No. 18-280

In the Supreme Court of the United States

NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC., ROMOLO COLANTONE, EFRAIN ALVAREZ, and JOSE ANTHONY IRIZARRY,
Petitioners,

v.

THE CITY OF NEW YORK and THE NEW YORK CITY POLICE DEPARTMENT-LICENSE DIVISION,
Respondents.

On Writ of Certiorari to the United States Court Of Appeals for the Second Circuit

BRIEF OF CONSTITUTIONAL LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

Amici curiae are scholars whose work is devoted to the study of constitutional rights. Having researched the treatment of Second Amendment claims and claimants in the Courts of Appeals as compared to the treatment of those involving other fundamental rights, they are interested in ensuring that the Court has an accurate picture of the matter.

A list of *Amici* and their respective academic positions is set forth in the Appendix.[1]

SUMMARY OF THE ARGUMENT

In their effort to obtain a broad ruling on the Second Amendment's scope, Petitioners and their *amici* have sought to convince this Court that the Courts of Appeals have systematically relegated the Second Amendment to "second-class" status. The approach taken by Courts of Appeals to interpreting the Second Amendment, Petitioners contend, is "tantamount to imposing 'a hierarchy of constitutional values' by judicial fiat." Pet. Br. at 31 (quoting *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982)). Various of their *amici* echo this sentiment.[2]

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[1] All parties have filed a notice of blanket consent to the filing of *amicus* briefs with the Clerk. In accordance with Rule 37.6, no counsel for any party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] *See* Am. Civil Rights Union Br. at 2 ("This Court commands that the Second Amendment must not be treated as second-class constitutional right, but that is precisely what the Second Circuit here—and other circuits as well—have done."); Bradley Byrne &

Petitioners and their supporters are incorrect. A fair review of ten years' worth of decisions applying *Heller* and *McDonald* shows that the Courts of Appeals have acted with fidelity to the Court's instructions. To begin, the Courts of Appeals have applied a doctrinal framework that aligns not only with *Heller* and *McDonald*, but also with the constitutional framework this Court has employed to review other fundamental rights. Next, an empirical analysis of Second Amendment challenges reveals a success rate that aligns closely to success rates for other challenges involving fundamental rights. And finally, review of the cases Petitioners and their *amici* highlight in their effort to prove systemic judicial hostility reflect instead a judicial effort to grapple with the difficult issues presented—all consistent with this Court's instructions. In other words, since *Heller* the Courts of Appeals have treated the Second Amendment as a fundamental right.

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119 Members of Congress Br. at 1 (action needed "to make clear that the fundamental right to keep and bear arms is not a second-class right"); Cal. Rifle & Pistol Ass'n Br. at 2 (arguing Second Circuit applied "scrutiny beneath the dignity of a fundamental constitutional right" and that "(mis)treatment of the Second Amendment is common among lower courts"); Liberal Gun Club Br. at 4 (Courts of Appeals approach "incompatible with any individual right the Constitution protects"); Mtn. States Legal Foundation Br. at 25 (contending Second Amendment has "second-tier status" in lower courts); NRA Br. at 4 ("any lesser form of scrutiny [than strict scrutiny] would demote [the Second Amendment] to second-class status"); Profs. of Second Amendment Law Br. at 2 ("lower courts have misused [a two-step test] to treat the Second Amendment as a second-class right"); George K. Young Br. at 6–7 (arguing that the "adequate alternatives" test used in some Circuit Court analyses of Second Amendment challenges would never be applied to other fundamental rights).

ARGUMENT

In *Heller*, after confirming that the Second Amendment "conferred an individual right to keep and bear arms," the Court declined to "clarify the entire field," leaving the task of constitutional interpretation to the Courts of Appeals in the first instance. *District of Columbia* v. *Heller*, 554 U.S. 570, 595, 628-29, 635 (2008). Since that ruling, the Courts of Appeals have faithfully sought to carry out the Court's mandate, reviewing the Second Amendment issues presented based on *Heller*'s instructions. There is no basis to conclude that the Courts of Appeals have elided this Court's instructions or relegated the Second Amendment to second-class status. As a result, there is also no reason for this Court now to accept Petitioners' invitation to "clarify the entire field." *Id.* This Court should continue to leave doctrinal development to the Courts of Appeals in the first instance.

I. The growing body of Second Amendment precedent has adhered to constitutional doctrine for reviewing fundamental rights.

A. Strict scrutiny does not invariably govern fundamental-rights claims.

To begin, the Court should reject the suggestion by several of Petitioners' *amici* that the failure to apply strict scrutiny in every Second Amendment case demonstrates second-class treatment. The premise of this argument is that fundamental rights invariably merit strict scrutiny.[3] That premise is untenable.

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[3] *See* NRA Br. at 4 ("Because the Second Amendment is a fundamental, enumerated right, any lesser form of scrutiny [than strict scrutiny] would demote it to second-class status[.]"); Profs.

Strict scrutiny is not a universal feature of fundamental rights. Instead, this Court has subjected governmental conduct to strict scrutiny only when it implicates a limited set of rights—those found in the First Amendment's Free Speech, Free Exercise, and Free Association Clauses, and in the Constitution's guarantees of due process and equal protection—and, even then, it has done so only in limited cases.[4]

Thus, the Court has applied a more relaxed standard of review in a number of cases involving these same rights. "Gradations of scrutiny" apply to the review of the First Amendment right to free speech, depending on the speaker, the type of speech, and the type of regulation. *See* Br. of Second Amendment Law Profs. at 15–17; *see also* pp. 8–9, below. Other examples abound. The First Amendment's Free Exercise

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of 2d Amendment Law Br. at 5 ("[T]he refusal to apply strict scrutiny is striking."); Bradley Byrne & 119 Members of Congress Br. at 6 ("Generally, a government action that burdens a fundamental right . . . is subject to strict scrutiny."); Cato Inst. Br. at 4 ("It is . . . clear that an interest-balancing approach is usually inappropriate when it comes to . . . fundamental rights.").

[4] *See, e.g.*, *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2019–20 (2017) ("laws that target the religious for 'special disabilities' based on their 'religious status'" (quoting *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U.S. 520, 533, 542 (1993))); *Fisher* v. *Univ. of Texas at Austin*, 136 S. Ct. 2198, 2207–08 (2016) (race-based classifications); *Reed* v. *Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226–27 (2015) (content-based regulation of speech); *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law* v. *Martinez*, 561 U.S. 661, 681 (2010) (noting "the strict scrutiny [the Court has] applied in some settings to laws that burden expressive association"); *see also* Timothy Zick, *The Second Amendment as a Fundamental Right*, 46 Hastings Const. L. Q. 621, 641–42 (2019).

Clause, for instance, protects the fundamental right to practice one's religion, but "neutral and generally applicable" laws receive reduced scrutiny even if they obstruct religious practices. *See Trinity Lutheran Church*, 137 S. Ct. at 2020–21 (discussing *Lyng* v. *Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) and *Emp. Div., Dep't of Human Res. of Or.* v. *Smith*, 494 U.S. 872 (1990)). Similarly, strict scrutiny sometimes applies to certain substantive due-process rights, but others are subject to lower standards of review. *See, e.g.*, *Whole Woman's Health* v. *Hellerstedt*, 136 S. Ct. 2292, 2309 (2016) ("undue burden").[5]

Other rights do not trigger strict-scrutiny review at all—those found, for example, in the Fourth, Sixth, and Eighth Amendments—but these rights are no less fundamental or "first-class." Just this past Term, for example, the Court held that the Eighth Amendment's protection against excessive fines is "fundamental," *Timbs* v. *Indiana*, 139 S. Ct. 682, 686–87 (2019), but the test for whether fines are excessive does not require the narrowest tailoring between ends and means, *see United States* v. *Bajakajian*, 524 U.S. 321, 334 (1998) (punitive forfeiture unconstitutional only if "grossly disproportional to the gravity of a defendant's offense").[6] The short of it is that a failure to

[5] *See also Flowers* v. *Mississippi*, 139 S. Ct. 2228, 2273 (2019) (Thomas, J., dissenting) ("our precedents do not apply 'strict scrutiny' to race-based peremptory strikes"); *Sessions* v. *Morales-Santana*, 137 S. Ct. 1678, 1689 (2017) (applying only "heightened scrutiny" for "'gender-based classifications'").

[6] *See also City of Ontario, Cal.* v. *Quon*, 560 U.S. 746, 763 (2010) ("This Court has 'repeatedly refused to declare that only the least intrusive search practicable can be reasonable under the Fourth Amendment.'" (quoting *Vernonia Sch. Dist. 47J* v. *Acton*, 515

apply strict scrutiny to firearms regulations could not show second-class status.

B. The Courts of Appeals have adhered to fundamental-rights doctrine.

Next, it is plain that the Courts of Appeals addressing Second Amendment challenges have applied doctrinal tests consistent with this Court's precedents. By and large, since *Heller*, the Courts of Appeals have applied an approach similar to the "two-step" framework the Second Circuit employed in this case, asking, first, "whether the challenged legislation impinges upon conduct protected by the Second Amendment" and second, "determining" "the appropriate level of scrutiny" based on the answer. *N.Y. State Rifle & Pistol Ass'n, Inc.* v. *City of New York*, 883 F.3d 45, 55 (2d Cir. 2018) (internal quotation marks omitted).[7] This two-step approach accords with *Heller* and this Court's fundamental-rights precedents.

U.S. 646, 663 (1995))); *Garza* v. *Idaho*, 139 S. Ct. 738, 744 (2019) (Sixth Amendment right to counsel violated only where "counsel's representation [falls] below an objective standard of reasonableness" and the deficiency is "prejudicial to the defense" (quoting *Strickland* v. *Washington*, 466 U.S. 668, 688, 692 (1984))).

[7] For other Courts of Appeals applying the test, *see, e.g., Gould* v. *Morgan*, 907 F.3d 659, 669 (1st Cir. 2018); *United States* v. *Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010); *United States* v. *Chester*, 628 F.3d 673, 678–80 (4th Cir. 2010); *Nat'l Rifle Ass'n of Am., Inc.* v. *Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 193–94 (5th Cir. 2012); *United States* v. *Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Ezell* v. *City of Chicago*, 651 F.3d 684, 701–04 (7th Cir. 2011); *United States* v. *Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013); *United States* v. *Reese*, 627 F.3d 792, 800–01 (10th Cir. 2010); *GeorgiaCarry.Org, Inc.* v. *Georgia*, 788 F.3d 1318, 1322–23 (11th Cir. 2015); *Heller* v. *District of Columbia*, 670 F.3d 1244, 1252–53 (D.C. Cir. 2011).

1. At the outset, it is plain that the Courts of Appeals have adhered to *Heller*'s reasoning. In holding that the Second Amendment conferred an individual right, *Heller* held that this right was "no different" from the First Amendment, while making clear it was "not unlimited." 554 U.S. at 595, 635. The Court acknowledged that the government may impose "prohibitions on the possession of firearms by felons and the mentally ill," and that the individual right to bear arms was no obstacle to laws "forbidding the carrying of firearms in sensitive places" or "imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626–27. The Court also noted "another important limitation"—the Second Amendment protects only weapons "'in common use.'" 554 U.S. at 627 (quoting *United States* v. *Miller*, 307 U.S. 174, 179 (1939)). Thus, "weapons that are most useful in military service—M–16 rifles and the like—may be banned." *Id.* at 627.

From these observations it follows that, when confronting a Second Amendment challenge, the courts *should* ask questions like "whether the challenged legislation impinges upon conduct protected by the Second Amendment," what sorts of constitutional interests does the legislation implicate, and how "sever[e]" is "the law's burden on the right." *N.Y. State Rifle & Pistol Ass'n, Inc.*, 883 F.3d at 55–56 (internal quotation marks omitted). It is entirely unremarkable, therefore, that the Courts of Appeals have considered the constitutional interests at stake when addressing Second Amendment claims.

2. Next, comparing the Courts' of Appeals Second Amendment doctrine since *Heller* to this Court's First Amendment jurisprudence shows that the Second

Amendment has been treated "no different[ly]," and indeed the doctrine has developed much like the way First Amendment doctrine historically developed. *See* Timothy Zick, The Second Amendment as a Fundamental Right, 46 Hastings Const. L. Q. 621, 660–75 (2019) (discussing doctrinal developments).

A two-step, Second Amendment framework that considers the nature of the conduct in issue and its relationship to the implicated constitutional principles conforms with well-established First Amendment doctrine. *See United States* v. *Alvarez*, 567 U.S. 709, 716–729 (2012) (plurality op.) (applying similar two-step inquiry to First Amendment challenge). Certain "utterances," the Court has held, "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572 (1942). As a result, some forms of speech receive little to no judicial protection. *E.g.*, *United States* v. *Grayson*, 438 U.S. 41, 54 (1978) (perjury); *Va. Bd. of Pharmacy* v. *Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (fraud); *Miller* v. *California*, 413 U.S. 15, 23 (1973) (obscenity); *Brandenburg* v. *Ohio*, 395 U.S. 444, 448–49 (1969) ("incitement to imminent lawless action"); *Watts* v. *United States*, 394 U.S. 705, 708 (1969) (per curiam) (true threats); *Chaplinsky*, 315 U.S. 568, 573 (1942) ("fighting words").

For other forms of speech, the level of scrutiny will vary with the constitutional interests implicated—ranging from truthful political speech that is at the core of the First Amendment's protections, *e.g.*, *Williams-Yulee* v. *Fla. Bar*, 135 S. C.t 1656, 1662 (2015)

(judicial campaign speech), to speech that receives judicial solicitude, but as to which the government has more latitude, *e.g.*, *Cent. Hudson Gas & Elec. Corp.* v. *Pub. Serv. Comm'n*, 447 U.S. 557, 561–66 (1980) (commercial speech); *Tinker* v. *Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 504–14 (1969) (student speech).

And even speech that is at the core of the First Amendment, this Court has held, may be subject to "reasonable" restrictions on the "time, place, [and] manner" of its exercise. *Ward* v. *Rock Against Racism*, 491 U.S. 781, 789–90 (1989). Such regulation as well as incidental restrictions on core speech may be imposed without requiring the government to satisfy anything approaching strict scrutiny. *Id.* ("[T]he Court of Appeals erred in requiring the city to prove that its regulation was the least intrusive means of furthering its legitimate governmental interests"); *see also Clark* v. *Cmty. for Creative Non-Violence*, 468 U.S. 288, 294–99 (1984) (upholding restriction on camping in national parks as applied to protesters, whether viewed as time/place/manner restriction or incidental burden on expressive conduct).

In sum, Petitioners and their *amici* may not like the flexible approach the Courts of Appeals have employed to review Second Amendment claims,[8] but that

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[8] Academics for the 2d Amendment Br. at 7 ("The practical effect of the dual standard of review is to allow lower courts to avoid any real application of the Second Amendment."); Cato Institute Br. at 2 ("The lack of a clear standard of review has enabled—if not encouraged—the development of an unintelligible and wildly divergent body of law."); Firearms Policy Foundation Br. at 10 ("[T]he lack of clear standards guiding and constraining the lower courts was happily noted by the court below, as precursor to its dismantling of any meaningful protection of Second

flexibility is a hallmark of the doctrine informing this Court's review of the very first of the individual rights enumerated in the Bill of Rights. And in the Second Amendment context, it is also required by *Heller*'s pronouncement that the Second Amendment is not unlimited, that it does not protect all weapons, and that it specifically allows certain forms of regulation (like felon-in-possession statutes). In this respect, the Second Amendment is no different from the First.

II. Success rates of Second Amendment claims do not suggest second-class status.

Certain *amici* have also stated that the second-class status of the right to keep and bear arms may be inferred from the success rates of Second Amendment claims. *See, e.g.*, Cal. Rifle & Pistol Ass'n Br. at 3–4

Amendment Rights."); Gun Owners Br. at 22 ("Sadly, most modern federal judges . . . . read into the Second Amendment the subjective, flexible, judge-empowering word 'unreasonably' before 'infringed.'"); NRA Br. at 10 ("The problem is with *the balancing inquiry itself*—and the fact that the tiers-of-scrutiny framework by its very nature *enables* judges, who in many cases do not weigh the values at stake in the same way as the People who adopted the Second Amendment, *to override* the balance the People struck and substitute their own."); Cal. Rifle & Pistol Ass'n Br. at 4–5 ("two-step" approach "affords courts multiple opportunities to tilt things in the government's favor"); Commonwealth 2d Amendment, Inc. Br. at 20 ("Reticence to examine the Second Amendment's requirements, and the government's consequent automatic victory, has now been fully absorbed into the two-step, means-ends scrutiny process."); Gun Owners Br. at 7 ("'[S]tep two' was designed to provide a lawful-sounding cover to authorize Second Amendment violations that appeal to judges."); Mtn. States Legal Foundation Br. at 12 ("[T]he two-step test is based on a fundamental misinterpretation of a single paragraph in *Heller*, has allowed courts to inappropriately narrow the scope of Second Amendment protected rights, and ignores this Court's explicit prohibition of the use of interest-balancing tests[.]").

(asserting that "essentially every iteration of Second Amendment challenge fail[s]" and that "only a few lower courts have struck a firearm restriction as unconstitutional"); Commonwealth Second Amendment Br. at 5 (contending that "[n]otwithstanding the fact that the federal, state, and local governments comprehensively regulate every aspect of the possession and use of arms, decisions holding such regulations unconstitutional are vanishingly rare"). An empirical review of lower court decisions tells a different story.

The most comprehensive quantitative study of which we are aware concludes the data do not show second-class status. Professors Joseph Blocher of the Duke University School of Law and Eric Ruben of the SMU Dedman School of Law have analyzed every available Second Amendment case between the date *Heller* was decided and February 1, 2016—1,153 claims in total, in state and federal court, at the trial and appellate level. *See* Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After* Heller, 67 Duke L.J. 1433, 1455 (2018). Ruben and Blocher show that the supposedly low success rate of Second Amendment claims "probably has more to do with the claims being asserted than with judicial hostility[.]" *Id.* at 1507.

To begin, Ruben and Blocher demonstrate that merely tallying Second Amendment "wins" and "losses" results in an inaccurate picture. A majority of Second Amendment challenges—742 of the 1,153 they identified—were brought by criminal defendants whose counsel, they observe, reasonably "might be expected to raise any nonsanctionable defense." Ruben & Blocher at 1507, *see also id.* at 1477–78. Indeed,

nearly half of those (or a quarter of all challenges) involved felon-in-possession laws—a form of regulation *Heller* held was "presumptively lawful." *Id.* at 1507; *see Heller*, 554 U.S. at 626–27 & n.26.

The success rate in civil cases, by contrast, is significantly higher, and it has steadily increased over time. Ruben & Blocher at 1486–90; *see also id.* at 1507–08. Represented plaintiffs succeed more often than *pro se* plaintiffs, and the success rate for represented civil litigants at the federal appellate level is 40 percent. *See* Ruben & Blocher at 1477–79, 1507–1509. That is "well within the range of success rates for other constitutional claims," and far from the insurmountable odds Petitioners' *amici* seek to portray. Br. of Second Amendment Law Profs. at 22–23 (citing studies showing success rates for other rights ranging from 10 percent (regulatory takings), to roughly 12 to 16 percent (Free Exercise), and 39 to 52 percent (Fourth Amendment)).[9]

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[9] *Amici* Professors of Second Amendment Law cite two articles that criticize Ruben & Blocher's methodology. *See* Profs. of Second Amendment L. Br. at 32 (citing David Kopel, *Data Indicate Second Amendment Underenforcement*, 68 Duke L.J. Online 79 (2018); George Mocsary, *A Close Reading of an Excellent Distant Reading of* Heller *in the Courts*, 68 Duke L.J. Online 41 (2018)). Both articles acknowledge that the success rate of Second Amendment cases is driven in part by weak claims, *see* Kopel at 80; Mocsary at 43–44, and Mocsary acknowledges that claims subjected to intermediate scrutiny (a test he has criticized) have fared better than others, Mocsary at 44–45. Meanwhile, Kopel, who does not analyze enforcement data in the context of other rights, appears to assume that the Second Amendment is being "underenforced" simply because he disagrees with certain decisions, including *Teixeira* v. *Cnty. of Alameda*, 873 F.3d 670 (9th Cir. 2017) (*en banc*), *cert. denied*, 138 S. Ct. 1988 (2019). *See* Kopel at 88.

What's more, "Second Amendment claims have had relatively high success rates in the courts that have been criticized as giving the Second Amendment right second-class treatment," including by *amici* supporting Petitioners here. Ruben & Blocher at 1475; *see also id.* at 1505. In both relative and absolute terms, Second Amendment challenges have fared best in the Second, Fourth, Seventh, Ninth, and D.C. Circuits. *Id.* at 1475; *compare* Cal. Rifle & Pistol Ass'n Br. at 2 ("the Second Circuit's (mis)treatment of the Second Amendment is common among lower courts" and the Ninth Circuit is "perhaps the worst offender").

For all these reasons, the Court should reject *amici*'s assertion that litigation success rates demonstrate a systematic bias against Second Amendment claims.

III. The Court should not credit conjecture about judicial "hostility".

Finally, the Court should discount the notion, advanced by certain *amici*, that a review of cherry-picked cases chosen by them reflects judicial "bias" or "hostility."[10] As just stated, a review of the doctrine

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[10] *See* Commonwealth Second Amendment Br. at 4 (urging Court to "address the lower courts' bias against the Second Amendment"); Firearms Policy Found. Br. at 2 ("[i]t is no secret that many federal courts . . . have been hostile to the point of contempt toward claims under the Second amendment"); Gun Owners of Am. Br. at 4 (asking Court to "put a stop to the open anti-gun prejudice of many lower court judges, quell the open rebellion in the lower courts, [and] admonish their near-universal rejection" of *Heller* and *McDonald*); Cal. Rifle & Pistol Ass'n Br. at 5–6 (claiming "the lengths to which courts have reached [to find that challenged laws do not burden the Second Amendment] confirms Amici's suspicion of bias in employing the test); Liberal

applied by the Courts of Appeals shows conformity with the approach taken toward evaluating other fundamental rights, and litigation success rates are roughly in line. Meanwhile, *amici*'s anecdotal evidence fares no better in establishing their thesis.

California Rifle & Pistol Association and their co-*amici*, for example, cite the Third Circuit's decision to uphold New Jersey's "justifiable need" requirement for a handgun carry license as evidence of bias. Br. at 6 (discussing *Drake* v. *Filko*, 724 F.3d 426 (3d Cir. 2013)). In that case, they assert, the court supposedly showed bias when it "pointed out that the list [of lawful restrictions in *Heller*] is not 'exhaustive' and that being 90-years-old qualified the requirement for inclusion." Br. at 6. But, in fact, the Third Circuit engaged in an extensive discussion of the history of New Jersey's regulation—as well as those in other jurisdictions—before concluding it was the type of "presumptively lawful" regulation *Heller* identified. 724 F.3d at 431–34. That mode of analysis is consistent with *Heller*, which stated that the scope of the Second Amendment should be determined by reference to historic regulations. *See Heller* 554 U.S. at 626–27; *see also McDonald* v. *City of Chicago*, 561 U.S. 742, 786 (2010); *id.* at 802 (Scalia, J., concurring) (observing that "traditional restrictions go to show the scope of the right, not its lack of fundamental character").

Gun Club Br. at 18 (describing lower courts' rulings as a "deliberate attempt to subject the protections of the Second Amendment to a death by a thousand cuts"); NRA Br. at 29 ("Judges who think that Second Amendment's 'scope too broad' have determined 'on a case-by-case basis' that in most every case that the Second Amendment right is not '*really worth* insisting upon.'" (quoting *Heller*, 554 U.S. at 634)).

Amici also point to the Fourth Circuit's decision holding that Maryland's assault-weapons ban is constitutional because the affected weapons are "'like' the M-16 machine gun," supposedly "ignor[ing] that the rifles are lawfully owned by millions of civilians in this country." Cal. Rifle & Pistol Ass'n Br. 6–7, (discussing *Kolbe* v. *Hogan*, 849 F.3d 114 (4th Cir. 2017) (*en banc*), *cert. denied*, 138 S. Ct. 469 (2017)). Here again, no bias is apparent. Instead, the *en banc* Fourth Circuit analyzed substantial record evidence that AR-15 pattern rifles and other weapons banned by Maryland were, in their design characteristics, sufficiently "like" M–16 rifles to fall within the scope of *Heller*'s express guidance that "weapons . . . most useful in military service" may be proscribed. *See* 849 F.3d at 124–29, 135–37, 141–44; *see also Heller* v. *District of Columbia*, 670 F.3d 1244, 1275 (D.C. Cir. 2011) ("*Heller II*") (Kavanaugh, J., dissenting) ("when legislatures seek to address new weapons that have not traditionally existed or to impose new gun regulations because of conditions that have not traditionally existed . . . [it] does [not] mean that the government is powerless[.] . . . [T]he proper interpretive approach is to reason by analogy from history and tradition").[11]

Both California Rifle & Pistol Association and Commonwealth Second Amendment *amici* also attack as "sleight of hand" or "moving the goal posts" the Ninth Circuit's conclusion in *Teixeira* that a county zoning ordinance restricting the location of gun stores did not burden conduct falling within the Second

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[11] As noted above, *amici* accuse the Fourth Circuit of "ignoring" the widespread ownership of the types of firearm at issue, but, in fact, the court addressed this point several times. *See Kolbe*, 849 F.3d at 135–36, 137 n. 11, 141–42.

Amendment's scope. Cal. Rifle & Pistol Ass'n Br. 8–9 (discussing *Teixeira* v. *Cnty. of Alameda*, 873 F.3d 670 (9th Cir. 2017) (*en banc*) *cert. denied*, 138 S. Ct. 1988 (2019)); *see also* Commonwealth Second Amendment Br. at 18–19. Here again, a review of the court's decision reveals no sleight of hand. Instead, the Ninth Circuit sitting *en banc* conducted a seven-page analysis of the text and history of the Second Amendment before concluding it does not "independently protect a proprietor's right to sell firearms." 873 F.3d at 690, *see also id.* at 681–689. Contrary to *amici*, *Teixeira* does not remotely suggest the court would have upheld a law "prohibiting gun stores altogether."[12]

With no actual proof of systemic bias, *amici* next point to passing judicial remarks as evidence of supposed bias. They quote, for example, the Fourth Circuit's comment that "[t]his is serious business" and "[w]e do not wish to be even minutely responsible for some unspeakably tragic act of mayhem because in the peace of our judicial chambers we miscalculated[.]" Commonwealth Second Amendment Br. at 7 (quoting *U.S.* v. *Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011).[13] But this sort of statement does not betray hostility either. *Heller* and *McDonald* do not require

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[12] Indeed, before analyzing the appellants' claim of a right to *sell* firearms, the Ninth Circuit considered whether the Second Amendment rights of prospective *purchasers* were burdened, *see Teixeira*, 873 F.3d at 677–78 (agreeing that the right to keep and bear arms necessarily includes the right to acquire them), and concluded there would be no plausible impact, because another store selling firearms was just 600 feet away, *id.* at 678–81.

[13] *See also id.* at 7–8 (criticizing other judicial comments); Profs. of Second Amendment Law Br. at 28–30 (similarly accusing lower courts of relying on public safety concerns when affording the Second Amendment second-class treatment).

the courts to ignore the consequences of their decisions or the safety justifications governments may interpose to support regulation. *See Heller*, 554 U.S. at 626–27 (the prohibition against the carrying of "dangerous and unusual weapons" is an "important limit" on Second Amendment rights); *cf. Heller II* 670 F.3d at 1271 (Kavanaugh, J., dissenting) (remarking that "D.C.'s public safety motivation in enacting these laws is worthy of great respect"). Again, First Amendment doctrine shows that is so; courts have long considered public safety and welfare in evaluating the scope of constitutional protections for free speech. *E.g.*, *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969).

In short, far from demonstrating a pattern of judicial "hostility," many of the cases *amici* identify show an effort to grapple with difficult questions, with fidelity to this Court's guidance in *Heller* and *McDonald*. The Second Amendment analysis that this Court instructed the Courts of Appeals to conduct calls for the exercise of "nuanced judgments," *see McDonald*, 561 U.S. at 803–04 (Scalia, J., concurring), and the available materials do not always point in the same direction.[14] *That* is what the cases show. They do not remotely evidence bias, let alone on a systemic basis.

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[14] *See also Heller II*, 670 F.3d at 1275 (Kavanaugh, J., dissenting) ("[t]o be sure, analyzing the history and tradition of gun laws in the United States does not always yield easy answers"); *Kachalsky* v. *Cnty. of Westchester*, 701 F.3d 81, 91 (2d Cir. 2012) ("History and tradition do not speak with one voice here."); *Drake*, 724 F.3d at 430–31 (historical evidence relating to licenses to carry firearms points in multiple directions).

CONCLUSION

There is no substance to the argument that the Second Amendment is systematically receiving "second-class" treatment, and, indeed, an analysis of the doctrine the Courts of Appeals have applied, and of the results of Second Amendment cases, tends to show the opposite. Review of the supposedly hostile cases Petitioners and their *amici* cite as anecdotal proof, meanwhile, demonstrates an effort to adhere to this Court's instructions and to develop the doctrine in the way the Court instructed in *Heller* and *McDonald*. There is, in short, neither occasion nor justification for the Court to codify an unvarying standard of strict review for the Second Amendment. No such standard governs any other fundamental right. And the Courts of Appeals should continue to develop the doctrine as they have, case by case, in the way *Heller* envisioned.

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APPENDIX

APPENDIX

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