No. 20-843

In the Supreme Court of the United States

NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC., *et al.*,

Petitioners,

v.

KEVIN P. BRUEN, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF NEW YORK STATE POLICE, *et al.*,

Respondents.

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

BRIEF OF AMICUS CURIAE J. JOEL ALICEA IN SUPPORT OF PETITIONERS AND REVERSAL

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J. Joel Alicea is an assistant professor of law at Catholic University of America's Columbus School of Law.[2] Professor Alicea's scholarship focuses on constitutional theory, and his articles have appeared, or are forthcoming, in the *Virginia Law Review*, *University of Pennsylvania Journal of Constitutional Law*, and the *Harvard Journal of Law & Public Policy*. In 2019, Professor Alicea published an essay about the history and validity of the tiers of constitutional scrutiny, *Against the Tiers of Constitutional Scrutiny*, NATIONAL AFFAIRS (Fall 2019) (with John D. Ohlendorf), upon which this brief is largely based, and he has spoken in multiple public fora on the subject. Professor Alicea has a strong interest in this case because the Second Circuit precedent that dictated the decision below, *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cr. 2012), was fundamentally premised upon the application of the tiers of scrutiny to Second Amendment challenges.

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[1] Pursuant to SUP. CT. R. 37.3(a), amicus certifies that all parties have consented to the filing of this brief. Pursuant to SUP. CT. R. 37.6, amicus certifies that no counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution to fund its preparation or submission, and no person other than amicus or his counsel made such a monetary contribution.

[2] Professor Alicea appears in his personal capacity. His institutional affiliation is provided for identification purposes only.

INTRODUCTION

In *District of Columbia v. Heller*, this Court held that the Second Amendment protects "the individual right to possess and carry weapons in case of confrontation," and that government restrictions of that right should be analyzed by measuring them against the Amendment's text, as understood by "ordinary citizens in the founding generation," as well as "the historical understanding of the scope of the right." 554 U.S. 570, 577, 592, 625 (2008). In adopting this framework, the Court *affirmatively rejected* the use of "a judge-empowering 'interest-balancing inquiry,' " reasoning that "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." *Id.* at 634–35. The controlling plurality opinion of the Court in *McDonald v. City of Chicago* reaffirmed the point. 561 U.S. 742, 790–91 (2010). *Heller* and *McDonald* thus instruct 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 ("Heller II")*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

The decision below upheld New York's "proper cause" licensing scheme for carrying concealed firearms based on a scrutiny analysis that cannot be squared with this Court's clear directions in *Heller*. The Second Circuit's decision in *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012)—which

dictated the panel's decision in this case, Pet. App. 2—held that "some form of heightened scrutiny" applied in Second Amendment cases, concluded that "intermediate scrutiny is appropriate" for regulations on the carrying of firearms outside the home, and determined that New York's "proper cause" restriction passes muster under that test because it is "substantially related" to the "substantial, indeed compelling, governmental interests in public safety and crime prevention." *Kachalsky*, 701 F.3d at 93, 96–97. And the Second Circuit is not alone in ignoring *Heller*'s text, history, and tradition standard in favor of the very "judge-empowering 'interest-balancing inquiry' " that this Court deliberately rejected. *Heller*, 554 U.S. at 634. Every other regional Court of Appeals except the Eighth Circuit has also explicitly adopted some form of scrutiny analysis for Second Amendment claims—with most cases settling on a watered-down version of the "intermediate scrutiny" test that resembles nothing so much as the interest-balancing inquiry advocated by *the dissent* in *Heller*. 554 U.S. 689–90 (Breyer, J., dissenting).[3]

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[3] *See, e.g.*, *Gould v. Morgan*, 907 F.3d 659, 670–71 (1st Cir. 2018); *United States v. Marzzarella*, 614 F.3d 85, 95–98 (3d Cir. 2010); *United States v. Chester*, 628 F.3d 673, 682–83 (4th Cir. 2010); *National Rifle Ass'n of Am., Inc. v. BATFE*, 700 F.3d 185, 195–96 (5th Cir. 2012); *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 837 F.3d 678, 690–93 (6th Cir. 2016) (en banc) (plurality); *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011); *United States v. Chovan*, 735 F.3d 1127, 1137–38 (9th Cir. 2013); *United States v. Reese*, 627 F.3d 792, 801–02 (10th Cir. 2010); *GeorgiaCarry.Org, Inc. v. United States Army Corps of Eng'rs*, 788

In addition to flouting *Heller*'s directions, the application of intermediate scrutiny in these cases extends into the Second Amendment context a doctrinal framework that is both contrary to the Constitution's original meaning and analytically dubious even on its own terms. The familiar "tiers of scrutiny" framework—a trio of doctrinal tests ranging from "strict scrutiny" through "intermediate scrutiny" and down to "rational-basis review"—looms large in modern discussions of constitutional law. This three-tiered method of analysis has come to dominate the jurisprudence of the First Amendment's Free Speech Clause and the 14th Amendment's Equal Protection Clause. But the tiers of scrutiny have no basis in the text or original meaning of the Constitution. They emerged as a political solution put forward by the Justices on the Court in the middle of the twentieth century to navigate internal factions at the Court. The Court should take this opportunity to reaffirm *Heller*'s rejection of balancing tests like the tiers of scrutiny and reassert a method of constitutional analysis based on the text and history of the Constitution.

SUMMARY OF ARGUMENT

I. The history of the tiers of scrutiny reveals that they do not have a strong claim to legitimacy. While the scrutiny framework appears to be the normal method of constitutional analysis today, it was not always so. For much of American history, beginning

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F.3d 1318, 1325–28 (11th Cir. 2015); *Heller II*, 670 F.3d at 1252–53.

with the Founding, courts analyzed the constitutionality of government actions not by weighing governmental interests but by determining *the scope* of constitutional rights and powers through textual and historical analysis. The tiers-of-scrutiny framework emerged only in the mid-twentieth century—and even then, it was devised not as a faithful implementation of the Constitution's meaning but as a politically-expedient compromise that united the various factions on the Supreme Court at that time to *evade* the categorical language of the Free Speech Clause.

II. As their questionable history suggests, the tiers of scrutiny are not consistent with the Constitution's original meaning and were never meant to be. For the design and function of the scrutiny tests—which generally kick in only *after* a judicial determination that the challenged government action impinges upon the scope of the constitutional right in question—is to find reasons to *uphold the government infringement anyway*, on the implicit notion that the government's interest in acting unconstitutionally outweighs the value of the constitutional right it has infringed. This balancing of government power against constitutional rights may be suitably designed to empower courts to reach the normatively best outcome—that is, the normatively best outcome in the eyes of *the judges*. What it does not do, by its very nature, is faithfully implement the value choices that *the People* enshrined in the Constitution, as originally understood.

III. The tiers of scrutiny ought to be rejected even by those who adhere to a method of constitutional interpretation that sanctions departure, in some cases, from the document's text and original meaning. The scrutiny framework lacks the most important feature of any doctrinal tool consistent with bedrock rule-of-law principles: it does not meaningfully guide legal analysis. At every turn, the tiers of scrutiny fail basic standards of analytical rigor. Their application fundamentally depends on the question of what level of generality to use when describing the government's interest—a question that will generally have no right answer. Even once a particular level of generality is selected, the inquiry into whether the government's interest is sufficiently important or compelling is simply a policy judgment, unconstrained by any objective or determinate principles. And the determination whether the challenged restriction is sufficiently tailored to the government's proffered interest is equally unmoored—turning on contested and complex empirical judgments that are far beyond the judge's ken.

IV. Whatever support the doctrine of *stare decisis* might lend to the tiers of scrutiny in those constitutional contexts where they have already been adopted—and there is good reason to think that this support is weak and insufficient to justify their continued use—precedent provides no basis to *extend* the dominion of the tiers of scrutiny to the Second Amendment. This Court's decisions in *Heller* and *McDonald* already made it clear enough that Second Amendment

cases are to be decided based on text and history—not interest-balancing inquiries. Indeed, even outside the context of the right to keep and bear arms, the domain of the tiers-of-scrutiny framework is much smaller than is often acknowledged. From the Confrontation Clause and other constitutional criminal-procedure rights to the Establishment Clause and the Fourth Amendment, this Court routinely decides constitutional cases without resort to any of the tiers of scrutiny. Given the analytical deficiencies of the scrutiny framework and their incompatibility with the Constitution's original meaning, this Court should be looking for opportunities to *reduce* the constitutional terrain they have colonized over the last six decades. It certainly should not import the critically flawed scrutiny tests into the Second Amendment context.

ARGUMENT

The decision below summarily upheld New York's "proper cause" licensing requirement for carrying a firearm outside the home on the authority of the Second Circuit's earlier decision in *Kachalsky v. County of Westchester*, which concluded that New York's licensing scheme is subject to "intermediate scrutiny," and that it survives that mode of analysis because it "is substantially related to the achievement of an important governmental interest." 701 F.3d at 96; *see* Pet. App. 2. The Second Circuit erred from the start, because neither intermediate scrutiny nor any of the other so-called "tiers of scrutiny" do, or should, apply to Second Amendment challenges. Indeed, the tiers-of-scrutiny framework is contrary to the

Constitution's original meaning *even outside* the context of the Second Amendment. And the continued application of this twentieth-century doctrinal invention creates real problems throughout the full panoply of constitutional litigation, by muddying judicial analysis and inviting manipulation. This Court should rethink the role of the tiers of scrutiny in constitutional adjudication writ large—and it certainly should not extend this doctrinal frame to the Second Amendment, where the constitution's text and history provide a ready means for analyzing laws that impinge upon the right to keep and bear arms.

I. The tiers of scrutiny were created in the mid-twentieth century as an expedient way of balancing away First Amendment rights.

Today, analysis of certain constitutional questions through the lens of the tiers of scrutiny is commonplace, part of the unquestioned backdrop of constitutional law. G. Edward White, *Historicizing Judicial Scrutiny*, 57 S.C. L. REV. 1, 2 (2005) ("It seems not much of an overstatement to say that the Supreme Court's constitutional jurisprudence for the last sixty-odd years has been consistently preoccupied with what level of judicial scrutiny to afford constitutionally challenged actions by other branches of government."). Yet, despite its familiarity, tiers-of-scrutiny analysis is "of recent vintage," dating back no earlier than the mid-twentieth century. *Whole Woman's Health v. Hellerstedt*, 579 U.S. ___, 136 S. Ct. 2292, 2327 (2016) (Thomas, J., dissenting). Understanding the origins of the tiers of scrutiny is essential to

understanding the hollowness of their claim to constitutional dominance.

At the time of the Founding, American courts did not use "strict scrutiny" or "rational-basis review" to sift the constitutionality of federal or state laws; instead, they engaged in the more lawyerly task of attempting to determine the *scope* of constitutional rights and legitimate governmental powers. As Professor Richard Fallon has put the point, "[t]hrough most of constitutional history, the Court conceived its task as marking the conceptual boundaries that defined spheres of state and congressional power on the one hand and of private rights on the other." Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1285 (2007).

This method is well-illustrated by Chief Justice Marshall's landmark opinion upholding the first Bank of the United States in *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316 (1819). As Chief Justice Marshall saw the case, the constitutionality of the bank, and of Maryland's attempt to tax it, was to be determined by demarcating "the conflicting powers of the government of the Union and of its members, as marked in th[e] constitution." *Id.* at 400. And the Chief Justice sought to limn these boundaries through textual and conceptual analysis: inquiry into the words of the constitutional text, as understood in "common usage," and explication of the nature of sovereignty, taxation, and the federal union itself. *Id.* at 410–13, 414, 428–31. Chief Justice Marshall explicitly prescinded from the type of policy analysis

emblematic of the tiers of scrutiny—the weighing of the importance of legislative ends and the sufficiency of legislative means. "[W]here [a challenged] law is not prohibited, and is really calculated to effect any of the objects intrusted to the government," the Court insisted, "to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power." *Id.* at 423.

Such judicial modesty was not to last. For complex reasons having to do in part with the rise of progressivism at the beginning of the twentieth century, the vision of the judicial role reflected in *McCulloch* came under assault, creating a legal environment that eventually led to the development of the tiers of scrutiny. *See White*, *supra*, at 53–57, 63–65. A deferential test resembling what we now call "rational-basis review" was the first to emerge, establishing itself in the aftermath of the New Deal (though rationality review has its origins in the late 19th century). *Id.* at 68–69; *see also* Thomas B. Nachbar, *The Rationality of Rational Basis Review*, 102 VA. L. REV. 1627, 1637 (2016). But it was not until mid-century, when the Court began to apply a form of heightened scrutiny, that an analysis recognizable as a tiers-of-scrutiny approach took shape. As Professor Stephen Siegel's leading historical account has explained, the interest-balancing approach that ultimately developed into the strict-scrutiny test "was established in First Amendment litigation in the late 1950s and early 1960s."

Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 361 (2006).

At that time, this Court was divided on free-speech issues between the First Amendment minimalists (Justices Frankfurter, Harlan, and Clark) who were inclined to "balance" the interest in free expression against the government's countervailing interests in suppressing it, and the First Amendment absolutists (Justices Black and Douglas) who sought to enforce the Free Speech Clause's protections categorically. *Id.* at 361–62. Significantly, the "compelling-interest" standard was pioneered by the minimalists, who saw it as a means of balancing away the Free Speech Clause's command that "Congress shall make *no law* . . . abridging the freedom of speech." U.S. CONST. amend. I (emphasis added). The tiers of scrutiny were thus born as a means to *evade* the categorical language of the Free Speech Clause, not to faithfully implement it.

The notion that the government may justify infringing a constitutional right if it has a "compelling" interest first appeared in Justice Frankfurter's concurrence in *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), a case overturning the conviction of a New Hampshire college professor for refusing to answer questions during a state investigation of subversive activities. In cases involving academic freedom, Justice Frankfurter wrote, the government may act only "for reasons that are exigent and obviously compelling." *Id.* at 262 (Frankfurter, J., concurring). And

while the 1957 decision in *Sweezy* was a victory for First Amendment rights during the Red Scare, Justice Frankfurter's formulation was swiftly embraced by his fellow minimalists on the Court as a means of *upholding* restrictions on free expression. Justice Clark's 1959 opinion for the Court in *Uphaus v. Wyman*, for example, upheld the contempt conviction of the director of a leftist summer camp for refusing to cooperate in a similar state legislative investigation, reasoning that "the governmental interest in self-preservation is sufficiently compelling to subordinate the interest in associational privacy" of suspected subversives. 360 U.S. 72, 81 (1959).

In 1962, however, the First Amendment tide turned, due to a series of membership changes on the Court that gave the pro-speech block a working majority. Siegel, *supra*, at 375. For contingent and largely political reasons, the task of reorienting the Court's First Amendment doctrine fell to Justice Brennan. *Id.* Justice Brennan spurned the categorical approach advocated by Justice Black, instead latching on to Justice Frankfurter's "compelling-interest" formulation as a way of bridging the gap between the Court's various factions. *Id.*

The key move came in *NAACP v. Button*, 371 U.S. 415 (1963), a case involving an attempt by Virginia officials to use state legal-ethics laws to prevent the NAACP's lawyers from engaging in school-desegregation litigation in the commonwealth. While conceding that Virginia had a "valid . . . interest" in regulating the practice of law within its borders, Justice

Brennan wrote for the Court's new pro-speech majority that the "decisions of this Court, have consistently held that only a compelling state interest . . . can justify limiting First Amendment freedoms." *Id.* at 438, 439. And while this compelling-interest formulation was the same one used by Justices Frankfurter, Harlan, and Clark to *allow* speech regulations only a few years earlier, Justice Brennan had poured new wine into the old wineskin: henceforth, the compelling-interest test would become known as one of the most exacting tests in constitutional law.

Justice Brennan's 1963 opinion in *Sherbert v. Verner*, 374 U.S. 398 (1963), adopted the same analysis under the Free Exercise Clause. His decision in *Shapiro v. Thompson*, 394 U.S. 618 (1969), employed the test to invalidate welfare statutes in Connecticut and the District of Columbia on equal-protection grounds. And, as Professor Siegel recounts, "[f]rom there its spread within equal protection analysis, and throughout general legal consciousness, was rapid." Siegel, *supra*, at 391. The tiers-of-scrutiny approach had gone from a formulation designed by judicial minimalists to uphold restrictions on free expression to the Warren Court's dominant method of protecting certain constitutional rights. Yet, this revolution in constitutional law happened not for reasons of principle and fidelity to the original meaning of the Constitution; it happened for reasons of contingency and political expediency.

II. The tiers of scrutiny are inconsistent with the Constitution's original meaning.

For those who believe that the Constitution should be interpreted according to the meaning it had when it was enacted, this history of the tiers of scrutiny provides a good and sufficient reason for rejecting them (leaving aside considerations of *stare decisis*, *see infra*, Part IV); *see also Whole Woman's Health*, 136 S. Ct. at 2327 (Thomas, J., dissenting) (arguing that "using made-up tests to displace longstanding national traditions as the primary determinant of what the Constitution means" is "illegitimate[e]" (quotation marks omitted)). While it is logically conceivable that the original meaning of one or more constitutional provisions could itself require a balancing approach akin to the tiers of scrutiny—and some scholars have made arguments along these lines in the Free Exercise Clause context, *see, e.g.*, Stephanie H. Barclay, *The Historical Origins of Judicial Religious Exemptions*, 96 NOTRE DAME L. REV. 55, 113–17 (2020)—two features of the historical account just described make it unlikely that the tiers-of-scrutiny analysis is part of the original meaning of the Constitution.

First, this mode of judicial analysis was generally not applied at the Founding. Indeed, strict scrutiny did not come into being until 1957. Rational-basis review can be traced back earlier, but no one seriously contends that rationality review would constitute a viable framework for constitutional analysis on its own, without strict or intermediate scrutiny available to provide more meaningful review in at least some

cases. And while a full discussion of the scholarly debate about the role of judicial balancing under the original meaning of the Free Exercise Clause is beyond the scope of this brief, suffice it to say that those scholars who believe that the Clause sometimes requires judicially enforced exemptions from generally applicable laws do not appear to have uncovered any Founding-Era judicial decisions applying anything recognizable as the modern tiers of scrutiny.[4] Second, the tiers of scrutiny developed as a political expedient, not as a good-faith effort to recover the original

[4] The bulk of the evidence cited by Professor Barclay consists of cases engaged in statutory interpretation, not judicial review under the Free Exercise Clause (or State analogues). Barclay, *supra*, at 73–90. That is not surprising. As a majority of this Court has recognized, there are very few Founding-Era cases that could potentially shed light on the original meaning of the Free Exercise Clause, let alone what test is appropriate under that Clause. *See Fulton v. City of Philadelphia*, 593 U.S. ___, 141 S. Ct. 1868, 1882–83 (2021) (Barrett, J., joined by Kavanaugh, J., concurring); *id.* at 1907–11 (Alito, J., joined by Thomas and Gorsuch, J.J., concurring in the judgment). That being said, it is important to note that the question of whether the Free Exercise Clause sometimes requires exemptions from generally applicable laws is distinct from the question of whether the tiers of scrutiny—or some other legal test—is the appropriate way to determine *when* such exemptions are required. *Compare id.* at 1894–1912, *with id.* at 1924–25. The analysis here is concerned only with the latter question, and this Court could readily conclude that *Employment Division v. Smith*, 494 U.S. 872 (1990), should be overruled *without* adopting the tiers of scrutiny as the replacement test. *See Fulton*, 141 S. Ct. at 1882–83 (Barrett, J., concurring) (suggesting dissatisfaction with replacing *Smith* with a strict-scrutiny test).

understanding of the constitutional text. As Professor Fallon has said, strict-scrutiny analysis—and therefore tiers-of-scrutiny analysis—lacks "any foundation in the Constitution's original understanding." Fallon, *supra*, at 1268.

To be sure, sometimes courts develop jurisprudential tests that, while not *required* by the original meaning of the Constitution, are nonetheless *consistent* with it and help courts apply the Constitution to specific fact patterns. Some originalist scholars–such as Keith Whittington, Randy Barnett, and Lawrence Solum—call this form of constitutional analysis "constitutional construction" and distinguish it from the process of uncovering the original meaning of the text, which they call "constitutional interpretation." *See, e.g.*, Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. PUB. POL'Y 65, 65–70 (2011); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 95–96 (2010); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION 5–14 (2001). It is theoretically possible that the tiers of scrutiny might thus potentially be justified as a permissible "construction" of the constitutional rights they are used to enforce. One scholar has made something akin to this type of argument in the Free Speech context, while acknowledging that the tiers of scrutiny are inconsistent with the conception of the judicial role at the Founding. *See, e.g.*, Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 314–17 (2017).

The problem with this attempted justification of the tiers-of-scrutiny framework, however, is that this framework *cannot* be a permissible construction of the Constitution because it is inconsistent with the original meaning of the text. It is in the very nature of the tiers of scrutiny that they contradict the constitutional provisions in question, by purporting to find those rights "outweighed" by the government's interest in violating them. *See* Philip Hamburger, *The Inversion of Rights and Power*, 63 BUFF. L. REV. 731, 753 (2015) ("[W]hen a judge evaluates a government interest, he is deciding whether the interest of the government in its power trumps the interest of individuals in their rights.").

While tiers-of-scrutiny analysis is not a naked "cost-benefit" test, it *is* a *balancing* inquiry, even if the balancing is structured into distinct stages. *See Heller II*, 670 F.3d at 1281 (Kavanaugh, J., dissenting) ("From the beginning, it was recognized that [the strict and intermediate scrutiny] tests were balancing tests."). After all, scrutiny analysis generally begins only after the court has determined that the challenged restriction does indeed fall within the *scope* of the constitutional right in question. Thus, the avowed purpose of the inquiry—even in the form of rational-basis review—is generally to determine when that right has been validly "outweighed" by the government's interest in suppressing it. And there lies the root difficulty, for the Constitution does not provide a ranking or hierarchy of constitutional values and governmental interests, many of which appear

incommensurable. The scrutiny analysis therefore asks judges to *impose* on the Constitution a hierarchy of values and interests that—due to their incommensurability—is not objectively justifiable.

At this point, some may try to turn this interest-balancing defect into a justification. They may argue that, if Chief Justice Marshall was right that the Constitution must be "adapted to the various *crises* of human affairs," *McCulloch*, 4 Wheat. (17 U.S.) at 415, it cannot be ruled out that *some* of these crises will be so acute that the government's compelling interest in taking action *outweighs* the value of any constitutional restrictions that stand in the way. Similarly, looking at the point from the other direction, some scholars have argued that "balancing" is a necessary component of a just regime, since it is "a principle and . . . goal of constitutional government" that "larger harms imposed by government should be justified by more weighty reasons." Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3098 (2015).

What unites these two arguments for judicial balancing is a kind of perfectionism, a view of constitutionalism in which every constitutional dispute has a happy-ever-after ending that can be discovered by judges on a case-by-case basis. But this impulse is contrary to the very nature of American-style constitutionalism. The basic premise of a written constitution, at least in the American tradition, is that due to some combination of uncertainty about the nature and content of justice, disagreement over its demands, or

skepticism that future government actors can be trusted to pursue them, those future officials must be bound by an external, objectively discernible set of restraints that are established *in advance*. A theory of constitutional practice that promises happy-ever-after endings in every case—and empowers judges to achieve them via balancing tests—is in fundamental conflict with such a regime. As Professor Henry Monaghan observed four decades ago, we do not have "a perfect constitution" that always achieves the normatively best outcome. Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981). A society capable of drafting and implementing such a document would have no need for it.

Some have sought to avoid these objections by constructing an alternative theory of the tiers of scrutiny, casting the inquiry as a means of preventing the government from pretextually pursuing constitutionally *illegitimate motives or purposes*. Thus, Professor John Hart Ely famously justified strict scrutiny under the Equal Protection Clause as "a way of 'flushing out' unconstitutional motivation." JOHN HART ELY, DEMOCRACY & DISTRUST 146 (1980). Then-Professor Kagan offered a similar theory in the First Amendment context. Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 453 (1996). As Ely explained, the idea is that the "interest" prong prevents the government from justifying the challenged law by pointing to a sanitized goal "so unimportant that you have to suspect it's a pretext that didn't

actually generate the choice." ELY, *supra*, at 148. The "tailoring" prong ensures that the interest put forward by the government was its genuine motivation—on the theory that "[t]here is only one goal the classification is likely to fit" closely enough to pass muster, "and that is the goal the legislators actually had in mind." *Id.* at 146.

But even assuming that the original meaning of constitutional provisions like the Second Amendment proscribe certain motives (rather than certain actions or outcomes), this theory cannot justify the tiers of scrutiny. Even if application of the scrutiny tests will occasionally succeed in "smoking out" illicit government motives for the reasons Ely described, the inquiry is remarkably ill-suited to the task. In many cases, the tiers of scrutiny will result in the invalidation of laws that were in fact motivated by the genuine desire to pursue legitimate objectives the government believed were compelling. And in many others, illicitly motivated laws will nonetheless be upheld because the government chose its pretext carefully, enacting a law that passes the scrutiny gauntlet despite its sinister purpose. In the end, if certain constitutional rights really do forbid otherwise-valid government action motivated by illegitimate purposes, the way to enforce them is to *ask whether a challenged government act is motivated by an illegitimate purpose*. The courts already directly inquire whether the government has acted for impermissible purposes in many contexts. *See, e.g.*, *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265–68 (1977). There

is no reason to resort to the tiers of scrutiny as an ill-suited way of asking the same question.

III. The tiers of scrutiny are indeterminate and manipulable.

As just explained, because the tiers of scrutiny, by their very design, result in underenforcing the originally understood scope of constitutional rights in some cases, the familiar scrutiny framework cannot be squared with the Constitution's original meaning. But one need not be an originalist to reject the tiers of scrutiny; one who interprets the Constitution according to other available interpretive methodologies can—and should—just as readily condemn them. That is because the tiers of scrutiny lack the essential characteristic of any jurisprudential test whose aim is the faithful application of the law: serving as a meaningful guide to legal analysis. Instead, each step of the scrutiny process is marked by indeterminacy and manipulability. *See Whole Woman's Health*, 136 S. Ct. at 2327 (Thomas, J., dissenting) ("If our recent cases illustrate anything, it is how easily the Court tinkers with levels of scrutiny to achieve its desired result.").

Consider, as Professor Fallon has correctly pointed out, that "there will often be an important level-of-generality question involving purportedly compelling governmental interests." Fallon, *supra*, at 1323. For example, in the statutory context, the Religious Freedom Restoration Act requires courts to apply a form of strict scrutiny to federal laws that substantially burden the exercise of religion. 42 U.S.C.

§ 20000bb-1(b). When the Obama Administration was defending its contraception mandate, it consistently described the governmental interest in broad terms, such as "public health" and "gender equality." *See* Brief for the Petitioners 46–51, *Burwell v. Hobby Lobby Stores, Inc.*, No. 13-354 (U.S. Jan. 10, 2014). These formulations made the government's interest sound more compelling than those framed at a lower level of generality, such as "providing free contraceptives to employees of certain types of employers offering certain types of health-insurance plans."

The manipulability of the first step of the analysis, in turn, infects the second step's tailoring requirement. If the government's interest is stated broadly, there will likely be more ways of achieving that interest than if it is stated narrowly, which makes it less likely that the government can show the necessary tailoring of its interest to its chosen means. The contraception mandate again provides a case in point. If the government's interest had been stated narrowly—providing free contraceptives to employees of a particular type of employer under particular health-insurance plans—the mandate would have had a better (though perhaps not convincing) claim to being the only way to accomplish it. (Of course, this raises a separate manipulability problem: defining the interest to precisely match the chosen means.) But cast at a relatively high level of generality (though more specific than some of the extremely broad interests the Government asserted in that case)—as achieving broader access to contraceptives—it seemed likely that the

interest could have been achieved in ways other than forcing employers with religious objections to provide the contraceptives for free. Indeed, this is precisely why this Court held in *Burwell v. Hobby Lobby Stores, Inc.* that the contraception mandate failed strict scrutiny as applied to closely held corporations with religious objections. 573 U.S. 682, 728–32 (2014).

Thus, in many cases, to decide the level of generality is to decide the case. Yet, as Professor Fallon has observed, despite the importance of this level-of-generality inquiry, this Court has *never explained* how the level of generality of the government's interest is to be determined across cases. Fallon, *supra*, at 1325, 1336. The failure to provide an answer to this critical question is no surprise: There is no good answer.[5] Courts forced to choose between characterizing the government's interest as "public health," "increased access to contraceptives," or "free access to a particular type of contraceptive for employees with a certain

[5] The level-of-generality problem may not be as severe in the context of a general rule that is subject to case-by-case exemptions, because the existence of the provision authorizing exemptions may rule out the broadest characterization of the interests behind the general rule, as inconsistent with the availability of exemptions. *See Fulton*, 141 S. Ct. at 1881–82 (rejecting a broad characterization of the interest at issue). Similarly, the level-of-generality problem may not be as severe where the text of a statute or constitutional provision requires that the governmental interest explain why a specific individual must suffer an infringement on statutory or constitutional rights. *See Hobby Lobby*, 573 U.S. at 726–27 (same).

type of insurance" simply have no principled way of making the determination in most cases.

But even if there was a principled way of resolving these questions, the tiers of scrutiny would still pose intractable problems for the rule of law. How, for instance, is a court to determine whether an interest is important or compelling? The courts have tended to treat the question as a normative one reserved for their own judgment, but that makes the constitutionality of governmental action dependent on each judge's own subjective assessment of questions that can only be described as quintessentially political. And when the meaning of constitutional provisions rests on a judge's controversial political decisions, the courts become no more than a continuation of politics by other means. This makes the resolution of controversial constitutional questions difficult for the losing side to accept, since the judicial decision rests on political judgments rather than law, which undermines the very purpose of American-style constitutionalism.

When we reach the tailoring prong, the situation does not improve. Whether a challenged law will, in fact, achieve its stated goal is often a contested empirical question, as is the question of whether there are other, less-restrictive means of achieving the same end. Frequently, these empirical questions will depend on assumptions, analyses, and judgments that are extraordinarily complex and controversial. That does not mean that there is no right answer to such questions, but there is something farcical about a federal judge hearing testimony about fraught and

quintessentially legislative questions and pronouncing his conclusions as settled fact. As Justice Alito observed in his dissent in *United States v. Windsor*, "[o]nly an arrogant legal culture that has lost all appreciation of its own limitations could take such a suggestion seriously." 570 U.S. 744, 816 n.7 (2013) (Alito, J., dissenting).

The Circuit Court decisions applying intermediate scrutiny to "proper cause"-type license-to-carry restrictions perfectly illustrate the point. The First Circuit upheld Massachusetts's restriction based in part on its assessment of social-science "studies indicating that states with more restrictive licensing schemes for the public carriage of firearms experience significantly lower rates of gun-related homicides and other violent crimes." *Gould v. Morgan*, 907 F.3d 659, 675 (1st Cir. 2018). The Fourth Circuit similarly upheld Maryland's licensing requirements based on its resolution of the empirical question whether, on net, the State's restriction "strikes an appropriate balance between granting handgun permits to those persons known to be in need of self-protection and precluding a dangerous proliferation of handguns on the streets of Maryland." *Woolard v. Gallagher*, 712 F.3d 865, 881 (4th Cir. 2013). But the social-science evidence bearing on these questions simply does not speak with one voice, *see Moore v. Madigan*, 702 F.3d 933, 937–39 (7th Cir. 2012), making any determination of the actual likely effects of "proper-cause" restrictions on rates of violent crime, on the one hand, and effective self-defense, on the other, extraordinarily complex.

And even if those respective probabilities could be accurately determined, could it really be said that a court would then be in a position to decide whether any given restriction strikes the "appropriate balance," *Woolard*, 712 F.3d at 881, between public safety and the constitutional right to armed self-defense outside the home? To ask that question is to see that it begets no judicially ascertainable answer. Indeed, Justice Breyer recognized this problem in his dissenting opinion in *McDonald*, noting that assessing firearms restrictions based on balancing tests "requires finding answers to complex empirically based questions of a kind that legislatures are better able than courts to make." 561 U.S. at 922 (Breyer, J., dissenting). But that is precisely why *McDonald*—in line with *Heller*'s rejection of interest-balancing tests—reaffirmed that balancing tests are *inappropriate* in the Second Amendment context. *See id.* at 790–91 (plurality).

To be sure, interpreting a constitutional provision according to its text and history carries difficulties of its own, as does discerning how to apply the original meaning of a provision in modern circumstances. *See, e.g.*, *Kyllo v. United States*, 533 U.S. 27 (2001). But even acknowledging those difficulties (which can easily be overstated), they are incapable of justifying resort to the tiers of scrutiny. As noted above, courts generally turn to a scrutiny analysis only *after* they have determined that the challenged restriction indeed burdens conduct *within the scope* of the relevant constitutional guarantee. The doctrinal

approach adopted in the Second Amendment context by virtually every Court of Appeals, for instance, places the scrutiny inquiry in the *second* place of a two-pronged inquiry that begins with a determination of "the scope of the Second Amendment's protections" based on "a textual and historical analysis." *Teixeira v. County of Alameda*, 873 F.3d 670, 682 (9th Cir. 2017). The choice is thus not one between a fraught textual-and-historical inquiry, on the one hand, and a fraught empirical-cum-balancing inquiry, on the other. The choice is whether to layer the subjective balancing inquiry *on top of* an initial inquiry into the Constitution's textual and historical scope.

IV. The tiers of scrutiny should not be extended into the Second Amendment context.

Even if the argument against the tiers of scrutiny is strong, there remains the question of what role *stare decisis* should play in considering whether to abandon them. That question would likely be harder for some justices than others. *Compare Knick v. Township of Scott*, 588 U.S. ___, 139 S. Ct. 2162, 2178 (2019) (looking to "the quality of [the precedent's] reasoning, the workability of the rule it established, its consistency with other related decisions . . . and reliance on the decision"), *with Gamble v. United States*, 587 U.S. ___, 139 S. Ct. 1960, 1984 (2019) (Thomas, J., concurring) (urging that "if the Court encounters a decision that is demonstrably erroneous . . . the Court should correct the error, regardless of whether other factors support overruling the precedent"). Yet, even

for those who take a more robust approach to *stare decisis*, there are strong reasons why the judicial hesitancy to overrule precedent should not stand in the way of rethinking the role of the tiers of scrutiny, given their manipulability, their history, and the lack of any significant reliance interest in their continued application (as opposed to the reliance interest that may exist in the individual decisions the courts have reached under the tiers-of-scrutiny rubric). *See* Alicea & Ohlendorf, *supra*, at 81–83. As the Chief Justice has observed, the tiers of scrutiny "just kind of developed over the years as sort of baggage that the First Amendment picked up," Argument Transcript, *District of Columbia v. Heller* 44:18–21, No. 07-290 (U.S. Mar. 18, 2008), which is hardly the description of a constitutional analysis that merits retention under *stare decisis* principles.

Fortunately, however, in this case the question whether *stare decisis* justifies the continued application of the tiers of scrutiny *does not even arise*. For the question here is not whether to *continue applying* the tiers-of-scrutiny framework to Second Amendment challenges; it is whether *to extend* that framework to this context. About that question, the rule of *stare decisis*, if it has anything to say at all, counsels *against* the tiers of scrutiny.

This Court's decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), plainly do not adopt any tiers-of-scrutiny analysis in the Second Amendment context—and indeed, as multiple Members of this

Court have explicitly or implicitly recognized, the best reading of those cases is that they foreclose it. *See Rogers v. Grewal*, 140 S. Ct. 1865, 1866–68 (2020) (Thomas, J., joined by Kavanaugh, J., dissenting from the denial of certiorari) (expressly arguing that *Heller* and *McDonald* foreclose use of the tiers of scrutiny); *New York State Rifle & Pistol Ass'n v. City of New York*, 590 U.S. ___, 140 S. Ct. 1525, 1540–41 (2020) (Alito, J., joined by Thomas and Gorsuch, JJ., dissenting) (describing *Heller*'s test as a historical test and only considering the tiers of scrutiny in the alternative). After all, *Heller* makes clear that the Second Amendment "elevates" the right to armed self-defense "above all other interests," such that infringements upon that right may not be "subjected to a freestanding 'interest-balancing' approach." 554 U.S. at 634–35. And *McDonald* reaffirms that the Court "expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing." 561 U.S. at 785 (plurality opinion). As then-Judge Kavanaugh observed in his dissenting opinion in *Heller II*, the exhaustive historical analyses of *Heller* and *McDonald* show that the Second Amendment, when properly interpreted, requires that only "traditional, 'longstanding' regulations" of specific firearms or individuals be upheld as constitutional. 670 F.3d at 1270 (Kavanaugh, J., dissenting). Accordingly, whatever argument there may be for leaving the tiers-of-scrutiny framework undisturbed in those areas of the constitutional terrain where it has already put down roots, *stare decisis* provides no

argument for planting its seeds in the Second Amendment's newly tilled doctrinal soil.

Nor would a refusal to extend the tiers of scrutiny to this context make the Second Amendment a jurisprudential outlier. Indeed, *it is the tiers of scrutiny* that are inconsistent with the approach the Court has taken to many other provisions of the Bill of Rights. As then-Judge Kavanaugh's *Heller II* dissent also observed, "[s]trict and intermediate scrutiny tests are not employed in the Court's interpretation and application of many other individual rights provisions of the Constitution." *Id.* at 1283. From the Confrontation Clause to the Establishment Clause, from the Fourth Amendment to the right to a jury trial, the Court routinely strikes down—or sustains—challenged government restrictions without asking whether they are tailored to achieving the government's interests. *See, e.g.*, *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 575–91 (2014); *United States v. Jones*, 565 U.S. 400, 404–11 (2012); *Crawford v. Washington*, 541 U.S. 36, 60–65 (2004); *United States v. Gaudin*, 515 U.S. 506, 509–19 (1995). Even under the First Amendment's Free Speech Clause—where the tiers of scrutiny first emerged—a great many cases are decided without resort to any scrutiny analysis. *See, e.g.*, *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 254–58 (1974); *Stanley v. Georgia*, 394 U.S. 557, 564–68 (1969); *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964).

Moreover, in the context of those provisions already colonized by subjective balancing standards

akin to the tiers of scrutiny, the Court has recently begun the process of incrementally reclaiming constitutional territory. *Lemon v. Kurtzman*, 403 U.S. 602 (1971), adopted a subjective, ahistorical test for some Establishment Clause cases that has been subject to relentless criticism from scholars and jurists ever since. *E.g.*, *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398–400 (1993) (Scalia, J., dissenting); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 118, 128–31 (1992). But in recent years, the Court has begun to roll back *Lemon*'s domain. In the recent decision in *American Legion v. American Humanist Association*, a majority of the Court rejected the applicability of the *Lemon* test at least to cases involving "religious references or imagery in public monuments, symbols, mottos, displays, and ceremonies," relying instead on the long tradition of accepting the constitutionality of these religious references and images. 588 U.S. ___, 139 S. Ct. 2067, 2097 (2019) (Thomas, J., concurring); *accord id.* at 2081–85 (plurality). The Court has thus shown that it knows how to chip away at an ahistorical jurisprudential test and replace it, bit by bit, with one grounded in the original meaning of the Constitution. It should not reverse course and *extend* the reach of the ahistorical tiers of scrutiny to the Second Amendment.

The short of the matter is this: the tiers of scrutiny are not grounded in the text or original meaning of the Constitution; they were adopted for political reasons; they are inherently manipulable and

indeterminate; they place judges in the position of making controversial policy and political judgments; and, at least in the context of the Second Amendment, they have no refuge in *stare decisis*. This case presents the Court with the opportunity to stop the spread of this ahistorical and unmoored analysis to new constitutional contexts and, instead, to endorse a doctrinal framework that looks to the Constitution's text and history in resolving Second Amendment challenges. It should do so, and begin the process of eliminating the scrutiny tests from constitutional jurisprudence for good.

CONCLUSION

For these reasons, the Court should reverse the judgment of the Second Circuit.

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Respectfully submitted,

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