No. 19-423

In The
Supreme Court of the United States

BRIAN KIRK MALPASSO and MARYLAND STATE RIFLE AND PISTOL ASSOCIATION, INC.,

Petitioners,

v.

WILLIAM M. PALLOZZI, in his official capacity as Maryland Secretary of State Police,

Respondent.

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

BRIEF OF *AMICI CURIAE* FIREARMS POLICY COALITION, FIREARMS POLICY FOUNDATION, CALIFORNIA GUN RIGHTS FOUNDATION, MADISON SOCIETY FOUNDATION, AND SECOND AMENDMENT FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

Firearms Policy Coalition, Inc. ("FPC") is a nonprofit membership organization that defends constitutional rights—including the right to keep and bear arms—and promotes individual liberty. FPC engages in direct and grassroots advocacy, research, legal efforts, outreach, and education.

Firearms Policy Foundation is a nonprofit organization that serves its members and the public through charitable programs including research, education, and legal efforts, with a focus on constitutional rights.

California Gun Rights Foundation ("CGF") is a nonprofit organization that focuses on educational, cultural, and judicial efforts to advance civil rights. CGF has conducted research and participated in litigation involving the right to bear arms for over a decade.

Madison Society Foundation is a nonprofit corporation that supports the right to arms by offering education and training to the public.

Second Amendment Foundation ("SAF") is a nonprofit foundation dedicated to protecting the right to arms through educational and legal action programs. SAF has over 650,000 members, in every State

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[1] All parties received timely notice and consented to the filing of this brief. No counsel for any party authored the brief in whole or part. Only *amici* funded its preparation and submission.

of the Union. SAF organized and prevailed in *McDonald v. City of Chicago*.

SUMMARY OF ARGUMENT

Lower courts are deeply divided over the extent to which the right to bear arms applies beyond the home. Some courts have held that the right applies with equal strength outside the home as inside the home; some have determined that the right likely applies outside the home, but in a weaker form; some have declined to decide whether the right exists outside the home; and some have decided that bans on carrying concealed firearms are constitutional, although perhaps not if open carry is also prohibited. The only broad consensus among lower courts is the need for additional guidance from this Court.

The proper resolution of several other issues depends on how this Court defines the right to bear arms. For instance, lower courts have had to guess how this Court will define the right to decide whether young adults can be prohibited from bearing arms; whether states can categorically deny nonresidents the right; whether the right can be denied on outdoor government property; whether firearms can be banned in areas surrounding "sensitive places"; and whether criminal activity can be inferred from the mere carrying of a firearm in public.

Another problematic issue among lower courts is the interest-balancing that the right to bear arms has

been subjected to—despite this Court's explicit and repeated repudiations of interest-balancing tests for Second Amendment rights. Laws requiring an applicant to demonstrate a special need to bear arms necessarily require the governing agency to balance interests. Here, Maryland's "good and substantial reason" standard requires the government's determination that permission to bear arms is *necessary* as a reasonable precaution against apprehended danger.

Making matters worse, lower courts often uphold these laws through the application of means-end scrutiny, which involves more interest-balancing.

Indeed, a compelling trend among the federal circuit courts has emerged. Courts that follow this Court's precedents by conducting a historical analysis to determine the founding-era right hold that the right to bear arms applies to all law-abiding citizens. But courts that replace the historical analysis with means-end scrutiny hold that the right can be limited to those who can demonstrate a special need.

The necessity for this Court to clarify the role of history in defining the right is illuminated by so many outcomes depending on whether the reviewing court considers history. Disregarding history and merely interest-balancing Second Amendment rights has allowed the Second Amendment to be singled out for special—and specially unfavorable—treatment. Many courts have boldly admitted doing so, offering justifications that this Court has previously rejected. Until this Court reinforces its precedents, lower courts will

continue to treat the right to bear arms as a second-class right.

ARGUMENT

I. Certiorari should be granted to define the right to bear arms.

A. To what extent the right to bear arms applies beyond the home has deeply divided lower courts.

The federal circuit courts have struggled to find clarity in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and are intensely divided over the right to bear arms. Nearly every circuit has addressed the issue, but agreements among even a few courts are rare.

1. The D.C. and Seventh Circuits held that the right applies just as strongly outside the home as inside the home.

Both the D.C. and Seventh Circuits concluded that the right to bear arms applies outside the home as strongly as it applies inside the home.

The D.C. Circuit held that "possession and carrying—keeping and bearing—are on equal footing." *Wrenn v. District of Columbia*, 864 F.3d 650, 666 (D.C. Cir. 2017). Striking down a requirement that applicants demonstrate a "good reason" for a handgun carry permit, the court concluded that "the individual right to carry common firearms beyond the home for self-defense—

even in densely populated areas, even for those lacking special self-defense needs—falls within the core of the Second Amendment's protections." *Id.* at 661.

The Seventh Circuit struck down a prohibition on bearing arms in *Moore v. Madigan*, reasoning that "the amendment confers a right to bear arms for self-defense, which is as important outside the home as inside." 702 F.3d 933, 942 (7th Cir. 2012).

2. The First and Second Circuits determined that the right likely applies outside the home, but in a weaker form.

The First and Second Circuits determined that the right to bear arms likely exists outside the home but in weaker form than inside the home.

The First Circuit "view[s] *Heller* as implying that the right to carry a firearm for self-defense guaranteed by the Second Amendment is not limited to the home." *Gould v. Morgan*, 907 F.3d 659, 670 (1st Cir. 2018). But the court determined that "[t]his right is plainly more circumscribed outside the home," *id.* at 672, and upheld a law requiring concealed carry permit applicants to demonstrate "good reason to fear injury." *Id.* at 674 (citing Mass. Gen. Laws ch. 140, § 131(d)).

Similarly, the Second Circuit determined that "the Amendment must have *some* application in the very different context of the public possession of firearms." *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012) (emphasis in original). But it further determined

that restrictions outside the home "fall[] outside the core Second Amendment protections," and upheld a requirement that applicants for concealed carry permits demonstrate "proper cause." *Id.* at 94.

3. The Third and Fourth Circuits declined to decide whether the right exists outside the home.

Both the Third and Fourth Circuits have declined to decide whether there is a right to bear arms outside the home.

The Third Circuit "decline[d] to definitively declare that the individual right to bear arms for the purpose of self-defense extends beyond the home," upholding New Jersey's "justifiable need" requirement for a carry permit as a " 'longstanding,' 'presumptively lawful' regulation." *Drake v. Filko*, 724 F.3d 426, 431, 432 (3d Cir. 2013).

Upholding the restriction at issue here, the Fourth Circuit "hew[ed] to a judicious course today, refraining from any assessment of whether Maryland's good-and-substantial-reason requirement for obtaining a handgun permit implicates Second Amendment protections." *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013).

4. The Ninth and Tenth Circuits held that the right to bear arms does not protect concealed carry.

The Ninth and Tenth Circuits both held that the Second Amendment does not protect carrying concealed firearms—but while expressly refusing to consider the ability to openly carry firearms. *Peterson v. Martinez*, 707 F.3d 1197, 1208 (10th Cir. 2013) (basing analysis "on the effects of the state statute [restricting concealed carry] rather than the combined effects of the statute and the ordinance [restricting open carry]"); *Peruta v. Cty. of San Diego*, 824 F.3d 919, 927 (9th Cir. 2016) (en banc) ("We do not reach the question whether the Second Amendment protects some ability to carry firearms in public, such as open carry."). In contrast, Florida's Supreme Court upheld an open carry ban because Florida's concealed carry "licensing scheme provides almost every individual the ability to carry a concealed weapon." *Norman v. State*, 215 So. 3d 18, 28 (Fla. 2017).

5. What lower courts agree on is the need for further guidance from this Court.

Lower courts have roundly called for additional guidance on the right to bear arms.

Addressing a ban on firearms in national parks, the Fourth Circuit explained, "This case underscores the dilemma faced by lower courts in the post-*Heller* world: how far to push *Heller* beyond its undisputed core holding. On the question of *Heller*'s applicability

outside the home environment, we think it prudent to await direction from the Court itself." *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011). Anticipating additional guidance over eight years ago, the court added, "we 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." *Id.* Others have voiced similar reservations about getting ahead of this Court. *See 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"); *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").

Other courts have expressed a similar need for more guidance. *See Kachalsky*, 701 F.3d at 89 ("What we do not know is the scope of that right beyond the home and the standards for determining when and how the right can be regulated by a government. This vast '*terra incognita*' has troubled courts since *Heller* was decided."); *Drake*, 724 F.3d at 430 ("Outside of the home, however, we encounter the 'vast terra incognita' "); *Gould*, 907 F.3d at 670 ("Withal, *Heller* did not supply us with a map to navigate the scope of the right of public carriage for self-defense."); *Wrenn*, 864 F.3d at 655 ("[T]he Supreme Court has offered little guidance. . . . And by its own admission, [*Heller*] manages to be mute on how to review gun laws in a range of other cases.").

The Court of Appeals of Maryland was bolder. Adopting the narrowest interpretation of *Heller* and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), 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).

B. Several related issues depend on how this Court defines the right to bear arms.

Lower courts have addressed several issues related to the right to bear arms, basing their holdings on predictions of how this Court will define the right. Until this Court provides additional guidance, lower courts will continue to guess what the right is as they decide similar cases.

1. Can certain adults be denied the right to bear arms based on their age?

Can the right to bear arms be limited to certain ages, even among adults? Without definitively deciding what the right to bear arms protects, the Fifth Circuit upheld a statutory scheme prohibiting 18-to-20-year-old adults from carrying handguns in public. *Nat'l Rifle Ass'n of Am., Inc. v. McCraw*, 719 F.3d 338 (5th Cir. 2013). The Supreme Court of Illinois upheld a similar prohibition. *People v. Mosley*, 2015 IL 115872 (statute prohibiting possession of a firearm while outside one's

home or on a public way while under 21 years of age did not violate the right to bear arms). *But see* David Kopel & Joseph Greenlee, *The Second Amendment Rights of Young Adults*, 43 S. ILL. U. L.J. 495 (2019)[2] (demonstrating that in the colonial and founding eras, 18-to-20-year-olds were commonly required, and never forbidden, to keep and bear arms).

2. Can a state categorically deny nonresidents from bearing arms?

Does the right to bear arms stop at state lines? The Seventh Circuit upheld Illinois's concealed carry licensing scheme that made nonresidents from 45 states categorically ineligible to even apply for an Illinois license, based merely on their state of residence. *Culp v. Raoul*, 921 F.3d 646 (7th Cir. 2019).

In a related case, the Second Circuit established that a part-time resident of New York who makes his permanent domicile elsewhere is eligible to apply for a carry license. *Osterweil v. Bartlett*, 738 F.3d 520, 521 (2d Cir. 2013).

3. Can the right to bear arms be prohibited on United States Postal Service property?

Does the right to bear arms extend to a Post Office, or its parking lot? The Tenth Circuit upheld a

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[2] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=320566.

regulation "which prohibits the storage and carriage of firearms on USPS property . . . including the . . . parking lot." *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1122–23 (10th Cir. 2015).

Similarly, in an unpublished opinion, the Fifth Circuit upheld a handgun ban on USPS property—including the parking lot—even "[a]ssuming Dorosan's Second Amendment right to keep and bear arms extends to carrying a handgun in his car." *United States v. Dorosan*, 350 F. App'x 874, 875 (5th Cir. 2009) (unpublished).

4. Can the right to bear arms be prohibited on Army Corps of Engineers land?

The "Army Corps manages 422 projects, mostly lakes, in forty-two states and is the steward of twelve million acres of land and water used for recreation, with 54,879 miles of shoreline." *GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Engineers*, 212 F. Supp. 3d 1348, 1353 (N.D. Ga. 2016) ("*GeorgiaCarry.Org III*"). Can it prohibit firearms on all this property?

The Eleventh Circuit upheld the federal regulation prohibiting loaded firearms and ammunition on Army Corps of Engineers property. *GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Engineers*, 788 F.3d 1318, 1320 (11th Cir. 2015) ("*GeorgiaCarry.Org II*"). The United States District Court for the District of Idaho, however, ruled it unconstitutional. *Morris v. U.S. Army Corps of Engineers*, 60 F. Supp. 3d 1120 (D. Idaho 2014).

5. Can firearms be prohibited in areas surrounding "sensitive places"?

In *Heller*, this Court identified a series of "presumptively lawful regulatory measures," including "laws forbidding the carrying of firearms in sensitive places." 554 U.S. at 626–27 & n.26. Are areas surrounding "sensitive places" also sensitive? The D.C. Circuit recently held that the area containing "the many angled parking spots that line the 200 block of Maryland Avenue SW . . . approximately 1,000 feet from the entrance to the Capitol itself" was sensitive because "although it is not a government building . . . it is sufficiently integrated with the Capitol for *Heller I*'s sensitive places exception to apply." *United States v. Class*, 930 F.3d 460, 462, 464 (D.C. Cir. 2019). By comparison, Illinois's Supreme Court struck a prohibition on carrying arms within 1,000 feet of a public park, reasoning that the area surrounding a sensitive place cannot itself be treated as sensitive. *People v. Chairez*, 2018 IL 121417.

6. Can criminal activity be inferred from merely carrying a firearm in public?

Can criminal activity be inferred merely because an individual is carrying a firearm in public? The Supreme Court of Pennsylvania held that it cannot. *Commonwealth v. Hicks*, 208 A.3d 916, 937 (Pa. 2019) ("there simply is no justification for the conclusion that the mere possession of a firearm, where it lawfully may be carried, is alone suggestive of criminal activity."). But plaintiffs have lost 42 U.S.C. § 1983 actions for

false arrest and unconstitutional seizure of property—despite being wrongfully arrested and having their arms confiscated for lawfully carrying a firearm—because the right remains undefined. *Gonzalez v. Vill. of W. Milwaukee*, 671 F.3d 649, 659 (7th Cir. 2012) ("Whatever the Supreme Court's decisions in *Heller* and *McDonald* might mean for future questions about open-carry rights, for now this is unsettled territory."); *Burgess v. Town of Wallingford*, 569 F. App'x 21, 23 (2d Cir. 2014) (unpublished) ("[T]he protection that Burgess claims he deserves under the Second Amendment—the right to carry a firearm openly outside the home—is not clearly established law.").

II. Certiorari should be granted to clarify what sort of interest-balancing this Court rejected in *Heller* and *McDonald*.

"The Supreme Court has at every turn rejected the use of interest balancing in adjudicating Second Amendment cases." *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 702–03 (6th Cir. 2016) (en banc) (Batchelder, J., concurring in most of the judgment).

Heller rebuffed the "judge-empowering 'interest-balancing inquiry' " from Justice Breyer's dissent "that 'asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests.' " 554 U.S. at 634 (quoting *id.* at 689–90 (Breyer, J., dissenting)).

This Court rejected interest-balancing again in *McDonald*:

> 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.

561 U.S. at 790–91; *id.* at 785 ("we expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing") (citing *Heller*, 554 U.S. at 633–35).

"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." *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." *Id.* "We would not apply an 'interest-balancing' approach to the prohibition of a peaceful neo-Nazi march through Skokie." *Id.* at 635 (citing *National Socialist Party of America v. Skokie*, 432 U.S. 43 (1977) (*per curiam*)). Rather, "The Second Amendment . . . [l]ike the First . . . is the very *product* of an interest balancing by the people." *Id.*

Indeed, "[a] constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." *Id.* at 634.

A. Ascertaining a "good and substantial reason" requires interest-balancing.

Despite this Court's explicit and repeated repudiations of interest-balancing tests, several courts have upheld concealed carry permitting schemes that allow government officials to determine whether an individual's need for self-defense is sufficiently unique to outweigh the government's interest in an unarmed public. *See Kachalsky*, 701 F.3d 81 (upholding "proper cause" requirement); *Drake*, 724 F.3d 426 (upholding "justifiable need" requirement); *Gould*, 907 F.3d 659 (upholding "good reason to fear injury" requirement); *Woollard*, 712 F.3d 865 (upholding "good-and-substantial-reason" requirement).

Here, Maryland's "good and substantial reason" standard requires the Secretary of the Maryland State Police to investigate, among other things, whether "the permit is necessary as a reasonable precaution for the applicant against apprehended danger." Md. Code Regs. 29.03.02.03(13).

"[A]pprehended danger cannot be established by, inter alia, a 'vague threat' or a general fear of 'liv[ing] in a dangerous society.'" *Woollard*, 712 F.3d at 870 (quoting *Scherr v. Handgun Permit Review Bd.*, 163 Md. App. 417, 437 (2005)). It requires examination of such factors as "the nearness or likelihood of a threat

or presumed threat"; "whether the threat is particular to the applicant, as opposed to the average citizen"; and "the length of time since the initial threat occurred." *Id.*

In other words, the Secretary is granted "the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Heller*, 554 U.S. at 634.

B. Means-end scrutiny requires interest-balancing.

"*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." *Heller v. District of Columbia*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) ("*Heller II*") (Kavanaugh, J., dissenting).

Indeed, when declining to apply "Justice Breyer's *Turner Broadcasting* intermediate scrutiny approach," *id.* at 1278, the *Heller* majority 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. . . .
>
> 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).

Undeterred, every circuit has adopted a heightened scrutiny test[3] for Second Amendment challenges except the Eighth.[4] If the interest-balancing inherent in heightened scrutiny contradicts this Court's precedents, the precedents must be reaffirmed.

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[3] The test was established in *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010). It was adopted in *Gould*, 907 F.3d at 669; *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 254 (2d Cir. 2015) ("*NYSRPA I*"); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Ezell v. City of Chicago*, 651 F.3d 684, 701–03 (7th Cir. 2011) ("*Ezell I*"); *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) ("*GeorgiaCarry.Org I*"); *Heller II*, 670 F.3d at 1252.

[4] *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."); *United States v. Adams*, 914 F.3d 602, 607 (8th Cir. 2019) (Kelly, J., concurring in judgment) (criticizing the majority for not adopting the "sensible, two-pronged approach" that "sister circuits have used").

III. Certiorari should be granted to clarify whether the right to "bear" arms—like the right to "keep" arms—should be defined by text and history.

A. This Court defined the right to "keep" arms by analyzing the Second Amendment's text, informed by history and tradition.

"Constitutional rights are enshrined with the scope they were understood to have when the people adopted them." *Heller*, 554 U.S. at 634–35. Thus, "*Heller* examined the right to keep arms as it was understood in 1791 when the Second Amendment was ratified." *Friedman v. City of Highland Park*, 784 F.3d 406, 417 (7th Cir. 2015) (Manion, J., dissenting). And this Court concluded with "our adoption of the *original understanding* of the Second Amendment." *Heller*, 554 U.S. at 625 (emphasis added).

Determining the "original understanding" of the right required this Court to examine the text of the Second Amendment in light of the history and tradition of the founding era—which is precisely what *Heller* did:

Part I of *Heller* briefly 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 consisted of 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 "the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons,' " *id.* at 627, and other restrictions for which "there will be time enough to expound upon the historical justifications." *Id.* at 635.

Finally, 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." *Id.* at 634–35.

In *McDonald*, Justice Scalia joined the majority opinion but 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).

B. Some lower courts look to text and history, but others do not, and the outcome typically depends on which approach the reviewing court takes.

Despite this Court's heavy reliance on the Second Amendment's text, history, and tradition to define "keep," many courts have largely ignored the text, history, and tradition in defining "bear." The necessity for this Court to clarify the role of history in defining the right is illuminated by so many outcomes depending on whether the reviewing court considers history.

"Indeed, all of the circuits settling on a level of scrutiny to apply to good-reason laws explicitly declined to use *Heller I*'s historical method to determine how rigorously the Amendment applies beyond the home. . . . It excused courts from sifting through sources pointing to the equal importance of the right to bear." *Wrenn*, 864 F.3d at 663.

The Third Circuit explicitly declined to conduct a historical analysis in *Drake*: "Appellants contend also that 'text, history, tradition and precedent all confirm that individuals enjoy a right to *publicly* carry arms for their defense.' At this time, we are not inclined to address this contention by engaging in a round of full-blown historical analysis. . . ." 724 F.3d at 431 (citation and brackets omitted).

Other circuits upholding laws requiring a special need to exercise the right to bear arms have likewise

overlooked history. *See Woollard*, 712 F.3d 865; *Gould*, 907 F.3d 659; *Kachalsky*, 701 F.3d 81.[5]

> Other circuits reviewing good-reason regulations have [held] that burdens on carrying trigger only intermediate scrutiny because the right to carry merits less protection than the right to possess in *Heller I*. Each circuit court justifying this modest review of good-reason laws has relied on an inference from the tolerance in American law for certain other carrying regulations. But each of these courts has also dispensed with the historical digging that would have exposed that inference as faulty—digging that *Heller I* makes essential to locating the Amendment's edge, or at least its core.

Wrenn, 864 F.3d at 661.

The D.C. Circuit in *Wrenn* "trace[d] the boundaries laid in 1791 and flagged in *Heller I*. And the resulting decision rests on a rule so narrow that good-reason

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[5] Of these, *Kachalsky* focused most on history, but still cited only two pre-nineteenth century laws—both unrelated to bearing arms. 701 F.3d at 84. A 1784 act limiting the quantity of gun powder that could be stored within certain areas of New York City to twenty-eight pounds. 1784 N.Y. Laws 627. And a 1785 act restricting areas where people could shoot "guns, pistols, rockets, squibs, and other fireworks" in New Year celebrations. 1785 N.Y. Laws 152.

Despite this lack of founding-era authority, the Second Circuit concluded that "state regulation of the use of firearms in public was enshrined within the scope of the Second Amendment when it was adopted." *Kachalsky*, 701 F.3d at 96 (brackets and quotations omitted).

laws seem almost uniquely designed to defy it: that the law-abiding citizen's right to bear common arms must enable the typical citizen to carry a gun." *Id.* at 668.

"Indeed, that conclusion is shared by the only other circuit that *has* surveyed the relevant history through the lens of *Heller I*: the Seventh." *Id.* at 664 (citing *Moore*, 702 F.3d at 935–37) (emphasis in original).

The Seventh Circuit in *Moore*, recognizing "1791, the year the Second Amendment was ratified—[as] the critical year for determining the amendment's historical meaning," 702 F.3d at 935, "regard[ed] the historical issues as settled by *Heller*," *id.* at 941, and held that this Court's "historical analysis" sufficiently supported the conclusion that "eighteenth-century America understood the Second Amendment to include a right to bear guns outside the home." *Id.* at 942.

The Ninth Circuit provided a thorough historical analysis in *Young v. Hawaii*, concluding that for ordinary law-abiding citizens, "the Second Amendment encompasses a right to carry a firearm openly in public for self-defense." 896 F.3d 1044, 1068 (9th Cir. 2018), *reh'g en banc granted*, 915 F.3d 681 (9th Cir. 2019). Although the court has since ordered rehearing en banc, the panel decision is consistent with the pattern throughout the federal circuit courts: when a court conducts a historical analysis, the right to bear arms applies to all law-abiding citizens; when the historical analysis is replaced by means-end scrutiny interest-balancing, only those with a special need may exercise the right.

IV. Certiorari should be granted to clarify Second Amendment doctrine so lower courts stop running roughshod over it.

Lower courts have taken advantage of the lack of express guidance from this Court to treat the Second Amendment as a second-class right. Indeed, taking examples from this brief alone, lower courts have prohibited ordinary law-abiding citizens from bearing arms, limited the ages of adults that can exercise the right, allowed states to discriminate against nonresidents, banned arms on outdoor government property, allowed criminal activity to be inferred from the mere carrying of a firearm, upheld interest-balancing permitting schemes, and adopted interest-balancing tests for Second Amendment cases.

This Court declared that 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 several courts have boldly admitted doing so.

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." *Kachalsky*, 701 F.3d at 92. 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." *Id.* Put differently, if the First and Second Amendments were

treated equally, courts would undermine the First in order to avoid enforcing the Second.

The Tenth Circuit believes the Second Amendment can be treated as inferior because of its inherent dangers. In *Bonidy*, the court determined that "[t]he 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." 790 F.3d at 1126.

Similarly, the Third Circuit admitted that "[w]hile 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. This is for good reason: 'the risk inherent in firearms and other weapons distinguishes the Second Amendment right from other fundamental rights. . . .'" *Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Attorney Gen. New Jersey*, 910 F.3d 106, 124 n.28 (3d Cir. 2018) (quoting *Bonidy*, 790 F.3d at 1126) (brackets omitted). Thus, "the articulation of intermediate scrutiny for equal protection purposes is not appropriate here." *Id.* As the Third Circuit dissent noted, "the majority candidly admits that it is not applying intermediate scrutiny as we know it. It concedes that its approach does not come from the First Amendment or the Fourteenth Amendment (or any other constitutional provision, for that matter). It offers only one reason: guns are dangerous." *Id.* at 133 (Bibas, J., dissenting) (citations omitted).

This Court has denounced special treatment for the Second Amendment. "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.

As "*Heller* explained, other rights affect public safety too. The Fourth, Fifth, and Sixth Amendments often set dangerous criminals free. The First Amendment protects hate speech and advocating violence. The Supreme Court does not treat any other right differently when it creates a risk of harm. And it has repeatedly rejected treating the Second Amendment differently from other enumerated rights. The Framers made that choice for us. We must treat the Second Amendment the same as the rest of the Bill of Rights." *Ass'n of New Jersey Rifle & Pistol Clubs*, 910 F.3d at 133–34 (Bibas, J., dissenting) (citing *Heller*, 554 U.S. at 634–35; *McDonald*, 561 U.S. at 787–91).

"*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).

Justices of this Court have lamented 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."); *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").

Others have noticed the nullification problem. *See*, *e.g.*, *Ass'n of New Jersey Rifle & Pistol Clubs*, 910 F.3d at 126 (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"); David Kopel, *Data Indicate Second Amendment Underenforcement*, 68 DUKE L.J. ONLINE 79 (2018) (identifying 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 other rights); David Kopel & Joseph Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 ST. LOUIS L.J. 193, 294–95 (2017) (criticizing one-sided view of evidence in Second Amendment cases).

Until this Court reinforces its precedents, lower courts will continue to treat the right to bear arms as a second-class right.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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