No. 18-663

In The
Supreme Court of the United States

FREDRIC RUSSELL MANCE, JR.; TRACEY AMBEAU HANSON; ANDREW HANSON; CITIZENS COMMITTEE FOR THE RIGHT TO KEEP AND BEAR ARMS,

Petitioners,

v.

MATTHEW G. WHITAKER, ACTING U.S. ATTORNEY GENERAL; THOMAS E. BRANDON, DEPUTY DIRECTOR, HEAD OF THE BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF OF *AMICI CURIAE* PROFESSORS OF SECOND AMENDMENT LAW, INDEPENDENCE INSTITUTE, AND MILLENNIAL POLICY CENTER IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

What test applies to Second Amendment challenges?

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Kopel, David B., *Data Indicate Second Amendment Underenforcement*, 68 DUKE L.J. ONLINE 79 (2018) 24

Mocsary, George A., *A Close Reading of an Excellent Distant Reading of* Heller *in the Courts*, 68 DUKE L.J. ONLINE 41 (2018) 24

Rostron, Allen, *Justice Breyer's Triumph in the Third Battle Over the Second Amendment*, 80 GEO. WASH. L. REV. 703 (2012) 24

INTEREST OF *AMICI CURIAE*[1]

***Amici* professors** are law professors who teach and write on the Second Amendment: Randy Barnett (Georgetown), Royce Barondes (Missouri), Robert Cottrol (George Washington), Nicholas Johnson (Fordham), Nelson Lund (George Mason), Joyce Malcolm (George Mason), George Mocsary (Southern Illinois), Joseph Olson (Mitchell Hamline), Glenn Reynolds (Tennessee), and Gregory Wallace (Campbell). As described in the Appendix, the professors were cited by this Court in *District of Columbia v. Heller* and *McDonald v. City of Chicago*. Oft-cited by lower courts as well, these professors include authors of the first law school textbook on the Second Amendment, as well as many other books and law review articles on the subject.

Independence Institute is a non-partisan policy research organization. The Institute's *amicus* briefs in *District of Columbia v. Heller* and *McDonald v. City of Chicago* (under the name of lead *amicus* Int'l Law Enforcement Educators & Trainers Association (ILEETA)) were cited in the opinions of Justices Breyer (*Heller*), Alito (*McDonald*), and Stevens (*McDonald*).

Millennial Policy Center is a research and educational center that develops policy solutions to advance freedom and opportunity.

[1] All parties were timely notified and consented to this brief. No counsel for any party authored it in whole or part. No one other than *amici* funded its preparation or submission.

SUMMARY OF ARGUMENT

Over a decade after this Court's decision in *District of Columbia v. Heller*, lower courts are struggling to interpret and apply it.

Lower courts disagree over what test to apply to Second Amendment challenges. Although nearly every federal circuit court has adopted the Two-Part Test, many judges—in the Fifth Circuit and elsewhere—believe the Text, History, and Tradition Test is more appropriate. As they point out, the Text, History, and Tradition Test is the one used in *Heller* and *McDonald v. City of Chicago*.

The Two-Part Test is an interest-balancing test; such a test was expressly rejected in *Heller* and *McDonald*. It meshes poorly with *Heller*'s list of presumptively lawful gun laws and has created much confusion.

Some major lower court cases have used the Two-Part Test to treat the Second Amendment as a second-class right. They defy *Heller* by using a rational basis test for laws against law-abiding firearms owners and gun stores. They allow the government to prevail on thin or conclusory evidence. They apply a feeble version of heightened scrutiny that does not consider less burdensome alternatives. Each of these problems is manifest in the opinions below in this case.

Assorted lower courts expressly hew to the narrowest potential interpretation of the Second Amendment, pending further precedent from this Court. Development of Second Amendment jurisprudence is abrogated without additional guidance by this Court.

This Court should grant certiorari to state the appropriate test and to clarify issues within that test.

ARGUMENT

I. Certiorari should be granted to identify the appropriate Second Amendment test.

A. Lower courts are struggling to follow *Heller*.

Judge Willett emphasized that this case "underscore[s] the need for [] resolution, not just of the ultimate 'who wins?' question but of the prefatory 'which test?' question." *Mance v. Sessions*, 896 F.3d 390, 396 (5th Cir. 2018) (Willett, J., dissenting from denial of rehearing en banc). Indeed, as Justice Thomas recently wrote, "[t]his Court has not definitively resolved the standard for evaluating Second Amendment claims." *Silvester v. Becerra*, 138 S. Ct. 945, 947 (2018) (Thomas, J., dissenting from denial of certiorari). Consequently, a decade after *Heller*, lower courts are still debating how to analyze Second Amendment challenges.

Many courts have asked this Court for more guidance. In the words of an early post-*Heller* case, "This

case underscores the dilemma faced by lower courts in the post-*Heller* world . . . we think it prudent to await direction from the Court itself." *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011). *See also*, *e.g.*, *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 703 (6th Cir. 2016) (en banc) (Batchelder, J., concurring in most of the judgment) (discussing how the court should "pass the time . . . while we wait for the Supreme Court to step in and do the historical analysis it has promised."); *Pena v. Lindley*, 898 F.3d 969, 976 (9th Cir. 2018) ("[S]ince *Heller*, the courts of appeals have spilled considerable ink in trying to navigate the Supreme Court's framework.").

Other courts have refused to contribute to the development of Second Amendment case law without this Court's lead. For instance, the Court of Appeals of Maryland adopted the narrowest interpretation of *Heller* and *McDonald*, despite acknowledging that the opinions suggested a broader interpretation. The court proclaimed, "[i]f the Supreme Court, in this dicta, meant its holding to extend beyond home possession, it will need to say so more plainly." *Williams v. State*, 417 Md. 479, 496 (2011). *See also Hightower v. City of Boston*, 693 F.3d 61, 74 (1st Cir. 2012) ("we should not engage in answering the question of how *Heller* applies to possession of firearms outside of the home"); *Masciandaro*, 638 F.3d at 475 ("[W]e believe the most respectful course is to await that guidance from the nation's highest court. There simply is no need in this litigation to break ground that our superiors have not

tread."); *Dearth v. Lynch*, 791 F.3d 32, 41 (D.C. Cir. 2015) (Griffith, J., concurring) ("I would extend *Heller* no further unless and until the Supreme Court does so").

Because of lack of guidance, the dispute over the proper test in the court below was profound but not unique. Many disagreements exist among the circuit courts and within circuits.

B. Two tests have emerged.

Two approaches are most prevalent: the Text, History, and Tradition Test and the Two-Part Test. The difference between the two derives from a single sentence in *Heller*.

1. The Text, History, and Tradition Test.

The Text, History, and Tradition Test applies *Heller* on its own terms.

Part I of *Heller* summarized the facts.

Part II constituted the majority of the analysis. Part II.A presented a 24-page (576–600) textual analysis, informed by history, that defined the Second Amendment's operative and prefatory clauses and their relationship. Parts II.B–D were a 19-page (600–619) historical analysis: II.B explored state constitutions in the founding-era; II.C analyzed the drafting history of the Second Amendment; and II.D "address[ed]

how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century." 554 U.S. at 605. II.E focused mostly on this Court's precedents and concluded that *United States v. Miller*, 307 U.S. 174 (1939), despite its deficiencies, stood for protecting "arms in common use" and therefore "accords with the historical understanding of the scope of the right." *Heller*, 554 U.S. at 624–25.

Part III identified traditional restrictions on the right, including "prohibitions on carrying concealed weapons," "prohibitions on the possession of firearms by felons and the mentally ill," "laws forbidding the carrying of firearms in sensitive places," "laws imposing conditions and qualifications on the commercial sale of arms," and "the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" *Id.* at 626–27.

Part IV addressed the ordinances at issue. Turning again to history, this Court emphasized that "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them." Therefore, the Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 634–35.

In *McDonald*, Justice Scalia joined the majority opinion and also wrote separately to defend this Court's "history focused method." Compared to interest-balancing tests, "it is much less subjective, and

intrudes much less upon the democratic process." 561 U.S. at 804 (Scalia, J., concurring).

Thus, *Heller* and *McDonald* "set[] forth a test based wholly on text, history, and tradition." *Heller v. District of Columbia*, 670 F.3d 1244, 1276 (D.C. Cir. 2011) ("*Heller II*") (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.

Heller itself promised that "there will be time enough to expound upon the *historical justifications* for the exceptions [to the right to keep and bear arms] we have mentioned." 554 U.S. at 635 (brackets and emphasis added). *See also United States v. Bena*, 664 F.3d 1180, 1183 (8th Cir. 2011) ("That the Supreme Court contemplated such a historical justification for the presumptively lawful regulations is indicated by the Court's reference to the 'historical tradition' that supported a related limitation on the *types* of weapons protected by the Second Amendment") (quoting *Heller*, 554 U.S. at 627).

Other courts and judges have agreed. *See, e.g.*, *Tyler*, 837 F.3d at 702 (Batchelder, J., concurring in most of judgment) ("[T]wo-step [] test . . . fails to give adequate attention to the Second Amendment's original public meaning in defining the contours of the mental health exception. And it is *that* meaning—as *Heller* and *McDonald* make unmistakably clear—informed as it is by the history and tradition surrounding the

right, that counts."); *Gowder v. City of Chicago*, 923 F. Supp. 2d 1110, 1123 (N.D. Ill. 2012) ("[T]he text, history, and tradition approach is the proper approach"); *Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1118 (S.D. Cal. 2017), *aff'd*, 742 F. App'x 218 (9th Cir. 2018) (the test based on historical understanding—the "simple *Heller* test"—was more appropriate than the "overly complex analysis" developed by circuit courts); *Rocky Mountain Gun Owners v. Hickenlooper*, 371 P.3d 768, 778 (Colo. App. 2016) (Graham, J., concurring in part and dissenting in part) (in light of *Heller* and *McDonald*, preferring a Text, History, and Tradition Test for Colorado's state constitutional right).

The discord in the Fifth Circuit demonstrates the need for this Court's guidance. The Fifth Circuit has adopted the Two-Part Test (discussed below), yet at least seven circuit judges believe that the Text, History, and Tradition Test is more appropriate. Joined by six judges in a dissent from denial of rehearing en banc in this case, Judge Elrod wrote, "unless and until the Supreme Court says differently, . . . *Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition. . . ." *Mance v. Sessions*, 896 F.3d 390, 396 (5th Cir. 2018) (Elrod, J., dissenting from denial of rehearing en banc) (quotations and citations omitted).

2. The Two-Part Test.

"[T]he first step [in the Two-Part Test] is to determine whether the challenged law impinges upon

a right protected by the Second Amendment." *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012) ("*BATFE*"). Part One is essentially the Text, History, and Tradition Test: "To determine whether a law impinges on the Second Amendment right, we look to whether the law harmonizes with the historical traditions associated with the Second Amendment guarantee." *Id.* at 194.

In Part Two, the Two-Part Test adds means-end scrutiny. The level of scrutiny "depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right." *Id.* at 195.

a. Means-end scrutiny.

In contrast to Text, History, and Tradition—which constituted roughly 50 pages of the *Heller* opinion and nearly its entire analysis—means-end scrutiny is conceived from a single sentence.

Over 55 pages into the opinion, this Court declared: "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 (quotation and citation omitted).

Of all the means-end scrutiny conducted in Second Amendment cases, *Heller*'s lone sentence is easily the

shortest—perhaps indicating that it was not intended as means-end scrutiny at all.

Indeed, means-end scrutiny contradicts *Heller*, *McDonald*, and the concurrence in *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016). "The Supreme Court has at every turn rejected the use of interest balancing in adjudicating Second Amendment cases." *Tyler*, 837 F.3d at 702–03 (Batchelder, J., concurring in most of the judgment).

It has been observed that *Heller* rejected interest-balancing tests:

> 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. 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. We know as much because the Court expressly dismissed Justice Breyer's *Turner Broadcasting* intermediate scrutiny approach and went on to demonstrate how courts should consider Second Amendment bans and regulations—by analysis of text, history, and tradition.

Heller II, 670 F.3d at 1277–78 (Kavanaugh, J., dissenting) (citations omitted).

When declining to apply "Justice Breyer's *Turner Broadcasting* intermediate scrutiny approach," this Court also rejected strict scrutiny—as Justice Breyer acknowledged:

> Respondent proposes that the Court adopt a "strict scrutiny" test. . . . But the majority implicitly, and appropriately, rejects that suggestion by broadly approving a set of laws—prohibitions on concealed weapons, forfeiture by criminals of the Second Amendment right, prohibitions on firearms in certain locales, and governmental regulation of commercial firearm sales—whose constitutionality under a strict-scrutiny standard would be far from clear.
>
> Indeed, adoption of a true strict-scrutiny standard for evaluating gun regulations would be impossible. . . . [A]ny attempt *in theory* to apply strict scrutiny to gun regulations will *in practice* turn into an interest-balancing inquiry, with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other, the only question being whether the regulation at issue impermissibly burdens the former in the course of advancing the latter.

Heller, 554 U.S. at 688–89 (Breyer, J., dissenting).

McDonald too rejected interest-balancing:

> Justice BREYER is incorrect that incorporation will require judges to assess the costs and benefits of firearms restrictions and thus to make difficult empirical judgments in an area

> in which they lack expertise. As we have noted, while his opinion in *Heller* recommended an interest-balancing test, the Court specifically rejected that suggestion. "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."

561 U.S. at 790–91 (quoting *Heller*, 554 U.S. at 634) (citations omitted).

This Court has never indicated approval of the Two-Part Test. It was absent from Justice Alito's concurrence in *Caetano*. The concurrence simply stated that because "stun guns are widely owned and accepted as a legitimate means of self-defense across the country[,] Massachusetts' categorical ban of such weapons therefore violates the Second Amendment." 136 S. Ct. at 1033 (Alito, J., concurring).

Yet lower courts using the Two-Part Test disregard this Court's precedents by applying means-end scrutiny—making difficult empirical judgments in an area in which they lack expertise.

b. Commonality.

The Two-Part Test has been adopted by all circuits[2] except the Eighth.[3] But not all circuits use it enthusiastically. The en banc Sixth Circuit acknowledged the "logical appeal" of "jettison[ing] tiers of scrutiny," but was wary to "strike out on our own analytical path and part ways with nearly all of the circuit courts." *Tyler*, 837 F.3d at 693 n.14. Concurring, Judge Batchelder responded, "I do not think that in adjudicating fundamental rights we should value uniformity over fidelity to the law." *Id.* at 704 n.1 (Batchelder, J., concurring in most of the judgment). Indeed, "the 'analytical path' was first cut in *Heller*. It is the lower courts . . . that have departed from that path, engaging in narrowing from below by implementing the increasingly indeterminate framework of heightened scrutiny review." *Id.* (citations omitted).

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[2] The test was established in *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010). It was adopted in *Gould v. Morgan*, 907 F.3d 659, 669 (1st Cir. 2018); *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 254 (2d Cir. 2015) ("*NYSRPA*"); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *BATFE*, 700 F.3d at 194; *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Ezell v. City of Chicago*, 651 F.3d 684, 701–03 (7th Cir. 2011); *United States v. Chovan*, 735 F.3d 1127, 1136–37 (9th Cir. 2013); *United States v. Reese*, 627 F.3d 792, 800–01 (10th Cir. 2010); *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1261 n.34 (11th Cir. 2012); *Heller II*, 670 F.3d at 1252.

[3] *See United States v. Hughley*, 691 F. App'x 278, 279 (8th Cir. 2017) (unpublished) ("Other courts seem to favor a so-called 'two-step approach.' . . . We have not adopted this approach and decline to do so here.").

The Seventh Circuit is also divided. It rejected the Two-Part Test in striking a ban on bearing arms, *Moore v. Madigan*, 702 F.3d 933, 941 (7th Cir. 2012) ("our analysis is not based on degrees of scrutiny"), then created a new test in upholding a ban on common arms. *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015); David Kopel & Joseph Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 ST. LOUIS L.J. 193, 210–11 (2017) (*Friedman* uses the test rejected by the Court's *Caetano per curiam*).

As can be expected from a test that is untethered to Supreme Court analysis and is being developed by many different courts simultaneously, there are many conflicting applications. Therefore, if the test is deemed most appropriate, this Court should grant certiorari to address the contradictions and ambiguities among lower courts.

II. If the Two-Part Test applies, it requires clarification.

This case illustrates some of the inconsistencies arising from the Two-Part Test.

A. Presumptively-lawful regulations.

Heller identified "presumptively lawful regulatory measures," including "longstanding prohibitions on the possession of firearms by felons and the mentally ill, [ ] laws forbidding the carrying of firearms in sensitive places such as schools and government buildings,

[and] laws imposing conditions and qualifications on the commercial sale of arms." 554 U.S. at 626–27. This Court repeated these "longstanding regulatory measures" in *McDonald*, 561 U.S. at 786.

Here, the Government argued that the interstate sales ban is presumptively lawful as a longstanding prohibition imposing conditions and qualifications on the commercial sales of arms. While the district court concluded that such laws "do not date back quite far enough to be considered longstanding," *Mance v. Holder*, 74 F. Supp. 3d 795, 805 (N.D. Tex. 2015), the Fifth Circuit "assume[d], without deciding, that they are not 'longstanding regulatory measures.' " *Mance v. Sessions*, 896 F.3d 699, 704 (5th Cir. 2018) (citations omitted).

The Fifth Circuit had previously expressed confusion over the issue: "We admit that it is difficult to map *Heller*'s 'longstanding,' 'presumptively lawful regulatory measures,' onto this two-step framework." *BATFE*, 700 F.3d at 196 (quoting *Heller*, 554 U.S. at 626, 627 n.26).

Other circuits have expressed similar confusion. *E.g.*, *Marzzarella*, 614 F.3d at 91 ("the phrase 'presumptively lawful' could have different meanings under [the Two-Part Test]"); *Masciandaro*, 638 F.3d at 469 ("The full significance of these pronouncements is far from self-evident.") (internal citation omitted); *Pena*, 898 F.3d at 976 ("Our sister circuits have struggled to unpack the different meanings of 'presumptively lawful.' ").

Circuits have struggled to determine, *inter alia*: whether the "presumptively lawful" language is a presumption that can be rebutted or is a binding rule of law; what makes a law "longstanding"; and what unlisted laws are presumptively lawful.[4]

B. Can the presumption be rebutted?

The word "presumptively" indicates that a regulation's constitutionality can be rebutted. "A presumption is a rule of law, statutory or judicial, by which finding of a basic fact gives rise to existence of presumed fact, *until presumption is rebutted*." Black's Law Dictionary 1185 (6th ed. 1990) (emphasis added). "Nevertheless, the answer has proven elusive, as the circuits have splintered over the question." *Pena*, 898 F.3d at 1004 (Bybee, J., concurring in part and dissenting in part).

As the Third Circuit explained, if the presumption in favor of conditions and qualifications on the commercial sale of arms were irrebuttable and "there were somehow a categorical exception for these restrictions, it would follow that there would be no constitutional defect in prohibiting the commercial sale of firearms. Such a result would be untenable under *Heller*." *Marzzarella*, 614 F.3d at 92 n.8.

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[4] For discussion of circuit splits over "presumptively lawful" regulations, *see* Kopel & Greenlee, 61 St. Louis L.J. at 214–28.

Some courts do allow the presumption to be rebutted. *See Tyler*, 837 F.3d at 686 ("*Heller* only established a presumption that such bans were lawful; it did not invite courts onto an analytical off-ramp to avoid constitutional analysis."); *United States v. Barton*, 633 F.3d 168, 173 (3d Cir. 2011) ("By describing the felon disarmament ban as 'presumptively' lawful, the Supreme Court implied that the presumption may be rebutted.") (citation omitted); *Heller II*, 670 F.3d at 1253 ("A plaintiff may rebut this presumption"); *Peterson v. Martinez*, 707 F.3d 1197, 1218 n.1 (10th Cir. 2013) (quoting *Heller II*); *Chester*, 628 F.3d at 679 ("the phrase '*presumptively* lawful regulatory measures' suggests the possibility that one or more of these 'longstanding' regulations 'could be unconstitutional in the face of an as-applied challenge.' ") (quoting *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010)). *See also Pena*, 898 F.3d at 1004 (Bybee, J., concurring in part and dissenting in part) ("It is contrary to my instincts to read 'presumptively lawful' as 'conclusively lawful.' ").

Yet other courts have treated "presumptively" lawful measures as conclusively lawful. *See, e.g.*, *United States v. Bogle*, 717 F.3d 281 (2d Cir. 2013) (ban on felons); *United States v. McRobie*, No. 08-4632, 2009 WL 82715, at *1 (4th Cir. 2009) (unpublished) (lifetime ban for present or past mental illness); *United States v. Castro*, No. 10-50160, 2011 WL 6157466, at *1 (9th Cir. 2011) (unpublished) (commercial sales); *United States v. Davis*, 304 F. App'x 473, 474 (9th Cir. 2008) (unpublished) (prohibition on weapons in sensitive places).

C. What is longstanding?

According to the district court, "state residency restrictions do not date back quite far enough to be considered longstanding . . . the earliest of these restrictions occurring in 1909." *Mance*, 74 F. Supp. 3d at 805. "While two-hundred years from now, restrictions from 1909 may seem longstanding, looking back only to 1909, today, omits more than half of America's history and belies the purpose of the inquiry." *Id.* More important was "the absence of any evidence of founding-era thinking that contemplated that interstate, geography-based, or residency-based firearm restrictions would be acceptable." *Id.*

This Court never explained what makes a regulation "longstanding." Rather, *Heller* said that this Court would "expound upon the historical justifications" of the presumptively lawful longstanding regulatory measures at a later date. 554 U.S. at 635.

In the meantime, lower courts have struggled to make sense of the timeframe. None have defined "longstanding," but some have observed that the measures listed in *Heller* were not widespread in the founding-era. *See BATFE*, 700 F.3d at 196 ("*Heller* demonstrates that a regulation can be deemed 'longstanding' even if it cannot boast a precise founding-era analogue"); *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc) ("we do take from *Heller* the message that exclusions need not mirror limits that were on the books in 1791."); *United States v. Booker*, 644 F.3d 12, 23–24 (1st Cir. 2011) (explaining that the federal

felony firearm possession ban, 18 U.S.C. §922(g)(1), "bears little resemblance to laws in effect at the time the Second Amendment was ratified," was enacted in 1938, included non-violent felons starting in 1961, and targeted possession rather than receipt starting in 1968).

D. What other laws are "presumptively lawful"?

After providing specific examples of "presumptively lawful regulatory measures," this Court noted in a footnote that "our list does not purport to be exhaustive." *Heller*, 554 U.S. at 627 n.26.

Lower courts are uncertain about what other regulatory measures are presumptively lawful. "Some courts have treated *Heller*'s listing of 'presumptively lawful regulatory measures,' for all practical purposes, as a kind of 'safe harbor' for unlisted regulatory measures . . . which they deem to be analogous to those measures specifically listed in *Heller*." *Chester*, 628 F.3d at 679. For examples of laws that are not longstanding, yet were upheld merely by analogy to laws listed in *Heller*, *see United States v. White*, 593 F.3d 1199 (11th Cir. 2010) (domestic violence misdemeanors); *Bena*, 664 F.3d at 1184 (domestic violence restraining orders); *United States v. Dugan*, 657 F.3d 998 (9th Cir. 2011) (drug users).

The Fourth Circuit criticized the practice of analogizing modern laws to longstanding laws, because that "approximates rational-basis review." *Chester*,

628 F.3d at 679. Other courts have decided against that approach as well. *See, e.g.*, *Chovan*, 735 F.3d at 1137 (prohibition on domestic violence misdemeanants is not longstanding or rooted in history); *Greeno*, 679 F.3d at 517 (dangerous weapon enhancement was not presumptively lawful because the specific type of law was not listed in *Heller*).

E. Do only substantial burdens on the right receive heightened scrutiny?

Heller explicitly rejected rational basis review: "Obviously, [rational basis] could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms." 554 U.S. at 629. Most circuits have acknowledged that rational basis review is precluded by *Heller*.[5]

Yet in this case, Judge Higginson favored reliance on *United States v. Decastro*, 682 F.3d 160, 162 (2d Cir. 2012), which upheld 18 U.S.C. §922(a)(3) under rational basis. *Mance v. Sessions*, 896 F.3d 390, 392 (5th Cir. 2018) (Higginson, J., concurring in denial of rehearing en banc).

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[5] *Booker*, 644 F.3d at 25; *Marzzarella*, 614 F.3d at 95–96; *Chester*, 628 F.3d at 680; *BATFE*, 700 F.3d at 195; *Tyler*, 837 F.3d at 686; *Skoien*, 614 F.3d at 641; *Chovan*, 735 F.3d at 1137; *Reese*, 627 F.3d at 801; *GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Engineers*, 788 F.3d 1318, 1328 (11th Cir. 2015); *Heller II*, 670 F.3d at 1256.

The Ninth Circuit seemingly endorsed *Decastro*'s rational basis approach by recently declaring that heightened scrutiny is appropriate only if the law "meaningfully" burdens the right. *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 680 & n.14 (9th Cir. 2017) (en banc) (allowing county to ban all new gun stores).

Although this Court has already addressed the rational basis point explicitly, it requires reinforcement. Rational basis review would quickly enfeeble the right to keep and bear arms. "If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect." *Heller*, 554 U.S. at 629 n.27.

F. Must less burdensome alternatives be considered?

Below, the Fifth Circuit purported to apply strict scrutiny, but it upheld the law despite the obvious existence of many less burdensome alternatives to the interstate handgun sales ban. *See Mance v. Sessions*, 896 F.3d 390, 402–03 (5th Cir. 2018) (Ho, J., dissenting from denial of rehearing en banc).

Some circuit courts regularly disregard the requirement of considering less burdensome alternatives when applying the Two-Part Test.

As this Court recently reiterated, intermediate scrutiny requires the consideration of substantially

less burdensome alternatives: "the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *McCullen v. Coakley*, 134 S. Ct. 2518, 2540 (2014).

Notably, the rejected intermediate scrutiny-like balancing test proposed in Justice Breyer's *Heller* dissent considered "reasonable, but less restrictive, alternatives." 554 U.S. at 710 (Breyer, J., dissenting).

Some courts have recognized the requirement. *See Heller v. District of Columbia*, 801 F.3d 264, 277–78 (D.C. Cir. 2015) ("*Heller III*") (striking a requirement for the triennial re-registration of firearms because less burdensome alternatives existed); *Ezell*, 651 F.3d at 710 (striking a ban on firing ranges, because the safety concerns "may be addressed by more closely tailored regulatory measures"); *Reese*, 627 F.3d at 803 (upholding a ban on persons subject to domestic violence restraining orders only after determining that there was not "a severable subcategory of persons as to whom the statute is unconstitutional."); *Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Attorney Gen. New Jersey*, No. 18-3170, 2018 WL 6378284, at *11 (3d Cir. Dec. 5, 2018) (examining "whether the legislature considered less restrictive means").

However, other courts, including the Fifth Circuit, omit the requirement in the Second Amendment context. *See Nat'l Rifle Ass'n of Am., Inc. v. McCraw*, 719 F.3d 338, 349 (5th Cir. 2013) (refusing to consider

intermediate scrutiny requirement of "substantially less burdensome alternative" to excluding all young adults from the handgun carry licensing system); *NYSRPA*, 804 F.3d at 261 (failing to consider a strict licensing system as an alternative to a ban on common firearms and magazines).

In light of so many intricacies and uncertainties, one court recently described the Two-Part Test as "an overly complex analysis that people of ordinary intelligence cannot be expected to understand." *Duncan*, 265 F. Supp. 3d at 1117.

III. Until this Court clarifies its Second Amendment doctrine, lower courts will continue to run roughshod over it.

The Second Amendment is not a "second-class right" to be "singled out for special—and specially unfavorable—treatment." *McDonald*, 561 U.S. at 778–79, 780.

Yet as lower courts and legal scholars have recognized, this Court's lack of enforcement of *Heller* over the past decade has made the Second Amendment a second-class right. *See*, *e.g.*, *Ass'n of New Jersey Rifle & Pistol Clubs, Inc.*, 2018 WL 6378284, at *14 (Bibas, J., dissenting) (the majority opinion and five other circuits that reached similar decisions "err in subjecting the Second Amendment to different, watered-down rules and demanding little if any proof."); *Mance v. Sessions*, 896 F.3d 390, 398 (5th Cir. 2018) (Ho, J., dissenting from denial of rehearing en banc) ("the Second

Amendment continues to be treated as a 'second-class right' "); Allen Rostron, *Justice Breyer's Triumph in the Third Battle Over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 703 (2012) (explaining approvingly that "Justice Breyer [] stands poised to achieve an unexpected triumph despite having come out on the losing side of both of the Supreme Court's recent clashes over the right to keep and bear arms" because "the lower courts have focused on contemporary public policy interests and applied a form of intermediate scrutiny that is highly deferential to legislative determinations and leads to all but the most drastic restrictions on guns being upheld."); David Kopel, *Data Indicate Second Amendment Underenforcement*, 68 DUKE L.J. ONLINE 79 (2018) (systemic problems in the Second, Fourth, and Ninth Circuits); George Mocsary, *A Close Reading of an Excellent Distant Reading of* Heller *in the Courts*, 68 DUKE L.J. ONLINE 41, 53–54 (2018) (Second Amendment claims are subjected to a substantially weakened form of heightened scrutiny with extremely lower success rates than heightened scrutiny for other rights).

Some courts admit to second-class right treatment. The Second Circuit acknowledged that "analogies between the First and Second Amendment were made often in *Heller*" and that "[s]imilar analogies have been made since the Founding." Nevertheless, the court refused to "assume that the principles and doctrines developed in connection with the First Amendment apply equally to the Second," because "that approach . . . could well result in the erosion of hard-won

First Amendment rights." *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 92 (2d Cir. 2012). In other words, if the First and Second Amendments were treated equally, courts would undermine the First in order to avoid enforcing the Second.

Some courts claim that the Second Amendment can be treated as inferior because of its inherent dangers. *See Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015) ("The risk inherent in firearms and other weapons distinguishes the Second Amendment right from other fundamental rights that have been held to be evaluated under a strict scrutiny test, such as the right to marry and the right to be free from viewpoint discrimination"); *Ass'n of New Jersey Rifle & Pistol Clubs, Inc.*, 2018 WL 6378284, at *11 n.28 ("While our Court has consulted First Amendment jurisprudence concerning the appropriate level of scrutiny to apply to a gun regulation, we have not wholesale incorporated it into the Second Amendment." Additionally, "the articulation of intermediate scrutiny for equal protection purposes is not appropriate here.") (citations omitted).

This Court has said the opposite: "The right to keep and bear arms, however, is not the only constitutional right that has controversial public safety implications. All of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes fall into the same category." *McDonald*, 561 U.S. at 783. "*Heller* noted, while it is true that, in the decades before the Founding, the right to bear arms was often treated by English courts with far less

respect than other fundamental rights . . . that is not how *we* may treat that right." *Tyler*, 837 F.3d at 706–07 (Batchelder, J., concurring in most of the judgment) (citing *Heller*, 554 U.S. at 608; *McDonald*, 561 U.S. at 780).

Some lower courts have created a special, feeble version of heightened scrutiny for the Second Amendment. They let the government prevail on thin or conclusory evidence and ignore rebuttal evidence. *See*, *e.g.*, *NYSRPA*, 804 F.3d at 261 (upholding bans on common arms by looking only at government evidence that "fairly supports" the bans, and ignoring contrary evidence); Kopel & Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 St. Louis L.J. at 294–95 (criticizing one-sided view of evidence); *New York State Rifle & Pistol Ass'n v. City of New York*, 883 F.3d 45, 63–64 (2d Cir. 2018), *petition for cert. filed* (Sept. 6, 2018) (No. 18-280) (ban on taking registered handguns outside of New York City upheld on basis of conclusory affidavits of government officials, with no data or details).

As described above, enfeebled heightened scrutiny ignores less burdensome alternatives (Part II.F), and defies this Court by employing rational basis (Part II.E). According to the Ninth Circuit, a ban on all new gun stores in a county does not even implicate the Second Amendment. *Teixeira*, 873 F.3d 670.

Justices of this Court have lamented the lower courts' disregard for its precedents. *See Jackson v. City & Cty. of San Francisco*, 135 S. Ct. 2799, 2799 (2015)

(Thomas, J., joined by Scalia, J., dissenting from denial of certiorari) ("Despite the clarity with which we described the Second Amendment's core protection for the right of self-defense, lower courts, including the ones here, have failed to protect it."; ordinance prohibits persons from having a functional handgun when sleeping, bathing, or changing clothes); *Friedman v. City of Highland Park*, 136 S. Ct. 447, 447 (2015) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari) (denouncing "noncompliance with our Second Amendment precedents" by "several Courts of Appeals"); *Peruta v. California*, 137 S. Ct. 1995, 1999 (2017) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari) (noting "a distressing trend: the treatment of the Second Amendment as a disfavored right."); *Silvester v. Becerra*, 138 S. Ct. 945, 950 (2018) (Thomas, J., dissenting from denial of certiorari) ("the lower courts are resisting this Court's decisions in *Heller* and *McDonald* and are failing to protect the Second Amendment").

Until this Court reinforces *Heller*, lower courts will continue to defy this Court's precedents and the Constitution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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