No. 18-280

In the Supreme Court of the United States

NEW YORK STATE RIFLE & PISTOL ASS'N, 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 *AMICUS CURIAE* MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether New York City's ban on transporting a licensed, locked, and unloaded handgun to a home or shooting range outside city limits violates the text, history, and tradition of the Second Amendment.

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Mountain States Legal Foundation ("MSLF") is a nonprofit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. Since its creation in 1977, MSLF attorneys have brought and participated in numerous cases seeking to protect Americans' natural, fundamental, and unalienable right to self-defense. MSLF has represented a number of individuals, nonprofits, and other organizations challenging government actions that infringe on the constitutionally protected right to keep and bear arms. *See, e.g.*, *Caldara, et al. v. City of Boulder, et al.*, No. 18-1421 (10th Cir. appeal docketed Oct. 18, 2018); *Nesbitt, et al. v. U.S. Army Corps of Engineers, et al.*, No. 14-36049 (9th Cir. dismissed Dec. 15, 2017); *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121 (10th Cir. 2015); *Regents of Univ. of Colorado v. Students for Concealed Carry on Campus,* 271 P.3d 496 (Colo. 2012). MSLF's history of involvement includes filing *amicus curiae* briefs with this Court. *See, e.g.*, *Pena v. Horan*, No. 18-843, 2018 WL 6929714 (U.S. petition

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[1] The parties have consented to the filing of this *amicus curiae* brief. *See* Supreme Court Rule 37.3(a). Additionally, pursuant to Supreme Court Rule 37.6, the undersigned affirms that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

for *cert.* filed Dec. 28, 2018) (representing MSLF and other *amici*); *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (representing *amici* Rocky Mountain Gun Owners and National Association for Gun Rights); *District of Columbia v. Heller*, 554 U.S. 570 (2008) (representing MSLF). MSLF's *amici curiae* brief was cited in this Court's *McDonald* opinion. 561 U.S. 742, 777 n.27 (2010). The Court's ultimate decision in this case will have a direct impact on MSLF's current clients and litigation.

STATEMENT OF THE CASE

I. HISTORICAL BACKGROUND

"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.

The language of the Second Amendment was approved by the First Continental Congress on September 25, 1789, and sent to the states for ratification. NICHOLAS J. JOHNSON, *ET AL.*, FIREARMS LAW AND THE SECOND AMENDMENT 338 (2d ed. 2018). "On December 15, 1791, ratified by three-quarters of the states, the Second Amendment . . . became the law of the land." *Id.*

The Second Amendment owes its existence to the Founders and Framers' deep respect for the existence of natural rights, and their intent to preserve the

rights of the individual. *See* THE DECLARATION OF INDEPENDENCE PARA. 2 (U.S. 1776) ("WE hold these truths to be *self-evident*, that all Men are created equal, that they are endowed by their Creator with certain *unalienable Rights*, that among these are Life, Liberty and the pursuit of Happiness.") (emphasis added); *Cotting v. Godard*, 183 U.S. 79, 107 (1901) ("[I]t is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence."); 1 ANNALS OF CONG. 451 (Joseph Gales ed., 1834) (Madison began the process of proposing the first constitutional amendments in 1789 with: "First, That there be prefixed to the constitution a declaration, that all power is originally vested in, and consequently derived from, the people.").

In so doing, the Founders and Framers drew on their knowledge of history, particularly the longstanding requirements of private persons to keep and bear arms and their recent need for such a right in successfully fighting the American Revolution. *See Statute of Winchester*, 13 Edward I, at § 5 (1285) ("It is likewise commanded that every man have in his house arms for keeping the peace in accordance with the ancient assize . . . ."); 1 W. & M., 2d sess., c. 2 (Dec. 16, 1689) ("English Bill of Rights") ("That the subjects . . . , may have arms for their defence suitable to their conditions, and as allowed by law."); 1 WILLIAM BLACKSTONE, COMMENTARIES *139 ("The fifth and last auxiliary right of the subject . . . is that of having arms for their defence, suitable to their condition and degree, and such as are allowed by law. Which is . . . indeed a public allowance, under due

restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression."); THE FEDERALIST NO. 46 (Madison) ("It may well be doubted, whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops. Those who are best acquainted with the last successful resistance of this country against the British arms, will be most inclined to deny the possibility of it.").

George Washington and James Madison, among other Framers, "firmly believed that *the character and spirit of the republic* rested on the freeman's possession of arms as well as his ability and willingness to defend himself and his society." Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599, 614 (1982) (emphasis added). The colonial experience and the American Revolution strengthened the notion that an armed populace is essential to liberty. Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 327 (1991).

This Court first had cause to analyze the Second Amendment in *United States v. Cruikshank*, 92 U.S. 542 (1875). There, the Court recognized that the Second Amendment protected a natural right, which right was not dependent on the Constitution for its existence. *Id.* at 542 ("The right to bear arms is not granted by the Constitution; neither is it in any manner dependent upon that instrument for its existence."). This Court's next major Second

Amendment case came in the form of *United States v. Miller*, 307 U.S. 174 (1939). The *Miller* Court, in analyzing the constitutionality of the National Firearms Act, *id.* at 175, looked to the text of the Second Amendment, *id.* at 176–78, historical sources regarding the right to self-defense, *id.* at 179–80, and traditional sources from the early Republic, *id.* at 180–82, to determine that the Act was not unconstitutional, *id.* at 182–83.

After *Miller*, the Court was silent on the topic of the Second Amendment for nearly 70 years. In 2008, this Court decided the landmark case of *District of Columbia v. Heller*, 554 U.S. 570 (2008), and, shortly thereafter, *McDonald v. City of Chicago*, 561 U.S. 742 (2010). *Heller* was this Court's first in depth analysis of the Second Amendment, the rights it protects, and how courts must examine challenges brought thereunder. *Heller*, 554 U.S. at 635 ("[S]ince this case represents the Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field . . . ."). *McDonald* continued the mission of *Heller* and recognized that the Second Amendment protects against state action via the Fourteenth Amendment. *McDonald*, 561 U.S. at 791. The *Heller* and *McDonald* Courts both relied on the text of the Second Amendment, and the history and tradition of regulation of the right, to reject infringements the District of Columbia and Chicago, Illinois, respectively, had imposed on the natural, fundamental right to keep and bear arms.

Despite this Court's decisions in *Heller* and *McDonald*, numerous states and cities have continued

to violate their residents' natural, fundamental, unalienable rights to keep and bear arms and to self-defense. Such infringements have been upheld by circuit courts across the nation, like New York City's by the Second Circuit below.

II. FACTUAL BACKGROUND

New York City prohibits its residents—United States citizens—from possessing handguns within city limits without a license.[2] N.Y. Penal Law §§ 265.01, 265.20(a)(3). To apply for a license, city residents must: (1) be twenty-one years of age,[3] N.Y. Penal Law § 400.00; (2) prove good moral character, 38 R.C.N.Y. § 1-03(d)(1); (3) undergo a background investigation, *id.* at (d)(2); (4) prove their mental health status, or undergo a mental health investigation, *id.* at (d)(3); (5) prove they have not been "the subject or recipient of an order of protection or a temporary order of protection," *id.* at (d)(4); and (6) hope that "no good cause exists for the denial of a license," *id.* at (d)(5). Good cause is not defined.

Only once a resident has met these criteria does he or she qualify for a license as specified in

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[2] There are several licenses available under New York City's regulations, all of which provide different allowances and restrictions. *See* 38 R.C.N.Y. § 5-23 (defining "Premises License," "Carry Business License," "Limited Carry Business License," "Carry Guard License/Gun Custodian License," "Special Carry Business," and "Special Carry Guard License/Gun Custodian License.").

[3] There are some exceptions to this requirement, based on military service. N.Y. Penal Law § 400.00(1)(a).

38 R.C.N.Y. § 5-01. Should a resident wish to exercise their right to keep and bear arms within their home, they must obtain a "premises license." 38 R.C.N.Y. § 5-01(a). A premises license "is a restricted handgun license, issued for a specific business or residence location," that "permits the transporting of an unloaded handgun directly to and from an authorized small arms range/shooting club, secured unloaded in a locked container." *Id.*; *see also* 38 R.C.N.Y. § 5-23(a)(3) ("To maintain proficiency in the use of the handgun, the licensee may transport his/her handgun(s) directly to and from an authorized small arms range/shooting club, unloaded, in a locked container, the ammunition to be carried separately."). There are seven such authorized ranges in New York City. Pet.App.6.[4] Residents who own a handgun pursuant to a premises license are prohibited from transporting that handgun to a range or competition located outside of city limits. Pet.App.95. Residents who own a handgun pursuant to a premises license are prohibited from transporting that handgun to a second home or property outside of city limits. *See* 38 R.C.N.Y. § 5-23(1) ("The handguns listed on this license may not be removed from the address specified on the license, except as otherwise provided in this chapter."). Aside from transporting the firearm to a licensed range within New York City limits, there are no other exceptions to the requirement that the firearm must be kept in the residence or business where it is registered. *See id.* at § 5-23(a).

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[4] "Pet.App." refers to the Petitioners' Appendix filed with this Court by Petitioners accompanying their Petition for Writ of *Certiorari* on September 4, 2018.

III. PROCEDURAL BACKGROUND

Petitioners brought suit in the United States District Court for the Southern District of New York on March 29, 2013. Pet.App.42, Pet.App.44. Petitioners allege, *inter alia*, New York City's licensing scheme is unconstitutional, particularly in light of this Court's decisions in *Heller* and *McDonald*. Pet.App.44. Petitioners and Respondents filed cross-motions for summary judgment on June 5, 2014, and July 16, 2014. The district court purported to analyze this Court's *Heller* and *McDonald* opinions, specifically recognizing that some restrictions on Second Amendment protected rights were not unconstitutional. Pet.App.54–55. At no point, however, did the district court examine the text of the Second Amendment, or this Court's analysis of the text in *Heller* and *McDonald*—in fact, the district court did not cite to the Second Amendment or reproduce its language. Pet.App.42–76.

Further, rather than following this Court's mandated history and tradition analysis, the district court applied means-end scrutiny. Pet.App.56 ("A majority of courts, including the Second Circuit and courts in this Circuit, apply intermediate scrutiny to general challenges under the Second Amendment, even when reviewing statutes or laws that may restrict the possession of handguns in the home.") (citations omitted). The district court specifically rejected the argument that strict scrutiny was required because it held "the challenged rule does not impinge on the 'core' of the Second Amendment, as it does not establish or purport to establish a prohibition

or ban on the exercise of Plaintiffs' Second Amendment right to possess a handgun in the home for self-defense." Pet.App.57 (citations omitted). The district court held that New York City's licensing scheme does not violate the Second Amendment because: (1) Petitioners could "obtain[] an appropriate license . . . in the jurisdiction of their second home;" and (2) the ban on transporting a licensee's handgun outside of city limits is "reasonable and result[s] from the substantial government interest in public safety." Pet.App.60.

Petitioners filed their appeal with the United States Court of Appeals for the Second Circuit on March 3, 2015. *See* Pet.App.1–39. The Second Circuit had previously noted: "Lacking more detailed guidance from the Supreme Court, this Circuit has begun to develop a framework for determining the constitutionality of firearm restrictions. It requires a two-step inquiry." *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 254 (2d Cir. 2015) (citing *Kachalsky v. Cty. of Westchester*, 701 F.3d 81 (2d Cir. 2012) and *United States v. Decastro*, 682 F.3d 160 (2d Cir. 2012)). This two-step test requires the Second Circuit to: (1) "determine whether the challenged legislation impinges upon conduct protected by the Second Amendment" and (2) if it does, to "determine and apply the appropriate level of scrutiny." Pet.App.9–10 (citations and quotations omitted).

In the case below, the Second Circuit did not address the first step of its inquiry because it assumed, *arguendo*, transporting a licensed handgun is protected by the Second Amendment. Pet.App.10

(citations and quotations omitted). In its second step, the court determined that intermediate scrutiny was appropriate because "Rule 5-23 imposes no direct restriction at all on the right of the Plaintiffs . . . to obtain a handgun and maintain it at their residences for self-protection." Pet.App.17. Purporting to apply intermediate scrutiny, the Second Circuit then found that New York's licensing scheme "serves to protect the public safety of both license-holding and non-license-holding citizens of New York City." Pet.App.26. The court relied almost exclusively on statements of the former Commander of the License Division that "premises license holders 'are just as susceptible as anyone else to stressful situations,' including driving situations . . . 'where it would be better to not have the presence of a firearm.'" Pet.App.26 (citation omitted). The Second Circuit ultimately held:

> In light of the City's evidence that the Rule was specifically created to protect public safety and to limit the presence of firearms, licensed only to specific premises, on City streets, and the dearth of evidence presented by the Plaintiffs in support of their arguments that the Rule imposes substantial burdens on their protected rights, we find that the City has met its burden of showing a substantial fit between the Rule and the City's interest in promoting public safety.

Pet.App.29.

The Second Circuit denied Petitioners' petition for panel rehearing, or, in the alternative, for rehearing *en banc*. Pet.App.40–41. Petitioners timely filed their Petition for Writ of *Certiorari* with this Court on September 4, 2018, which Petition was granted on January 22, 2019.

SUMMARY OF THE ARGUMENT

This Court has explicitly set forth the text, history, and tradition test as the appropriate test for courts to assess challenges brought under the Second Amendment. More than just establishing the test, both *Heller* and *McDonald* operate as guides on how to navigate the analysis. First, a court must examine the text of the Second Amendment through the lens of its historical meaning at the time it was enacted and ratified. Once the court has thus established the scope of the right, it must then look to historical and traditional regulations to determine what, if any, traditional regulation of arms was considered appropriate. Finally, the court must parse the challenged statute or regulation to determine if it is consistent with historical and traditional regulations. If it is, the modern regulation withstands scrutiny, if not, the modern regulation is unconstitutional.

Despite this Court's instruction, courts across the nation have opted instead to employ a two-step, interest-balancing test to assess the constitutionality of regulations challenged under the Second Amendment. The first step requires courts to

determine if the right in question falls within the scope of the Second Amendment. If it does not, the inquiry ends and the regulation is upheld. If it does, courts proceed to the second step, which requires a court to balance the protected right against the governmental interest at issue via some form of means-end scrutiny. Despite its prevalence, the 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 for Second Amendment protected rights.

If the Southern District of New York and the Second Circuit had applied the text, history, and tradition test in the underlying case, those courts would have found that New York City's transportation ban is unconstitutional. The transportation ban prohibits activity that falls within the historical scope of the Second Amendment and does not comport with any historical or traditional regulations of the same activity.

ARGUMENT

> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government—even the Third

> Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.

District of Columbia v. Heller, 554 U.S. 570, 634–35 (2008).

I. THIS COURT HAS ALREADY SET FORTH THE APPROPRIATE TEST TO ANALYZE SECOND AMENDMENT CHALLENGES

Courts must analyze the text, history, and tradition of the Second Amendment when determining whether a modern firearm regulation is constitutional. This Court's opinion in *District of Columbia v. Heller* clearly sets forth this test for evaluating challenges to laws that potentially infringe upon Second Amendment protected rights. 554 U.S. 570, 576–628 (2008). This Court reiterated that test in *McDonald v. City of Chicago* when incorporating the Second Amendment's protections against the states via the Due Process Clause of the Fourteenth Amendment. 561 U.S. 742, 791 (2010). Despite this, the text, history, and tradition test has not been adhered to by the courts below.

Employing this Court's precedent, courts must first look to the text and history of the Second Amendment to determine the "scope of the right." *Heller*, 554 U.S. at 652. While the pure textual analysis allows the court to partially determine the scope of the right, this Court recognized that looking to the historical landscape is necessary because "the Second Amendment was not intended to lay down a 'novel principl[e]' but rather codified a right 'inherited from our English ancestors.'" *Id.* at 599 (alterations in original) (citing *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897)). Once the scope of the right is established, the court should then look to traditional regulation, which is "the public understanding of [the] legal text in the period after its enactment or ratification." *Id.* at 605. Finally, the court must parse the challenged regulation to determine if it fits within the history and tradition of Second Amendment regulations. *See id.* at 631–35 (analyzing traditional regulation of firearms against D.C.'s restrictive handgun regulations).

The only restrictions that are constitutional under the Second Amendment are those that comport with the historical and traditional regulation of arms in our early history. A court may, however, draw analogues between modern arms and traditional regulations, just as courts regularly do when evaluating First Amendment protections for electronic speech. *See Heller*, 554 U.S. 570, Transcript of Oral Argument, at 77 (Chief Justice Roberts: "[Y]ou would define 'reasonable' in light of the restrictions that existed at the time the amendment was adopted . . . . [Y]ou can't take it into the marketplace

was one restriction. So that would be—we are talking about lineal descendents (*sic*) of the arms but presumably there are lineal descendents (*sic*) of the restrictions as well."); *see also Heller v. District of Columbia*, 670 F.3d 1244, 1275 (D.C. Cir. 2011) ("*Heller II*") (Kavanaugh, J., dissenting) ("Nor does it mean that the government is powerless to address those new weapons or modern circumstances. Rather, in such cases, the proper interpretive approach is to reason by analogy from history and tradition.") (citing *Parker v. District of Columbia*, 478 F.3d 370, 398 (D.C. Cir. 2007)).

Sections II and III of the *Heller* majority opinion operate as a roadmap of how courts should undertake this text, history, and tradition analysis. 554 U.S. at 576–628. Section IV then applies the analysis to the underlying facts of that case. *Id.* at 628–36. First, the *Heller* Court engaged in a thorough analysis of the text of the Second Amendment "guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" *Id.* at 576 (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931) and citing *Gibbons v. Ogden*, 9 Wheat. 1, 188 (1824)). After analyzing the grammar, diction, syntax, and punctuation of the text, the Court then looked to the contemporaneous and analogous state constitutional provisions. *Id.* at 600–03. This Court next turned to the historical and traditional interpretation of the Second Amendment, including the period "immediately after its ratification through the end of the 19th century." *Id.* at 605. Finally, the *Heller* Court

specified that certain longstanding, traditional limitations on the right to keep and bear arms should still be considered constitutional. *Id.* at 626 ("Like most rights, the right secured by the Second Amendment is not unlimited.").[5]

The *McDonald* Court engaged in a similar analysis. First, looking to the textual analysis in *Heller*, *McDonald*, 561 U.S. at 767–68, then to the historical scope, *id.* at 768–69, and eventually to traditional treatment and regulation of the right, *id.* The *McDonald* court also reiterated that longstanding regulatory measures would withstand this inquiry. *Id*. at 786. Justice Scalia, in his concurrence, explained the importance of the text, history, and tradition approach:

> But the question to be decided is not whether the historically focused method is a perfect means of restraining aristocratic judicial Constitution-writing; but whether it is the best means available in an imperfect world . . . . I think it beyond all serious dispute that it is much less subjective, and

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[5] This Court produced an illustrative, but non-exhaustive list of regulations which presumably comported with the text, history, and tradition of the Second Amendment. *Heller*, 554 U.S. at 626–27 ("Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding 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.").

> intrudes much less upon the democratic process. It is less subjective because it depends upon a body of evidence susceptible of reasoned analysis rather than a variety of vague ethico-political First Principles whose combined conclusion can be found to point in any direction the judges favor.

Id. at 804 (Scalia, J., concurring).

A clear recitation of this *Heller* and *McDonald* analysis occurs in a dissent authored by then-Judge Kavanaugh in *Heller II*:

> [T]he *Heller* Court stated that the government may ban classes of guns that have been banned in our "historical tradition" . . . . "Constitutional rights," the Court said, "are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *Id.* at 634–35. The scope of the right is thus determined by "historical justifications." *Id.* at 635. And tradition (that is, post-ratification history) also matters because "examination of a variety of legal and other sources to determine the public understanding of a legal text in the period after its enactment or ratification" is a "critical tool of constitutional interpretation." *Id.* at 605 (emphasis omitted).

670 F.3d at 1271–72 (Kavanaugh, J., dissenting). "*Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny." *Id.* at 1271 (Kavanaugh, J., dissenting).

Despite the clear guidance in *Heller* and *McDonald*, including the complete absence of a balancing approach by those Courts, many lower courts have taken the opposite approach—attempting to balance natural, fundamental, constitutionally protected rights against modern assertions of state interest. *Heller*, 554 U.S. at 634 ("We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach.").

II. COURTS ACROSS THE NATION ARE APPLYING A TWO-STEP, INTEREST-BALANCING TEST, IN DIRECT CONTRAVENTION OF THIS COURT'S MANDATE

Since this Court decided *Heller* and *McDonald*, most circuits across the United States have eschewed history and tradition and have applied a two-step test to review the constitutionality of laws challenged under the Second Amendment—(1) whether the activity that is being prohibited or restricted is an activity within the scope of the Second Amendment; and (2) if so, is it appropriate under some means-end scrutiny. *See, e.g.*, *Gould v. Morgan*, 907 F.3d 659, 669 (1st Cir. 2018) ("Although we have not yet explicitly

adopted this two-step approach, we do so today.");[6] *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 254 (2d Cir. 2015) ("Lacking more detailed guidance from the Supreme Court, this Circuit has begun to develop a framework for determining the constitutionality of firearm restrictions. It requires a two-step inquiry."); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010) ("As we read *Heller*, it suggests a two-pronged approach to Second Amendment challenges. First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee . . . . If it does, we evaluate the law under some form of means-end scrutiny.") (citation omitted); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010) (same) (citing *Marzzarella*, 614 F.3d at 89); *NRA v. BATFE*, 700 F.3d 185, 194 (5th Cir. 2012) (same); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012) (same); *Ezell v. City of Chicago*, 651 F.3d 684, 701–03 (7th Cir. 2011) (same);[7] *United States v. Chovan*, 735 F.3d 1127, 1136–37 (9th Cir. 2013) (same) (citations omitted); *United States v.*

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[6] *But see United States v. Rene E.*, 583 F.3d 8, 14–16 (1st Cir. 2009) (applying the text, history, and tradition test).

[7] *But see Friedman v. City of Highland Park*, 784 F.3d 406, 410 (7th Cir. 2015) ("[I]nstead of trying to decide what 'level' of scrutiny applies, and how it works, inquiries that do not resolve any concrete dispute, we think it better to ask whether a regulation bans weapons that were common at the time of ratification or those that have 'some reasonable relationship to the preservation or efficiency of a well regulated militia,' and whether law-abiding citizens retain adequate means of self-defense.") (citations omitted).

Reese, 627 F.3d 792, 800–01 (10th Cir. 2010) (same); *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1261 n.34 (11th Cir. 2012) (same); *Heller II*, 670 F.3d at 1252 (same).[8]

This improper, but now widely adopted, test suffers three major problems: (1) the two-step test is based on the misinterpretation of a single paragraph in *Heller*, (2) lower courts have inappropriately limited the scope of the Second Amendment under the first step, and (3) both *Heller* and *McDonald* made clear that the interest-balancing conducted in step two is inappropriate in light of the natural, fundamental rights at issue.

A. The Two-Step Test is Based on a Fundamental Misinterpretation of *Heller*

The two-step test is purportedly "derived" from *Heller*, but in reality, is a misinterpretation of a single paragraph in that opinion, which reads:

> As the quotations earlier in this opinion demonstrate, the inherent right of self-defense has been central to the Second Amendment right. [D.C.'s] handgun ban amounts to a prohibition of an entire class of "arms" that is overwhelmingly chosen by

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[8] At this point, the Eighth Circuit has not adopted the two-step test adopted by the other circuits. *See* David B. Kopel & Joseph G.S. Greenlee, *Federal Circuit Second Amendment Developments 2018*, 7 L.M.U. L. REV., at *2 (forthcoming fall 2019), https://ssrn.com/abstract=3312935.

> American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family," would fail constitutional muster.

Heller, 554 U.S. at 628–29 (citations omitted). Then-Judge Kavanaugh recognized this exact issue in his dissent in *Heller II*:

> To be sure, the Court noted in passing that D.C.'s handgun ban would fail under any level of heightened scrutiny or review the Court applied. *Heller*, 554 U.S. at 628–29. But that was more of a gilding-the-lily observation about the extreme nature of D.C.'s law—and appears to have been a pointed comment that the dissenters should have found D.C.'s law unconstitutional even under their own suggested balancing approach—than a statement that courts may or should apply strict or intermediate scrutiny in Second Amendment cases.

670 F.3d at 1277–78 (Kavanaugh, J., dissenting). In misconstruing this paragraph, the lower courts have also ignored *Heller*'s specific charge to not engage in an interest-balancing approach. *Heller*, 554 U.S. at 634 ("We know of no other enumerated constitutional

right whose core protection has been subjected to a freestanding "interest-balancing" approach.").

Despite the lack of any interest-balancing in *Heller* or *McDonald*, and this Court's explicit prohibition of such a test, lower courts have used this one paragraph in *Heller* to justify their adoption of the two-step, interest-balancing test.

B. Lower Courts Have Inappropriately Limited the Scope of the Second Amendment Under Step One

The first step of the erroneous but prevalent two-step test requires the court to determine whether the regulation affects a Second Amendment protected right; if it does not, the court ends its constitutional inquiry there. *See Cuomo*, 804 F.3d at 254 ("First, we consider whether the restriction burdens conduct protected by the Second Amendment. If the challenged restriction does not implicate conduct within the scope of the Second Amendment, our analysis ends and the legislation stands.") (citation omitted). Many circuits, however, have taken a very narrow view of *Heller* and *McDonald*, and state the only "core" protected right under the Second Amendment is self-defense within the home. *See NRA v. BATFE*, 700 F.3d at 194 ("Instead, the Court identified the Second Amendment's central right as the right to defend oneself in one's home . . . ."); *Greeno*, 679 F.3d at 517 ("The core right recognized in *Heller* is "the right of law-abiding, responsible citizens to use arms in defense of hearth and home.").

Various courts, under this narrow construction, have found, amongst other things, that bearing arms outside of the home, possessing certain ammunition magazines, and selling firearms all fall outside of the "core" of the Second Amendment. *See Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 94 (2d Cir. 2012) (finding New York's "proper cause" requirement to obtain a concealed carry permit fell "outside of the core Second Amendment protections identified in *Heller*" because "New York's licensing scheme affects the ability to carry handguns only *in public*, while the District of Columbia ban applied *in the home* 'where the need for defense of self, family, and property is most acute.'") (quoting *Heller*, 554 U.S. at 628);[9] *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Attn'y Gen. N.J.*, 910 F.3d 106, 117–18 (3d Cir. 2018) (finding New Jersey's magazine ban "does not severely burden the core Second Amendment right to self-defense in the home . . . ");[10] *Teixeira v. County of Alameda*, 873 F.3d 670, 682 (9th Cir. 2017) ("Based on such an analysis, we conclude that the Second Amendment does not confer a freestanding right . . . upon a proprietor of a commercial establishment to sell firearms.").

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[9] *But see Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012) ("A right to bear arms thus implies a right to carry a loaded gun outside the home.").

[10] *But see Cuomo*, 804 F.3d at 258 ("[L]arge-capacity magazines are commonly owned by many law-abiding Americans, and their complete prohibition, including within the home, requires us to consider the scope of Second Amendment guarantees at their zenith.") (citations and quotations omitted).

By classifying some protected rights as "core" to the Second Amendment, and others as somehow less important, the various circuits have also "justified" applying weaker forms of scrutiny. *See, Pena v. Lindley*, 898 F.3d 969, 977 (9th Cir. 2018) ("Which level of scrutiny to apply depends on how close the law comes to the core of the Second Amendment right and the severity of the law's burden on the right. We strictly scrutinize a law that implicates the core of the Second Amendment right and severely burdens that right. Otherwise, we apply intermediate scrutiny if the law does not implicate the core Second Amendment right or does not place a substantial burden on that right.") (citations and quotations omitted). Others circuits have outright dismissed Second Amendment claims as not falling within the category of protected rights. *See Teixeira*, 873 F.3d at 682 (finding no Second Amendment protected right to sell firearms.).

Heller in no way supports this miserly, inconsistent approach to Second Amendment protected rights. In *Heller* the specific right at issue was the right to possess a handgun in the home for the "core lawful purpose of self-defense." *Heller*, 554 U.S. at 630. *Heller* did not, however, limit the Second Amendment *in totum*, instead stating that the Second Amendment protects the right of citizens to possess commonly owned arms for "lawful purposes." *Heller*, 554 U.S. at 625. *McDonald* reiterated that "our central holding in *Heller* [is] that the Second Amendment protects a personal right to keep and bear arms for *lawful purposes* . . . ." 561 U.S. at 780 (emphasis added). These lawful purposes include

more than just self-defense and require the court to look to the text and history of the Second Amendment to determine the full scope of the right at issue in each case. *See Heller*, 554 U.S. at 599 ("The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting."); *see also* David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 ST. LOUIS U.L.J. 193, 204 (2017) (listing various lawful purposes described in *Heller*).

By taking an unreasonably narrow view of *Heller*'s holding, circuit courts have failed to consider a number of Second Amendment challenges as implicating Second Amendment protected rights, or relegated them to second-tier status, thereby violating this Court's charge to view the scope of the right at issue based on the text and history of the Second Amendment.

C. Lower Courts Are Engaging in Interest-Balancing, Which Was Explicitly Rejected by *Heller* and *McDonald*, Under Step Two

If the court determines that the law in question implicates a Second Amendment protected right, the second step of the court's misguided inquiry is to then apply some interest-balancing approach. *See*, *Heller II*, 670 F.3d at 1261 ("[W]e determine the appropriate standard of review by assessing how severely the prohibitions burden the Second Amendment right.").

Courts generally either apply strict scrutiny or intermediate scrutiny. *See* Kopel & Greenlee, *The Federal Circuits' Second Amendment Doctrines*, at 275–78 (analyzing the various circuits' approaches to applying heightened scrutiny).

This is directly contrary to this Court's specific guidance:

> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.

Heller, 554 U.S. at 634. Further, despite the contention of some lower courts, the *Heller* Court did not simply reject the particular interest balancing approach suggested by Justice Breyer in his dissent, but explicitly rejects *any* interest-balancing approach. *See Heller II*, 670 F.3d at 1264 ("As we read *Heller*, the Court rejected only Justice Breyer's proposed 'interest-balancing' inquiry."); *but see Heller*, 554 U.S. at 635 (The Second Amendment "is the very *product* of an interest balancing by the people—which Justice Breyer would now conduct for them anew.") (emphasis in original).

As if predicting this issue, during oral argument in *Heller*, Chief Justice Roberts already began to distinguish the means-end scrutiny analysis: "Well, these various phrases under the different standards that are proposed, 'compelling interest,' 'significant interest,' 'narrowly tailored,' none of them appear in the Constitution. . . . I mean, these standards that apply in the First Amendment just kind of developed over the years as sort of baggage that the First Amendment picked up." *Heller*, 554 U.S. 570, Transcript of Oral Argument, at 44.

Despite *Heller*'s explicit prohibition, courts across the nation have continued to apply means-end scrutiny of Second Amendment protected rights. Worse, courts often purport to apply intermediate scrutiny, but do so in name only, really applying some sort of elevated rational basis review. *See Pena*, 898 F.3d at 981–87 (9th Cir. 2018) ("When policy disagreements exist in the form of conflicting legislative 'evidence,' we 'owe [the legislature's] findings deference in part because the institution is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions.'") (alterations in original) (quoting *Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180, 195 (1997)); *Cuomo*, 804 F.3d at 261–62 ("[W]e afford 'substantial deference to the predictive judgments of the legislature.'") (citing *Kachalsky*, 701 F.3d at 97) (quoting *Turner*, 520 U.S. at 195). That is exactly what the Second Circuit did in this case when it relied almost solely on the affidavit of the former Commander of the License Division to establish New York City's transportation ban was substantially

related to an important government interest. *See* Pet.App.24–29.

Since *Heller* and *McDonald*, the lower courts have utterly failed to analyze firearm regulations and prohibitions under the text, history, and tradition of the Second Amendment. Regardless of the number of circuits that have adopted the two-step, interest-balancing test, that test violates the charge of this Court—a charge this Court leveled due to the importance and nature of the rights at issue.

III. UNDER THE TEXT, HISTORY, AND TRADITION OF THE SECOND AMENDMENT, NEW YORK CITY'S TRANSPORTATION BAN IS UNCONSTITUTIONAL

If the Southern District of New York and the Second Circuit had applied the text, history, and tradition test as promulgated and required by this Court, those courts would have found that New York City's prohibition on transporting firearms outside of city limits is unconstitutional.

A. The Text of the Second Amendment

This Court has already set forth an in-depth, textual analysis of the Second Amendment in both *Heller* and *McDonald*. First, the Second Amendment protects, at minimum, the natural rights to self-defense and to keep and bear arms:

> [I]t has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it "shall not be infringed." As we said in [*Cruikshank*, 92 U.S. at 553], "[t]his is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed . . . ."

Heller, 554 U.S. at 592; *see also McDonald*, 561 U.S. at 778 (quoting *Cruikshank*). Importantly, "'[k]eep arms' was simply a common way of referring to possessing arms, for militiamen *and everyone else*," *Heller*, 554 U.S. at 583 (emphasis in original), and "[a]t the time of founding, as now, to 'bear' meant to 'carry,'" *id.* at 584 (citations omitted).[11]

Second, the right protected is an individual right, not a collective right tied to militia service. *Id.* at 595 ("There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.").

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[11] Petitioners set forth a thorough analysis of the textual, historical, and traditional basis for the Second Amendment protected right to transport arms outside of the home, which analysis *amicus* will not reproduce here. *See* Brief for Petitioners, at 19–26.

Third, based on the historical scope of the right, the Second Amendment protects a fundamental right. *McDonald*, 561 U.S. at 778 ("In sum, it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.").

Finally, the Second Amendment is incorporated, via the Fourteenth Amendment, against the states. *Id.* at 791 ("We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*.").

The Court in this matter need not rehash its textual analysis and can rely on the analysis from *Heller* and *McDonald*.

B. The History and Tradition of Firearm Transportation Regulation

Because the rights protected by the Second Amendment are not unlimited, the next step of a proper analysis is to determine whether there is a history and tradition of prohibiting the activities prohibited by the modern law or regulation in question, thereby allowing the modern regulation to withstand constitutional scrutiny. *See Heller*, 554 U.S. at 626 ("Like most rights, the right secured by the Second Amendment is not unlimited."). Here, when analyzing the breadth of New York City's regulations against the historical and traditional regulation of the Second Amendment, it is clear that

New York City's transportation ban is unconstitutional.

The only historic laws which prohibited the transportation of firearms outside of a colony were enacted to prepare the colonies for international conflict—a concern notably absent here. These two wartime provisions were enacted by the colonies of New York and Maryland. The New York colonial law dates to 1746 and prohibited "Export Out of this Colony, directly or indirectly by Land or Water any Gunpowder Arms or any kind of Ammunition or Warlike Stores or White pine Inch Boards or any of the following provisions, to wit, Beef, pork, Ship Bread or Cornell Indian Corn or pease . . . ." 3 COMMISSIONERS OF STATUTORY REVISION, THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 569 (The Lawbook Exchange, Ltd. 2011) (1894).[12] The Maryland colonial law dates to 1776 and states: "Resolved, that no muskets or rifles, except by the owner thereof on his removal to reside out of this province, or any gun barrels, gun locks, or bayonets, be carried out of this province, without the leave of the council of safety for the time being." J. LUCAS & E. K. DEAVER, PROCEEDINGS OF THE CONVENTIONS OF THE PROVINCE OF MARYLAND, HELD AT THE CITY OF ANNAPOLIS, IN 1774, 1775, & 1776, at 146 (Andesite Press 2015) (1836).[13]

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[12] https://babel.hathitrust.org/cgi/pt?id=umn.319510021585399;view=1up;seq=577

[13] https://archive.org/details/proceedingsofcon00mary/page/146

Both laws constitute historical prohibitions on the transportation of firearms outside of a particular boundary during wartime and are clearly distinguishable from New York City's current transportation ban for two reasons. First, the colonial laws were aimed directly at preparing for international conflict, with Canada and Britain respectively. New York in 1746 was preparing for the "Expedition for the Reduction of Canada" and Maryland was preparing for the oncoming Revolutionary War with Britain. THE COLONIAL LAWS OF NEW YORK, at 574 (contemporaneous "Act for the Encouraging of Voluntiers (*sic*) to Enlist in his Majesties Service upon the Expedition against Canada."). Both colonies sought to prohibit persons from removing firearms from their boundaries in order to retain the strength of their militias.

Second, the colonial laws applied to the boundaries of the entire province, not an individual settlement or city. This not only distinguishes New York City's current transportation ban but is significant due to the unequal footing the current law places New York City residents on as compared to other state residents. This disparate treatment goes directly to the claims asserted by Petitioners—namely, that they wish to transport their firearms to other ranges or homes in the State of New York, outside of New York City.

The current New York City transportation ban claims that the transport restriction is necessary for public safety to ensure license holders comply with New York's overly restrictive laws. City of New York's

Opposition Brief, at 4–5. Not only is the modern regulation significantly different than any historical or traditional regulations, but New York City's purpose does not match the history and tradition behind the 1746 New York or 1776 Maryland transportation restrictions.

The only other traditional regulations on the transportation of "firearms" were, in reality, restrictions on the transportation of gun powder, due almost exclusively to its explosive and volatile nature at the time. *See 1763 NY Laws § XVI*, in LAWS, STATUTES, ORDINANCES AND CONSTITUTIONS, ORDAINED, MADE AND ESTABLISHED, BY THE MAYOR, ALDERMEN, AND COMMONALTY, OF THE CITY OF NEW YORK (Gale Ecco, Print Editions, 2018) (1763) (requiring gun powder to be transported in leather bags); *1874 NJ Laws, Crimes, An Act Relating to the Transportation of Explosive and Dangerous Material § 1*, in NEW JERSEY, REVISION OF THE STATUTES OF NEW JERSEY 263 (The Lawbook Exchange, 2005) (1877) (requiring gun powder and other explosive materials to be transported in specific, clearly labeled containers);[14] *1874 PA Laws, Common Carriers § 2*, in FREDERICK C. BRIGHTLY, ANNUAL DIGEST OF THE LAWS OF PENNSYLVANIA FOR THE YEARS 1873 TO 1878, at 1835 (Gale, Making of Modern Law, 2012) (1878) (same);[15] *1877 NY Laws, Ordinances of the [City of*

[14] https://babel.hathitrust.org/cgi/pt?id=pst.000057639079;view=1up;seq=321

[15] https://babel.hathitrust.org/cgi/pt?id=hvd.hl3een;view=1up;seq=71

Brooklyn] § 16, in WILLIAM G. BISHOP, CHARTER OF THE CITY OF BROOKLYN, PASSED JUNE 28, 1873, at 192 (Ulan Press, 2012) (1877) (regulating the means of transporting gun powder);[16] *1887 VA Laws, [Ordinance of Lynchburg], Public Safety § 19*, in THOMAS D. DAVIS, THE CODE OF THE CITY OF LYNCHBURG, VA., CONTAINING THE CHARTER OF 1880, WITH THE AMENDMENTS OF 1884, 1886 AND 1887, AND THE GENERAL ORDINANCES IN FORCE JULY 1ST, 1887 (Gale, Making of Modern Law, 2013) (1887) (same). These historical prohibitions are much more akin to modern regulations on transportation of gun powder, or hazardous materials, than to New York City's prohibition on the transportation of modern firearms. *See* 49 C.F.R. § 173.171 (regulating the transportation of "[s]mokeless powder for small arms.").

New York City's firearm licensing scheme, and transportation ban specifically, does not comport with the historical and traditional Second Amendment regulations regarding the same subject matter and is therefore unconstitutional.

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This Court has clearly established that Second Amendment challenges must be analyzed based on the text of the Second Amendment, as well as the historical and traditional limitations on the right to keep and bear arms. This Court has unequivocally stated that an interest-balancing approach is

[16] https://books.google.com/books?id=tFg5AAAAMAAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false

inappropriate. Despite this, the Second Circuit below examined New York City's challenged regulation under some weakened form of intermediate scrutiny. This Court should clarify that since New York City's regulation restricts conduct that falls within the text and historical scope the Second Amendment and does not comport with any analogous historical or traditional firearms regulations, New York City's transportation ban is unconstitutional under the Second Amendment.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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