No. 20-1639

In The
Supreme Court of the United States

GEORGE K. YOUNG, JR.,

Petitioner,

v.

STATE OF HAWAII, et al.,

Respondents.

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

BRIEF OF *AMICI CURIAE* FIREARMS POLICY COALITION AND FIREARMS POLICY FOUNDATION IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

Firearms Policy Coalition (FPC) is a nonprofit organization devoted to advancing individual liberty and defending constitutional rights. FPC accomplishes its mission through legislative and grassroots advocacy, legal and historical research, litigation, education, and outreach programs. FPC's legislative and grassroots advocacy programs promote constitutionally based public policy that respects individual freedom and self-government. Its historical research aims to discover the founders' intent and the Constitution's original meaning. And its legal research and advocacy aim to ensure that constitutional rights maintain their original scope. Since its founding in 2014, FPC has emerged as a leading advocate for individual liberty in state and federal courts, regularly participating as a party or *amicus curiae*.

Firearms Policy Foundation (FPF) is a nonprofit organization dedicated to preserving the rights and liberties protected by the Constitution. FPF focuses on research, education, and legal efforts to inform the public about the importance of constitutional rights—why they were enshrined in the Constitution and their continuing significance. FPF is determined to ensure

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[1] No counsel for a party authored this brief in whole or in part, or made a contribution to fund the preparation and submission of this brief. No person other than *amici* or their counsel made a contribution to fund the preparation of this brief. This brief is filed with the written consent of the parties. *Amici* complied with the conditions by providing ten days' advance notice to the parties.

that the freedoms guaranteed by the Constitution are secured for future generations.

SUMMARY OF ARGUMENT

In the thirteen years since *District of Columbia v. Heller*, 554 U.S. 570 (2008), the lower courts have been unable to determine how Second Amendment challenges should be analyzed.

Most Circuits have adopted a two-level standard of review, with a higher standard applicable to cases involving the "core right" of the Second Amendment. But these Circuits split over what the "core right" is, and in particular, whether it includes carrying defensive arms outside the home.

The two-level standard involves tiers of scrutiny, which constitute the type of interest-balancing that this Court forbids in Second Amendment challenges. Moreover, some courts, including the Second Circuit, apply rational basis review to Second Amendment challenges, which this Court also forbids.

As an increasing number of lower court judges are recognizing, the test most consistent with this Court's precedents is one that focuses on the Second Amendment's text as informed by history and tradition. But until this Court reinforces those precedents, many lower courts will continue to apply the two-level standard of review and undermine the right to keep and bear arms.

The Ninth Circuit has been especially hostile to the Second Amendment. Since *Heller*, the court has upheld every firearm restriction it has considered. In doing so, the Ninth Circuit has made clear that unless this Court reinforces its precedents, it will continue to treat the Second Amendment as a second-class right.

ARGUMENT

I. Certiorari Should Be Granted to Resolve Sharp Divisions in the Circuit Courts Over Which Test Applies to Second Amendment Cases.

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), this Court recognized that the Second Amendment guaranteed an individual right to arms, and in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), it recognized that the Fourteenth Amendment protected the right to arms against state action. The Circuits have had eleven years since the latter decision to attempt practical application of these teachings.

All Circuits to date have assessed the Second Amendment by analogizing to the treatment given certain portions of the First Amendment,[2] and so begin

[2] One awkwardness to the First Amendment analogy is that courts end up sustaining firearms legislation which would never be allowed in the First Amendment arena. It is hard to imagine a court, for instance, sustaining a parade permit system with vague and narrow requirements that applicants be "of good moral character" and show they have an "exceptional case," are "qualified," and are a "suitable person" to exercise such a right.

with the threshold determination of the applicable standard of review. On that question, the Circuits have split sharply, and in multiple ways.

A. The Circuits Have Split on Whether to Apply One Standard of Review or Two.

Most Circuits have applied a two-level standard of review to Second Amendment cases, with a higher standard applicable to cases involving the "core right" of *Heller*. *But see Rogers v. Grewal*, 140 S. Ct. 1865, 1866–67 (2020) (Thomas, J., joined by Kavanaugh, J., dissenting from the denial of certiorari) (criticizing lower courts for "resist[ing] [the] decisions in *Heller* and *McDonald*," noting that "[t]he Second Amendment provides no hierarchy of 'core' and peripheral rights," and that "[t]he Constitution does not prescribe tiers of scrutiny.") (internal citations omitted). This, and the divisions within this approach, will be discussed below.

The Seventh Circuit has applied intermediate scrutiny to all such cases, on a sliding scale proportionate to the degree of restriction imposed. Severe burdens on the "core right" require an "extremely strong public-interest justification and a close fit," while restrictions "lying closer to the margins of the Second Amendment" are more easily justified. "How much more easily depends on the relative severity of the burden and its proximity to the core of the right." *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011). At its high end, this intermediate scrutiny can be seen as "not quite strict scrutiny." *Id.* at 708. The Supreme

Court of Illinois likewise employs sliding scale intermediate review. *People v. Chairez*, 104 N.E.3d 1158, 1170–71 (2018).

The Seventh Circuit approach thus involves a sliding scale based upon two factors, the approach to the "core right" and the severity of the restriction under review. The approach incorporates so much subjectivity that it hardly qualifies as a standard of review at all.

B. The Circuits Applying a Two-Level Standard of Review Have Split Upon the Dividing Line Between the Two Standards.

Circuits adopting a dual standard of review key the distinction to whether the restriction under review affects what they consider *Heller's* "core right." These Circuits split, however, on the dimensions of that "core right," and in particular whether it includes carrying defensive arms outside the home.

The Seventh Circuit held, in *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), that a restriction on carrying outside the home failed its sliding-scale intermediate review:

> In [*United States v.*] *Skoien* we said that the government had to make a "strong showing" that a gun ban was vital to public safety—it was not enough that the ban was "rational." 614 F.3d [638, 641 (2010)]. Illinois has not made that strong showing—and it would have

> to make a stronger showing in this case than the government did in *Skoien*, because the curtailment of gun rights was much narrower: there the gun rights of persons convicted of domestic violence, here the gun rights of the entire law-abiding adult population of Illinois.

702 F.3d at 940. In *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017), the District of Columbia Circuit held that the challenged restrictions on carrying would (like the possession ban struck in *Heller*) fail any form of heightened review.

In the Third Circuit, though, the core right is "the protection of hearth and home." *United States v. Marzzarella*, 614 F.3d 85, 94 (3d Cir. 2010). The Fifth Circuit definition of "core right" is similar: "for example, the right of a law-abiding, responsible adult to . . . use a handgun to defend his or her home and family. . . ." *NRA v. BATFE*, 700 F.3d 185, 195 (5th Cir. 2012).

The Fourth Circuit started out with a broad approach that included carrying, treating the core *Heller* right as "the right of a law-abiding, responsible citizen to possess and carry a weapon for self-defense." *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010) (emphasis removed). But a year later the Fourth Circuit narrowed its view to exclude carry, describing the core as the "core right of self-defense in the home by a law-abiding citizen. . . ." *United States v. Masciandro*, 638 F.3d 458, 470 (4th Cir. 2011). The First Circuit is in accord, "the core Second Amendment right is limited to self-defense in the home." *Gould v. Morgan*, 907 F.3d 659, 670, 671 (1st Cir. 2018).

C. The First, Second, and Ninth Circuits Have Split from the Other Circuits Employing Two-Level Review, by Applying the Higher Level of Scrutiny Only to "Severe" or "Substantial" Restrictions of the "Core Right."

Some circuits have added another barrier to qualifying for the higher standard of review, requiring that the challenged law not only infringe the "core right," but also that it do so in a severe or substantial way, sometimes equated to requiring a complete prohibition. In the First Circuit, "the appropriate level of scrutiny must turn on how closely a particular law or policy approaches the core of the Second Amendment right and how heavily it burdens that right." *Gould*, 907 F.3d at 670–71. In the Second Circuit, only laws that "substantially" burden arms rights, "like the complete prohibition on handguns struck down in *Heller*," *New York State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 259 (2d Cir. 2015) ("*NYSRPA I*"), receive heightened scrutiny.

The Ninth Circuit uses the term "severe burden" to describe what receives the higher standard of review, and it cites as examples of severe burdens complete prohibitions on firearm possession and carrying. *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 964 (9th Cir. 2014). *See also Tyler v. Hillsdale County Sheriff's Office*, 837 F.3d 678, 690 (6th Cir. 2016) (en banc) (choice of standard of review informed by "severity of the law's burden" on "core right").

D. Circuits Applying Two-Level Review Have Split on Whether the Two Levels Employed Are Strict Scrutiny and Intermediate Review, or Intermediate Review and Rational Basis.

To further complicate the two-level approach, the Circuits taking it have split on just what two standards apply. Most have held that the higher standard is strict scrutiny and the lesser one intermediate review. The Fifth Circuit has held that "[a] law that burdens the core of the Second Amendment guarantee—for example, 'the right of law-abiding, responsible citizens to use arms in defense of hearth and home,'—would trigger strict scrutiny," while a lesser infringement would receive intermediate review. *NRA v. McCraw*, 719 F.3d 338, 347 (5th Cir. 2013). The Fourth Circuit is in accord. *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011).

In contrast, the Second Circuit maintains that serious infringements are subject to a manner of intermediate review, and non-serious ones are subject to rational basis. "Laws that neither implicate the core protections of the Second Amendment nor substantially burden their exercise do not receive heightened scrutiny." *NYSRPA I*, 804 F.3d at 258, *accord New York State Rifle & Pistol Ass'n v. City of New York*, 883 F.3d 45, 56 (2d Cir. 2018) ("*NYSRPA II*").

The Second Circuit so holds, despite *Heller*'s admonition that "[i]f 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 628 n.27.

The practical result of the Second Circuit standard is that, unless a jurisdiction is so unwise as to re-enact the statute challenged in Heller*, completely forbidding possession in the home, all Second Amendment challenges are governed by rational basis.*

In contrast, the Sixth Circuit has cited the *Heller* language and concluded that "Because *Heller* rules out rational basis, the choice is between intermediate and strict scrutiny." *Tyler*, 837 F.3d at 678, 690.

The Seventh Circuit likewise rejected a claim that "only laws that substantially or 'unduly' burden Second Amendment rights should get any form of heightened judicial scrutiny," calling it an "odd argument" in conflict both with *Heller*'s language and with *McDonald*'s admonition that the Second Amendment is not a "second class right" subject to different rules. "The City's proposed 'substantial burden' test as a gateway to heightened scrutiny does exactly that." *Ezell*, 846 F.3d at 893.

II. The Use of Dual Standards of Review Involves Interest-Balancing and Enables Courts to Evade the Commands of *Heller* and *McDonald*.

"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). *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).

But interest-balancing is inherent to heightened scrutiny. As Judge Collins of the Ninth Circuit explained, "[i]t is difficult to square the type of means-ends weighing of a government regulation inherent in the tiers-of-scrutiny analysis with *Heller*'s directive that a core constitutional protection should not be subjected to a 'freestanding "interest-balancing"

approach.'" *Mai v. United States*, 974 F.3d 1082, 1087 (9th Cir. 2020) (quoting *Heller*, 554 U.S. at 634); *accord Jackson v. City & Cty. of San Francisco*, 576 U.S. 1013, 1017 (2015) (Thomas, J., dissenting from denial of certiorari) ("The Court should have granted a writ of certiorari . . . to reiterate that courts may not engage in this sort of judicial assessment as to the severity of a burden imposed on core Second Amendment rights.").

In the Second Circuit, where the "default" standard of review is rational basis, it is predictable that almost any infringement of the American right to arms will be sustained. *See Kwang v. Bloomberg*, 723 F.3d 160 (2d Cir. 2013) (upholding a $340 application fee for a permit to possess a handgun in the home); *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012) (upholding an undefined "good cause" requirement as standard for carry permit issuance); *NYSRPA II*, 883 F.3d 45 *cert. granted, dismissed as moot*, 140 S. Ct. 1525 (2020) (upholding ordinance forbidding transport of licensed handgun between owner's houses and to shooting ranges outside the city).

The Ninth Circuit achieves the same end by employing a watered-down, toothless version of intermediate scrutiny. *See Jackson*, 746 F.3d at 965 ("all forms of the standard require (1) the government's stated objective to be significant, substantial, or important; and (2) a reasonable fit between the challenged regulation and the asserted objective.") (internal citations omitted). *Cf. Edenfield v. Fane*, 507 U.S. 761, 767 (1993) (The test under intermediate scrutiny is "whether the

challenged regulation advances these interests in a direct and material way, and whether the extent of the restriction on protected speech is in reasonable proportion to the interests served," and " 'the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose.' " *Id.* at 770 (quoting *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980)).

Despite this Court having addressed ordinances which required that handguns kept in the home be kept in a locked container or with a trigger lock in *Heller*, the Ninth Circuit plainly ignores this Court's directive in *Jackson*. In *Jackson*, the Ninth Circuit faced an almost identical ordinance, which required firearms in the home be carried on the person, locked in a container, or fitted with a trigger lock. This Court already determined that the right to arms requires that firearms in the home be "operable for the purpose of immediate self-defense." *Heller*, 554 U.S. at 635.

Yet, the Ninth Circuit held that the San Francisco ordinance did not even come within its view of the *Heller* "core" right. It saw that core as limited to "severe restrictions" on self-defense in the home, and treated the ordinance as merely regulating the manner in which armed self-defense might be undertaken.

The Ninth Circuit conceded that carrying on the person might be difficult at certain times, including when sleeping, the time of day when the need for defense of hearth and home may be most acute. But it accepted the County's justifications—reducing theft,

suicide, and impulsive killings—even though the last two could only accrue to the extent that county residents complied by making their home defense tools "[in]operable for the purpose of immediate self-defense," as *Heller* forbids. *Heller*, 554 U.S. at 635.

III. This Court Should Reiterate that *Heller* and *McDonald* Compel a Test Based on the Second Amendment's Text, Informed by History and Tradition.

Certiorari should be granted to reaffirm the test elucidated in *Heller* and *McDonald*: one that assesses challenged laws on the basis of the Second Amendment's text, informed by history and tradition.

Because "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them," and "its words and phrases were used in their normal and ordinary . . . meaning," *Heller*, 554 U.S. at 576, 634–35 (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)), *Heller* spent roughly 50 pages analyzing the Second Amendment's text and using history and tradition to inform the original understanding of it.

In *McDonald*, Justice Scalia joined the plurality opinion but also wrote separately to defend this Court's "history focused method" to Second Amendment cases. 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).

Federal circuit court judges are increasingly recognizing that this test is required by *Heller* and *McDonald*. *See Heller v. District of Columbia*, 670 F.3d 1244, 1280–81 (D.C. Cir. 2011) (Kavanaugh, J., dissenting); *Mance v. Sessions*, 896 F.3d 390, 394 (5th Cir. 2018) (Elrod, J., joined by six other judges, dissenting from denial of rehearing en banc) ("we should apply a test rooted in the Second Amendment's text and history—as required under *Heller* and *McDonald*—rather than a balancing test like strict or intermediate scrutiny."); *Tyler*, 837 F.3d at 702 (Batchelder, J., joined by Boggs, J., concurring) ("[I]t is *that* meaning [the Second Amendment's original public meaning]—as *Heller* and *McDonald* make unmistakably clear—informed as it is by the history and tradition surrounding the right, that counts."); *Ass'n of New Jersey Rifle & Pistol Clubs Inc. v. Attorney Gen. New Jersey*, 974 F.3d 237, 252 (3d Cir. 2020) (Matey, J., dissenting) ("*Heller* makes clear that judicial review of Second Amendment challenges proceeds from text, history, and tradition."); *Mai*, 974 F.3d at 1086 (Bumatay, J., joined by VanDyke, J., dissenting from denial of rehearing en banc) ("*Heller*, thus, showed us exactly what to look at: the text, history, and tradition"); *see also Duncan v. Becerra*, 366 F. Supp. 3d 1131, 1154–55 (S.D. Cal. 2019), *aff'd*, 970 F.3d 1133 (9th Cir. 2020) (the test based on historical understanding—the "simple *Heller* test"—was more appropriate than the "overly complex analysis" developed by circuit courts).

Many state court judges similarly prefer a test based on the Amendment's text informed by history

and tradition. *See*, *e.g.*, *State v. Weber*, 2020-Ohio-6832, ¶71, 163 Ohio St. 3d 125, 146 (DeWine, J., concurring) ("Because a majority of the court today adopts this approach, going forward, lower courts in Ohio should follow the analytical framework used by the Supreme Court in *Heller* and assess Second Amendment claims based upon text, history, and tradition."); *Gowder v. City of Chicago*, 923 F. Supp. 2d 1110, 1123 (N.D. Ill. 2012) ("the text, history, and tradition approach is the proper approach"); *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); *State v. Roundtree*, 2021 WI 1, ¶¶116–17, 395 Wis. 2d 94, 152–53, 952 N.W.2d 765, 793 (Hagedorn, J., dissenting) ("A proper legal test must implement and effectuate the original public meaning of the law. . . . With these principles in mind, we turn to the text and history of the Second Amendment.").

A test based on the Amendment's text informed by history and tradition is true to the teachings of *Heller* and *McDonald*.

> 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.

Heller, 554 U.S. at 634–35; *accord, McDonald*, 561 U.S. at 790–91.

IV. The Ninth Circuit has been especially hostile to the Second Amendment.

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. But since *Heller*, the Ninth Circuit has upheld every firearm restriction it has considered.

On the few occasions that a three-judge panel holds a firearm restriction unconstitutional, the court inevitably rehears the case en banc to uphold the law. *See*, *e.g.*, *Teixeira v. County of Alameda*, 873 F.3d 670, 690 (9th Cir. 2017) (en banc) (reversing panel's decision holding unconstitutional a regulation prohibiting the right to purchase and sell firearms); *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc) (reversing panel's decision holding unconstitutional a law requiring a special need to obtain conceal carry permit when open carry was prohibited); *Young v. Hawaii*, 992 F.3d 765 (9th Cir. 2021) (en banc) (reversing panel's decision holding unconstitutional Hawaii's ban on open carry when concealed carry was prohibited). Most recently, after a panel struck down California's ban on

magazines capable of holding more than 10 rounds, the court agreed to rehear the case en banc. *Duncan v. Becerra*, 988 F.3d 1209, 1210 (9th Cir. 2021).

As Judge VanDyke explained:

> [O]ur court just doesn't like the Second Amendment very much. We always uphold restrictions on the Second Amendment right to keep and bear arms. Show me a burden—any burden—on Second Amendment rights, and this court will find a way to uphold it. Even when our panels have struck down laws that violate the Second Amendment, our court rushes in en banc to reverse course. . . . Other rights don't receive such harsh treatment. There exists on our court a clear bias—a real prejudice—against the Second Amendment and those appealing to it. That's wrong. Equal justice should mean *equal* justice.

Mai, 974 F.3d at 1104–05 (VanDyke, J., dissenting from denial of rehearing en banc).

Indeed, several Justices of this Court have noted the Ninth Circuit's disdain for Second Amendment rights as well. *Silvester v. Becerra*, 138 S. Ct. 945, 950 (2018) (Thomas, J., dissenting from denial of certiorari) ("The Ninth Circuit's deviation from ordinary principles of law is unfortunate, though not surprising. Its dismissive treatment of petitioners' [Second Amendment] challenge is emblematic of a larger trend."); *Peruta v. California*, 137 S. Ct. 1995, 1997, 1999 (2017) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari) ("The approach taken by the en banc

court is indefensible, and the petition raises important questions that this Court should address."); *Jackson*, 576 U.S. at 1016 (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari) ("[S]omething was seriously amiss in the decision below.").

The Ninth Circuit has made emphatically clear that unless this Court reinforces its precedents, it will continue to treat the Second Amendment as a second-class right.

CONCLUSION

The Circuits interpreting the Second and Fourteenth Amendment right to arms have divided in at least four different and significant ways. But only a test based on the Second Amendment's text, informed by history and tradition, is consistent with *Heller* and *McDonald*. This Court should resolve these differences.

Respectfully submitted,

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