ [https://perma.cc/3L3V-FDL9].

19 *Id.* Mr. Watson filed his amended complaint on April 5, 2018. Second Amended Complaint, Watson v. Dick's Sporting Goods, No. 18CV07671 (Or. Cir. Ct. Apr. 5, 2018). DSG filed its answer on April 17, 2018. Defendant's Answer to Plaintiff's Second Amended Complaint, Watson v. Dick's Sporting Goods, No. 18CV07671 (Or. Cir. Ct. Apr. 17, 2018).

20 OR. REV. STAT. § 659A.403 (2017).

21 Katie Shepherd, *Merchant-Imposed Age Restrictions On Gun Sales May Violate Oregon's Anti-Discrimination Laws,* WILLAMETTE WEEK (Mar. 4, 2018), http://www.wweek.com/news/business/2018/03/04/merchant-imposed-age-restrictions-on-gun-sales-may-violate-oregons-anti-discrimination-laws/ [https://perma.cc/K2XA-2MX6].

22 *Id.*

addressed a letter to the Oregon House and Senate leaders expressing its opinion that retail establishments are places of public accommodation under Oregon law and as such cannot discriminate against people based on their age.[23] The Bureau's letter further stated that, while "[e]very case must be decided on its merits, . . . we see nothing that would preclude an individual from filing a complaint" with the Bureau of Labor and Industries or going to civil court.[24] At the same time, the Bureau also acknowledged that the newly imposed age restrictions represent an effort to "make public places safer" and that the Bureau will present a bill to the Oregon legislature in 2019 to consider adding firearm sales as an age exemption to the Oregon public accommodation statutes.[25]

Consistent with the view of Judge Hargreaves and the Bureau of Labor and Industries, Mr. Watson believed that the retailers had violated the OPAA and, in addition to his complaint, filed a motion requesting a temporary restraining order and preliminary injunction.[26] In this motion, Mr. Watson argued that he has met the standard for an injunction because he will suffer injury if he continues to be subject to DSG's discriminatory policies and because his claim of age discrimination is very likely to succeed.[27] Mr. Watson offered no evidence in support of his first contention.[28] Regarding the merits, Mr. Watson concluded without support that the only reasonable interpretation of the OPAA demands a finding that the statute's prohibition against discriminating against those "of age" should be understood to cover those over the age of eighteen except where specifically excluded.[29]

DSG filed a memorandum in opposition to Mr. Watson's motion.[30] In its response, DSG, predictably, contends (1) that Mr. Watson has not shown the level of irreparable harm required to support the necessity of an injunction while the case is pending,[31] and (2) that Mr. Watson cannot show a likelihood

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23 *See* Chris Holmstrom & KOIN 6 News Staff, *Avakian to Lawmakers: Change Gun Buying Rules*, KOIN6 (Mar. 7, 2018, 5:37 PM PST), http://www.koin.com/news/civic-affairs/avakian-to-lawmakers-raise-gun-buying-age/1017749813 [https://perma.cc/54KY-F3YD].

24 *Id.*

25 *Id; see also Murmurs: New Gun-Sale Restrictions May Violate State Law, So One Oregon Official Aims to Change the Law*, WILLAMETTE WEEK (Mar. 7, 2018), http://www.wweek.com/news/2018/03/07/murmurs-new-gun-sale-restrictions-may-violate-state-law-so-one-oregon-official-aims-to-change-the-law/ [https://perma.cc/J9GL-N5CW].

26 *See supra* Part I.

27 *Ex Parte* Motion for Temporary Restraining Order and Preliminary Injunction, *supra* note 16, at 3-4.

28 *See id.* at 4.

29 *Id.* at 3.

30 Opposition to Plaintiff's *Ex Parte* Motion for Temporary Restraining Order and Preliminary Injunction, Watson v. Dick's Sporting Goods, No. 18CV07671 (Or. Cir. Ct. Mar. 25, 2018) (on file with authors).

31 *Id.* at 15-18.

of success on the merits.[32] As indicated above, Judge Grensky agreed that Mr. Watson did not show the level of irreparable harm needed to prevail on a preliminary injunction and therefore, denied the motion without comment.[33] The judge did not rule on the merits of the case.

DSG's argument that Mr. Watson cannot show a likelihood of success on the merits is instructive in that it provides insights into how DSG will argue these claims as the case unfolds in Oregon and in other jurisdictions. In this particular case, DSG argues Mr. Watson is likely to fail on the merits for two key reasons: (1) the OPAA protects only those over age twenty-one from age discrimination in places of public accommodation, and (2) even if the law protects those aged eighteen through twenty from age discrimination, public policy should be a permissible grounds on which to allow private parties to act contrary to the law when such actions are in the best interest of society. While the first argument is a question that is unique to claims brought in Oregon, the second argument is one that is likely to be central to a defense in other jurisdictions in which plaintiffs may bring age discrimination claims against retailers imposing age-based gun sale restrictions on those aged eighteen through twenty.

A. *Defendant's Argument 1: Statutory Construction of the OPAA Indicates that Plaintiff Is Not Protected Under the Act*

DSG's first argument is that the statutory protections of the OPAA should not be read as protecting those over eighteen, but instead are intended to apply to persons over twenty-one.[34] Since this issue is unique to Oregon, due to the wording of the OPAA, it is only briefly discussed here.

Prior to 2015, the OPAA was clear that age discrimination was prohibited against those "18 years of age or older."[35] However, when legislation was enacted in 2015 that legalized recreational marijuana, two amendments were made to the OPAA.[36] First, a new exception was added to clarify that those under twenty-one had no right to purchase marijuana and marijuana products.[37] Second, the phrase "18 years of age or older" was replaced with the phrase "of age, as described in this section, or older."[38] Without citing to

32 *Id.* at 3-15.

33 *See* Order Denying Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction, *supra* note 17.

34 Opposition to Plaintiff's *Ex Parte* Motion for Temporary Restraining Order and Preliminary Injunction, *supra* note 30, at 2.

35 *See* Act of June 30, 2015, ch. 614, § 27, 2015 Or. Laws 1446, 1457 (striking language applying the law to eighteen-year-olds).

36 *Id.*

37 *Id.*

38 *Id.*

any legislative history in support of its position, DSG argues that by removing the reference to "18 years of age or older" and replacing it with "of age, as described in this section, or older," the legislature intended to modify the public accommodation law to no longer provide any protections from discriminatory behavior for those under age twenty-one.[39] DSG contends that the only ages mentioned in the statute are twenty-one and fifty and the only construction of the statute that does not ignore these two ages would require the use of twenty-one.[40] However, this argument ignores the fact that twenty-one and fifty are mentioned in the exceptions in the statute rather than the general rule–implying exactly the opposite of what DSG argues.

DSG's statutory construction arguments fail to address other areas of Oregon law that place the statute in context. As an initial matter, Oregon law requires that "[i]n the construction of a statute . . . where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all."[41] This standard applies not only to a given statute itself but similar and related statutes.[42] Contrary to this standard, DSG asks the court to ignore a number of provisions of Oregon law that provide the context for the OPAA. First, Oregon's remedy provisions for OPAA violations apply only to an individual that is eighteen years of age or older, which would lead to the conclusion that "of age" would imply the same age, eighteen.[43] Oregon did not amend the remedy provision to change "eighteen" to "of age" after legalizing marijuana, as it did with the substantive statute.[44] DSG contends that the remedy provision therefore cannot "control the scope of the prohibited conduct," since if it did, a nineteen-year-old plaintiff could sue for discrimination when a vendor refuses to sell the plaintiff alcohol or marijuana in violation of state law.[45] DSG's perceived flaw in the statutory scheme is that a plaintiff who has not been the victim of a substantive violation may seek relief under the remedy provisions.[46] As a result, DSG discounts the applicability of the remedy provision in interpreting the substantive statute.[47]

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39 Opposition to Plaintiff's *Ex Parte* Motion for Temporary Restraining Order and Preliminary Injunction, *supra* note 30, at 4-8.

40 *Id.* at 4-5.

41 OR. REV. STAT. § 174.010 (2017).

42 Portland Gen. Elec. Co. v. Bureau of Labor & Indus., 859 P.2d 1143, 1146 (Or. 1993) (finding that "the context of the statutory provision at issue . . . includes other provisions of the same statute and other related statutes"), *superseded by statute*, OR. REV. STAT. § 174.020 (2017), *as recognized in* State v. Gaines, 206 P.3d 1042 (Or. 2009) (en blanc).

43 OR. REV. STAT. § 659A.885(8) (2017).

44 *Id.*

45 Opposition to Plaintiff's *Ex Parte* Motion for Temporary Restraining Order and Preliminary Injunction, *supra* note 30, at 7.

46 *Id.*

47 *See id.* ("In construing a statute, courts must refuse to give literal application to language when to do so would produce an absurd result." (quoting State v. Vasquez-Rubio, 917 P.2d 494, 497 (Or. 1996))).

But reading the provisions together, the logical approach would demand that we first look to the substantive provision[48] for a violation and then to the remedy provision.[49] Absent a substantive violation, no remedy would be granted and DSG's perceived flaw does not materialize. DSG also requests that the court ignore the age of majority in Oregon, which provides that when individuals reach the age of eighteen they have "all the rights and are subject to all the liabilities of a citizen of full age."[50] In order to read the age of majority statute harmoniously with the OPAA, the general rule against discrimination[51] should provide the same rights of individuals aged eighteen to twenty.[52] Ultimately, the court will be left to determine whether the legislature intended to change the applicable age, but DSG will likely have a difficult time convincing the court to accept its interpretation.

B. *Defendant's Argument 2: Public Policy Should Allow Private Actors to Act in a Manner Contrary to Statutory Language When in the Best Interest of Society*

DSG's second argument is that, even if the statute is intended to protect those aged eighteen to twenty from discrimination, the OPAA's legislative exceptions[53] should not be read as an exhaustive list but rather one that could be expanded by others (in this case by retailers) to other "reasonable restrictions" if such actions are in the public interest.[54] Should DSG prevail in that argument, the ramifications of such a conclusion are startling. Essentially, the legislative power would be removed from the legislature and placed in the hands of private actors, who would be able to substitute their view of what is in the best interest of society for that of the legislature.

Presently, no precedent exists supporting this position under Oregon law.[55] Instead, DSG looks to judicial decisions in the state courts of California and Michigan to support its argument. First, DSG cites *Javorsky v. Western Athletic Club* for the proposition that public policy can justify age

48 OR. REV. STAT. § 659A.403(2) (2017).

49 *Id.* § 659A.885(7).

50 *Id.* § 109.510.

51 *Id.* § 659A.403(1).

52 *See* Portland Gen. Electric Co. v. Bureau of Labor & Indus., 859 P.2d 1143, 1146 (Or. 1993); OR. REV. STAT. § 174.010 (2017).

53 OR. REV. STAT. § 659A.403(2) (2017).

54 Opposition to Plaintiff's *Ex Parte* Motion for Temporary Restraining Order and Preliminary Injunction, *supra* note 30, at 9-10.

55 DSG does argue from Oregon law that the restrictions for marijuana and alcohol cannot be exclusive, since it is also unlawful in Oregon to sell tobacco to persons under twenty-one years of age. *Id.* at 8. However, that prohibition rests on a separate Oregon statute, which, regardless of whether it is in some tension with the text of the OPAA, has little relevance to DSG's policy argument.

discrimination.[56] In *Javorsky*, a 2015 California case, an individual over age thirty filed a complaint alleging age discrimination by a health club in violation of California's Civil Rights Act due to the club's offering of discount pricing to those aged eighteen through twenty-nine.[57] In affirming summary judgment against the plaintiff, the court indicated that although California did not explicitly offer protection from discrimination based on age, California's judicial precedents indicated that the list of protections provided by the Civil Rights Act should be seen as "illustrative rather than restrictive" and that judges could expand these protections as necessary to prohibit arbitrary discrimination.[58] The court declined to apply the Civil Rights Act to age-differentiated health club pricing because, rather than being arbitrary, it advances the public policy goals of "promot[ing] participation in beneficial activities [i.e., recreation]" and "benefit[ing] age groups with relatively limited financial resources."[59] This case therefore addresses not the situation of *Watson v. DSG*, but its inverse: whether protection against discrimination can be expanded by the judiciary based on public interest in the absence of a statute, not whether considerations of public interest can justify the expansion of the discrimination of private parties in direct violation of one. It is unlikely that a policy of private discrimination against a young person with respect to purchasing a rifle can be viewed as analogous to protecting an older person from discriminatory pricing policies at a health club.

DSG also looks for support in Michigan's 1984 case *Department of Civil Rights v. Beznos Corp.* to justify treating minors differently due to their "special nature and characteristics."[60] Once again, the reliance of DSG appears to be misplaced. In that case, a claim was brought by the Michigan Department of Civil Rights against the landlord of a multi-dwelling apartment complex who restricted children to certain buildings and excluded them from the pool area.[61] Applicable Michigan law at the time prohibited discrimination in a real estate transaction on the basis of "religion, race, color, national origin, age, sex, or marital status of a person or a person residing with that person."[62] In ruling on behalf of the landlord, the court determined this law "does not prohibit differential treatment of minors per se where such treatment is reasonably necessitated by the special nature and characteristics of

56 *Id.* at 9.

57 *See* Javorsky v. W. Athletic Clubs, Inc., 195 Cal. Rptr. 3d 706, 709 (Cal. Ct. App. 2015).

58 *Id.* at 712.

59 *Id.* at 718.

60 *Id.* at 10 (quoting Dep't of Civil Rights v. Beznos Corp., 365 N.W.2d 82, 88 (Mich. 1984)).

61 Dep't of Civil Rights v. Beznos Corp., 365 N.W.2d 82, 83 (Mich. 1984).

62 *Id.* at 86 (quoting Act of Jan.13, 1977, No. 453, § 37.2502(1), 1977 Mich. Pub. Acts 1701, 1707 (current version at MICH. COMP. LAWS § 37.2502(1) (2017))).

children."[63] The court explains that the terms of the act do not require "the identical treatment of children and adults in every situation" and, more significantly, that this disparity is justified because "children are, in many respects, different than adults."[64] DSG uses this case in support of its argument that a literal application of age discrimination in all contexts is not required and in some instances would be contrary to the interests of minors.[65] That argument is a fair reading of the Michigan case, but DSG's reliance on that case is misplaced. *Beznos* focused on the fact that special treatment may be needed for minors in some situations. Such consideration is not analogous to limiting the rights of individuals aged eighteen through twenty that have reached the age of majority and that, under relevant law, are subjected to all the responsibilities and liabilities of adults.[66] Where the Oregon legislature chose to make a distinction in ages, it did so.[67] The Oregon legislature and other state legislatures with similar statutes could choose to expand their exceptions to include guns. If they have not expanded their exceptions to the public accommodation statutes, retailers should not make that choice for the citizens of that state.

In support of its argument that the age-based restrictions for long gun purchases should not be seen as a violation of the OPAA because these restrictions are "[l]egitimate and rational,"[68] DSG relies on various research studies focused on gun violence.[69] For example, DSG points to research that has shown that "the risk of perpetrating or being victimized by serious violent crimes increases rapidly during adolescence and in the early 20s" and that a survey of those convicted of gun-related offenses found that "nearly a quarter . . . would have been prohibited [from obtaining firearms at the time of the crime] if the minimum legal age for possessing any type of firearm was 21 years."[70] In light of the tragedy at Parkland and at subsequent school

63 *Id.* at 88.

64 *Id.* at 87-88.

65 Opposition to Plaintiff's *Ex Parte* Motion for Temporary Restraining Order and Preliminary Injunction, *supra* note 30, at 10.

66 *See, e.g.*, OR. REV. STAT. § 109.510 (2017).

67 *See id.* § 659A.403(2).

68 Opposition to Plaintiff's *Ex Parte* Motion for Temporary Restraining Order and Preliminary Injunction, *supra* note 30, at 11. The terms "legitimate" and "rational" ordinarily apply to disputes over whether a particular statute or regulation is rationally related to a legitimate government interest. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471, 483 (1970). Here, DSG seeks to invoke the terms of the rational basis test in arguing that it should be permitted to deny rights to individuals aged eighteen through twenty.

69 Opposition to Plaintiff's *Ex Parte* Motion for Temporary Restraining Order and Preliminary Injunction, *supra* note 30, at 11.

70 Declaration of Joel A. Mullin in Support of Defendant's Opposition to Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction, Watson v. Dick's Sporting Goods, 18CV07671 (Or. Cir. Ct. Mar. 26, 2018) (Exhibits 4, 6) (on file with authors).

shootings, such evidence is compelling. But, the question of whether something should be done with regard to gun ownership rights to help stem the tide of senseless tragedy is quite distinct from the question before us in this case of whether retailers or any other private party are vested with the right to take such matters into their own hands when those independent actions run afoul of a state's laws. There is nothing in Oregon precedent to suggest the court will accept a public policy argument to allow a private party to restrict the application of the OPAA.

III. IMPLICATIONS OF *WATSON* FOR OTHER JURISDICTIONS

After the filing of the Watson case (and three other cases) in Oregon and the filing of the Fulton case in Michigan, can we expect a flood of similar claims throughout the state courts in all jurisdictions in which retailers such as DSG, Walmart, Kroger, and Bi-Mart refuse to sell long guns to those aged eighteen through twenty? The short answer to that question is "no." As mentioned at the outset, not all states protect against age discrimination in their public accommodation statutes. In total, eighteen states and the District of Columbia have laws that prohibit discrimination based on age in retail establishments.[71] In states without such protections, retailers are free to set their own terms of sale. In addition, there are a handful of states that have resolved the issue of long gun sales to those under twenty-one through state law.[72] Hawaii[73] and Illinois,[74] for example, prohibit those under twenty-one from purchasing long guns. Florida joined this group after the Parkland shooting, prohibiting firearm ownership by those under twenty-one in the "Marjory Stoneman Douglas High School Public Safety Act."[75]

It can be expected that in those states that prohibit age-based discrimination in places of public accommodation, we are likely to see an increase in litigation like that filed by Mr. Watson. These cases will play out in the courts in the months and years ahead. The outcome of such decisions will depend, in part, on the wording of the state public accommodation statutes, and how expansively or narrowly such protections are interpreted by the courts. This will require the courts to engage in the balancing of individual rights: the right of an individual to make a purchase in accordance

71 *See supra* note 9.

72 *Minimum Age to Purchase & Possess*, GIFFORD L. CTR. TO PREVENT GUN VIOLENCE, http://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/minimum-age/ [https://perma.cc/RWN2-G5WL].

73 HAW. REV. STAT. § 134-2(a), (d) (2017).

74 430 ILL. COMP. STAT. § 65/3(a), 65/4(a)(2)(i) (2017). Illinois permits those under 21 to receive the necessary identification to possess a firearm with consent of their parent or legal guardian.

75 2018 Fla. Laws Ch. 2018-3 § 11 (codified at FLA. STAT. § 790.065(13) (2018)).

with their right to bear arms and the right of those in society to take actions to alleviate the threat of gun violence in their communities.

This balancing will take place against the backdrop of a society reeling from recent tragedies of senseless gun violence. Debates on the scope and limits of an individual's right to bear arms under the Second Amendment are now front and center in the public square.[76] Since the Supreme Court's landmark 2008 decision in *District of Columbia v. Heller*,[77] state legislatures and courts have struggled with the scope of protection provided by the Second Amendment. In *Heller*, an individual challenged the constitutionality of the District of Columbia's prohibition on the registration of handguns, and the requirement that registered long guns kept within the home be kept "unloaded and disassembled or bound by a trigger lock or similar device."[78] In ruling for the plaintiff, the Supreme Court recognized for the first time that the Second Amendment created an individual right to own firearms.[79] But the *Heller* court also pointed out that the right to bear arms is not unlimited, and offered a non-exhaustive list of possible restrictions, including "possession of firearms by felons and the mentally ill, . . . 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."[80] Since the *Heller* decision, challenges to federal, state, and local gun restrictions continue to test the limits of *Heller*'s protections.[81]

State legislatures, reacting to the Parkland tragedy as well as subsequent mass shootings, are seeking ways to reduce gun violence through more stringent gun ownership requirements, sometimes through "red-flag" laws designed to take guns out of the hands of those who present a risk of harm to themselves, their loved ones, or others.[82] While a discussion of the existing and newly proposed more stringent rules is beyond the scope of this Essay,

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76 *See* Adam Soloperto, Comment, *A Standard of Review for Gun Rights: The Second Amendment Question Hot as a Two-Dollar Pistol*, 47 SETON HALL L. REV. 225, 228-31 (2016) (discussing the combination of fierce public controversy and uncharted legal territory characterizing gun rights cases after *District of Columbia v. Heller)*.

77 554 U.S. 570.

78 *Id*. at 575.

79 *Id*. at 595.

80 *Id*. at 626-27.

81 For a more comprehensive discussion of this issue, see generally SARAH S. HERMAN, CONG. RESEARCH SERV., R44618, POST-*HELLER* SECOND AMENDMENT JURISPRUDENCE (2017).

82 *See* Jonathan Allen, *Florida Governor Signs Gun-Safety Bill into Law After School Shooting*, REUTERS: POLITICS (Mar. 9, 2018, 3:22 PM), https://www.reuters.com/article/us-usa-guns-florida-law/florida-governor-signs-gun-safety-bill-into-law-after-school-shooting-idUSKCN1GL2RA [https://perma.cc/UJN5-TKPV]; *see also* Lisa Mullins & Lynn Jolicoeur, *Bills Before Mass. Lawmakers Aim to Help Police Take Guns from People Deemed an 'Extreme Risk'*, WBUR NEWS (Mar. 1, 2018), http://www.wbur.org/news/2018/03/01/massachusetts-bills-to-help-police-take-guns [https://perma.cc/DV2N-WZH9].

one illustration is informative. On March 5, 2018, Governor Rick Scott of Florida signed a "red-flag" measure within the Marjory Stoneman Douglas High School Safety Act, the same bill that included the prohibition against firearm possession by persons under twenty-one.[83] Almost immediately, the National Rifle Association (NRA) filed a lawsuit in the U.S. District Court in Tallahassee alleging violations of the Second Amendment and equal protection of the law guaranteed by the Fourteenth Amendment.[84] The NRA put forth the following argument on behalf of individuals aged eighteen through twenty: "At 18, citizens are eligible to serve in the military – to fight and die by arms for the country. Indeed, male citizens in this age-group are designated members of the militia by federal statute, and may be conscripted to bear arms on behalf of their country."[85]

The same argument applies to DSG's policy, which would deny guns to citizens who can be required to fight for their country.

CONCLUSION

While Second Amendment claims will play out in the courts in the months and years ahead, retailers such as DSG are seeking to have an immediate impact in the community by restricting gun sales through company policy. In some states, those aged eighteen through twenty are seeking to roll back these policies alleging violations of state laws prohibiting age discrimination in places of public accommodation. It is against the backdrop of the fight for gun ownership as a Second Amendment right that claims such as Mr. Watson's claim of age discrimination can best be understood. From Mr. Watson's perspective, in the absence of a limitation imposed under federal or state law, he arguably has certain rights to possession of a firearm under the Second Amendment. At present, there is no federal law prohibiting an individual between eighteen and twenty years of age from purchasing a shotgun or rifle. The question then becomes who has the power to diminish that right? We look first to Congress, then to the State Legislatures as the arbiters of such matters, subject to the oversight of the courts.

Actions by private parties, such as retailers, do not implicate the Second Amendment. But the Second Amendment may help inform the answer to the question raised by retailers' long gun sale restrictions. Where a state public

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83 2018 Fla. Laws Ch. 2018-3 §§ 8, 10; *see also* Ed McNulty, Tanya Ballard Brown & Barbara Campbell, *Florida Governor Signs Package of New Gun Restrictions*, NPR (Mar. 9, 2018, 3:26 PM), https://www.npr.org/sections/thetwo-way/2018/03/09/592393010/florida-gov-rick-scott-signs-gun-package [https://perma.cc/NF5P-APEK].

84 Complaint for Declaratory and Injunctive Relief, NRA of Am. v. Bondi, No. 4:18-cv-00137-MW-CAS (N.D. Fla. Mar. 9, 2018), http://www.flchamber.com/wp-content/uploads/2018/03/NRA-v.-Pam-Bondi.pdf [https://perma.cc/ND3Y-8P47].

85 *Id.* at 3 (internal citation omitted).

accommodation law prohibits retailers from discriminating against their customers based on age, should retailers be able to take actions contrary to that law as a way to remedy what they perceive to be a societal problem? DSG says yes, analogizing their restrictions of gun sales to situations involving health club pricing and swimming pool access restrictions. But given the current divide and lack of clarity on the scope of the Second Amendment's protections, the courts will likely recognize that an individual's right to keep and bear arms is not analogous to health club pricing and pool area restrictions. While it may be in the interest of society to limit the extent of gun ownership for those under twenty-one, it is not in the interest of society to allow corporate boards to usurp the authority vested in duly elected representatives and take actions that violate age-discrimination statutes.

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