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, ET AL.,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR AMICI CURIAE CALIFORNIA RIFLE & PISTOL ASSOCIATION, INCORPORATED AND SECOND AMENDMENT LAW CENTER, INC. IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF AMICI CURIAE

Founded in 1875, California Rifle & Pistol Association, Incorporated ("CRPA") is a nonprofit organization dedicated to defending the Second Amendment. CRPA regularly participates as a party or amicus in firearm-related litigation. CRPA works to preserve the constitutional and statutory rights of gun ownership. CRPA is also dedicated to promoting the shooting sports, providing education, training, and organized competition for adult and junior shooters. CRPA has been a party to or amicus in various Second Amendment challenges to firearm restrictions, including carry restrictions much like the one at issue here.

The Second Amendment Law Center, Inc. ("the Center") is a nonprofit corporation headquartered in Henderson, Nevada. The Center is dedicated to promoting and defending the individual rights to keep and bear arms as envisioned by the Founding Fathers. The Center's purpose is to defend these rights in state and federal courts across the United States. The Center also seeks to educate the public about the social utility of private firearm ownership and to provide accurate and truthful historical, criminological, and technical information about firearms to policymakers, judges, attorneys, police, and the public.[1]

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[1] No counsel for a party authored this brief in whole or in part nor did such counsel or any party make a monetary contribution to fund this brief. Preparation and submission of this brief was funded by the California Rifle & Pistol Association, Incorporated and The Second Amendment Law Center, Inc.

SUMMARY OF ARGUMENT

Petitioners have left little, if any, doubt in their brief that New York's carry regime violates the Second Amendment. They have also correctly identified the source of the Second Circuit's error in upholding that regime: application of judicial scrutiny beneath the dignity of a fundamental constitutional right.

Amici do not reiterate those arguments here. Instead, they wish to highlight that the Second Circuit's (mis)treatment of the Second Amendment is not anomalous but disquietingly common among lower courts. As plaintiff or amicus in various Second Amendment lawsuits, mainly in the Ninth Circuit—perhaps the worst offender of peddling in counterfeit Second Amendment analyses—Amici speak from first-hand experience. Over the last decade, theirs have been among the consistent flood of petitions to the Court seeking review of rejected Second Amendment claims.

To remedy these lower courts' errors and avoid similar ones in the future, the Court should articulate a comprehensive test for analyzing Second Amendment claims or at least admonish courts that the watered-down forms of scrutiny they have been applying will not be tolerated. As for the right to bear arms specifically, the Court should make clear that while regulating public firearms carriage is allowed, government must afford all individuals entitled to exercise their Second Amendment rights some outlet to publicly carry a firearm in some manner, whether openly or concealed.

Petitioners and Respondents consented to the filing of this amici curiae brief.

Left unguided by the Court, lower courts like the Second and Ninth Circuits will continue to trample on Second Amendment rights with impunity. And the petitions for certiorari will not abate. Amici do not, of course, expect the Court to resolve once and for all every conceivable dispute that might arise over what is a constitutionally permissible firearm regulation—an impossible feat to be sure. But continuing the status quo will only result in more such disputes, not fewer. Strikingly, the post-*Heller* era has seen an increase of strict gun laws being adopted in places like California. It is safe to assume those too will be challenged and that, under the trend, petitioned to the Court.

ARGUMENT

I. Lower Courts Have Filled the Manufactured Analytical Vacuum for Second Amendment Claims Post-*Heller* with Weak Tests Spawning the Sorts of Errors the Second Circuit Committed Below

Lower courts routinely apply subjective tests to Second Amendment claims that lack grounding in *District of Columbia v. Heller*, 554 U.S. 570 (2008) or any other Supreme Court precedent, leading to essentially every iteration of Second Amendment challenge failing. This phenomenon is no secret to the bench. One circuit judge described the Second Amendment as "the Rodney Dangerfield of the Bill of Rights." *Mance v. Sessions*, 896 F.3d 390, 396 (5th Cir. 2018) (Willett, J., dissenting). Another warned that "[o]ur cases continue to slowly carve away the fundamental right to keep and bear arms," noting

how one such case's "decision further lacerates the Second Amendment, deepens the wound, and resembles the Death by a Thousand Cuts." *Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 694 (9th Cir. 2017), *cert. denied sub nom.*, 138 S. Ct. 1988 (2018); *see also Duncan v. Becerra*, No. 17-1017, 366 F. Supp. 3d 1131, 1166 (S.D. Cal. 2019) (observing that courts purport to respect the Second Amendment, but then give the right "*Emeritus* status, all while its strength is being sapped from a lack of exercise"). Indeed, several members of the Court have expressed "concern that some federal and state courts may not be properly applying *Heller* and *McDonald*." *See N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York* (*NYSRPA*), -- U.S. --, 140 S. Ct. 1525, 1527 (2020) (Kavanaugh, J., concurring); *id.* (Alito, J., dissenting, joined by Gorsuch, J., in full and Thomas, J., in part).

It is undeniable that "*Heller* has left in its wake a morass of conflicting lower court opinions regarding the proper analysis to apply to challenged firearms regulations." *United States v. Chester*, 628 F.3d 673, 688-89 (4th Cir. 2010) (Davis, J., concurring in the judgment). In the decade since that 2010 proclamation, the conflicts have only increased. Amici believe this has resulted from lower courts intentionally exaggerating *Heller*'s perceived lack of guidance as a pretext for employing tactics to reduce that landmark opinion's effect. For it is unlikely a coincidence that of the hundreds of Second Amendment cases filed since the Court decided *Heller*, only a few lower courts have struck a firearm restriction as unconstitutional—despite many jurisdictions increasing such laws both in number and scope during that time.

But whether this development stems from courts' genuine confusion or their deliberate sabotage of *Heller* is ultimately irrelevant. In either case, the Court can quash the problem by expressly articulating the analytical framework under which Second Amendment challenges are to be reviewed. Or, at least, declaring that the sort of watered-down scrutiny the lower courts have applied is unacceptable.

A. The Analyses Lower Courts Employ Are Susceptible to Abuse in Favor of the Government

The trend among lower courts has been to adopt a "two-step" analysis for laws challenged under the Second Amendment. Under this approach, courts first ask whether the restriction burdens conduct protected by the Second Amendment. If it does, courts then determine what level of scrutiny to apply by examining how close the burdened conduct is to the Second Amendment's "core" right and the severity of the burden on that right. *See e.g.*, *Gould v. Morgan*, 907 F.3d 659 (1st Cir. 2018); *United States v. Focia*, 869 F.3d 1269 (11th Cir. 2017); *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013); *NRA v. McCraw*, 719 F.3d 338 (5th Cir. 2013); *Schrader v. Holder*, 704 F.3d 980 (D.C. Cir. 2013); *United States v. Greeno*, 679 F.3d 510 (6th Cir. 2012); *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011); *Chester*, 628 F.3d at 680; *United States v. Reese*, 627 F.3d 792 (10th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85 (3rd Cir. 2010). Despite virtual consensus among the circuits, the Court should reject this approach.

On its face, the two-step analysis may seem reasonable, even practical. But its application affords

courts multiple opportunities to tilt things in the government's favor. And courts regularly seize those opportunities. Indeed, some courts have forged creative interpretations of *Heller*'s passages—rather than looking to the Second Amendment's text and history—to exclude some restrictions from Second Amendment scrutiny altogether. While other courts simply assume Second Amendment protection without deciding the question, allowing them to unceremoniously find that the restriction passes muster under an extremely weak version of what they incorrectly call "intermediate scrutiny."

1. Lower Courts Have No Shortage of Excuses for Avoiding Second Amendment Scrutiny Altogether

Although the two-step approach begins with the proper question—whether the Second Amendment protects the restricted conduct—the lengths to which courts have reached to answer that question in the negative supports Amici's suspicion of bias in employing this test. For example, despite recognizing that "the Second Amendment's individual right to bear arms *may* have some application beyond the home," the Third Circuit concluded that a requirement that carry license applicants establish a "justifiable need" to obtain one—a standard almost no applicant can meet—"qualifies as a 'presumptively lawful,' 'longstanding' regulation and therefore does not burden conduct within the scope of the Second Amendment's guarantee." *Drake v. Filko*, 724 F.3d 426, 429 (3d Cir. 2013). The court never specified which of the "longstanding prohibitions" listed in *Heller* it was relying on. Instead, it merely pointed out

that the list is not "exhaustive" and that being 90 years old qualified the requirement for inclusion. *Id.* at 446.

In *United States v. White*, 593 F.3d 1199 (11th Cir. 2010), the Eleventh Circuit likewise arbitrarily added to *Heller*'s list of "presumptively lawful" measures to avoid Second Amendment scrutiny. There, the court upheld a conviction under 18 U.S.C. § 922(g)(9), which prohibits possession of firearms by those who have been convicted of a "*misdemeanor* crime of domestic violence." *White*, 593 F.3d at 1206. The court held that there is "no reason to exclude § 922(g)(9) from the list of longstanding prohibitions on which *Heller* does not cast doubt." *Id.* at 1205-06. Noting that *Heller* views restrictions on felons as "presumptively lawful," the court essentially declared that *misdemeanor* domestic violence is close enough to a felony and reasoned it should be treated the same without anchoring its decision to any historical justification. *Id.*

The Fourth Circuit rejected a challenge to a ban on the most popular rifles in the country simply by declaring them to be "like" the M-16 machine gun, "most useful in military service," and thus "among those arms that the Second Amendment does not shield." *Kolbe v. Hogan*, 849 F.3d 114, 135 (4th Cir.) (en banc) (citing *Heller*, 554 U.S. at 627). Yet the court did not identify a single military that actually uses the rifles. *Id.* at 159 (Traxler, W., dissenting). And it seemingly ignored the record evidence showing that millions of Americans lawfully own them. *Id.*

According to the Fifth Circuit, anyone under age 21 is likely "unworthy of the Second Amendment guarantee" and thus has no constitutional complaint

against a federal law prohibiting adults between 18 and 21 years old from acquiring a handgun. *NRA v. BATFE*, 700 F.3d 185, 202 (5th Cir. 2012). But that conclusion is wanting. For "the properly relevant historical materials … couldn't be clearer: the right to keep and bear arms belonged to citizens 18 to 20 years old at the crucial period in our nation's history." *NRA v. BATFE*, 714 F.3d 334, 339 (5th Cir. 2012) (Jones, J., dissenting from denial of rehearing en banc).

While it did not expressly say that possession of a handgun at one's summer home falls outside of Second Amendment protection, the Second Circuit tellingly described the notion as "a serious constitutional question." *Osterweil v. Bartlett*, 706 F.3d 139, 142 (2d Cir. 2013). As if there is any doubt that one's fundamental right to "use arms in defense of home and hearth" is not merely a good-for-only-one coupon. *Heller*, 554 U.S. at 635.

Rather than doctrinally stretch to avoid Second Amendment protection, some courts instead refashion plaintiffs' claims as seeking relief that was undisputedly unavailable—and clearly not what was being asked for. In *Teixeira v. County of Alameda*, for example, the Ninth Circuit, sitting en banc, employed a sleight of hand when holding that a county zoning ordinance restricting the locations of stores selling firearms "does not burden conduct falling within the Amendment's scope ...." 873 F.3d at 690. The challenged ordinance prohibited any store selling firearms from being located within 500 feet of any residential district, school, other store that sells firearms, or establishment that sells liquor. *Id.* Despite the plaintiffs alleging that the ordinance created a ban on new gun stores, the court artificially

narrowed the question, asking whether there is "an independent, freestanding right to sell firearms under the Second Amendment." *Id.* at 682. Finding that there is not, the court reasoned that "the right of gun users to acquire firearms legally is not coextensive with the right of a particular proprietor to sell them." *Id.* This not only mischaracterized the plaintiffs' claim, it ignored the broader implications. *Id.* at 673. Logically, the court's ruling would mean the government has the power to practically bar acquisition of firearms by prohibiting gun stores altogether and the Second Amendment has no say. The court unconvincingly dismissed that consequence, claiming its ruling did not impair the right to acquire arms but was simply holding "the Second Amendment does not independently protect a proprietor's right to sell firearms." *Id.* at 690.

Importantly, *Teixeira* was reheard en banc after the original panel merely ruled that the matter should be remanded and reviewed under heightened scrutiny. *Teixeira v. Cnty. of Alameda*, 822 F.3d 1047, 1060, 1064 (9th Cir. 2016), *reh'g en banc*, 873 F.3d 670 (9th Cir. 2017). There had not even been a merits ruling yet. This low standard for en banc review is not an isolated incident. Years before *Teixeira*, the Ninth Circuit ordered en banc review of a panel decision holding that the Fourteenth Amendment incorporates the Second Amendment as applying against the states and local governments. *Nordyke v. King*, 563 F.3d 439, 144 (9th Cir. 2009), *reh'g en banc granted*, 575 F.3d 890 (9th Cir. 2009). Before that en banc panel could rule, however, the Court mooted the issue with its decision in *McDonald v. City of Chicago*, 561 U.S. 742 (2010)—and vindicated the original panel.

A three-judge panel in *Nordyke* later affirmed the county's motion to dismiss the plaintiff's Second Amendment claim but granted the plaintiff leave to amend the complaint given the Court's rulings in *Heller* and *McDonald*. *Nordyke v. King*, 664 F.3d 776, 788-89 (9th Cir. 2011). The Ninth Circuit, however, *again* ordered the matter to en banc review, not caring to first see the amended complaint or how the district court would dispose of it. *Nordyke v. King*, 664 F.3d 774 (9th Cir. 2011). This trend of en banc review continues.

In fact, every merits decision that is remotely positive for the Second Amendment to come from a Ninth Circuit panel has been ordered to en banc review and each that has reached decision was reversed. *See, e.g.*, *Peruta v. Cnty. of San Diego*, 742 F.3d 1144 (9th Cir. 2014), *rev'd en banc*, 824 F.3d 919 (9th Cir. 2016); *Young v. Hawaii,* 896 F.3d 1044 (9th Cir. 2018), *rev'd en banc*, 992 F.3d 765 (both discussed below). The only semi-exception is the affirmance of a preliminary injunction against California's enforcement of its confiscatory ban on possession of so-called "large capacity magazines." *Duncan v. Becerra*, 742 F. App'x 218 (9th Cir. 2018). But, even that case—involving a memorandum opinion upholding a preliminary injunction under an abuse of discretion standard where the merits briefing had been completed in the lower court—drew a sua sponte call for an en banc vote. Order Calling Vote Re En Banc*, Duncan v. Becerra,* No. 17-56081 (9th Cir. Aug. 22, 2018). Only after the state of California made clear that even it did not think the matter warranted en banc review at that stage did the court relent. Order Denying Rehearing En Banc, *Duncan v.* Becerra, No. 17-56081 (9th Cir. Oct. 31, 2018). And

when a three-judge panel affirmed the district court's decision in favor of the *Duncan* plaintiffs on the merits, the Ninth Circuit again agreed to rehear the case en banc—a decision in which is now pending. *Duncan v. Becerra*, 988 F.3d 1209, 1210 (9th Cir. 2021) (ordering case be reheard en banc).

Any claim that this is merely a product of Second Amendment jurisprudence being in its infancy is belied by the fact that the Ninth Circuit has not taken a single *un*favorable Second Amendment decision en banc, despite receiving several requests to do so. *Rodriguez v. City of San Jose*, 930 F.3d 1123 (9th Cir. 2019), *reh'g en banc denied*, No. 17-17144, 2019 U.S. App. LEXIS 28877 (9th Cir. Sep. 24, 2019); *Bauer v. Becerra*, 858 F.3d 1216 (9th Cir. 2017), *reh'g en banc denied,* No. 15-15428 (9th Cir. Jul. 12, 2017); *Silvester v. Harris*, 843 F.3d 816 (9th Cir. 2016), *reh'g en banc denied,* No. 14-16840 (9th Cir. Apr. 4, 2017); *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953 (9th Cir. 2014), *reh'g en banc denied,* No. 12-17803 (9th Cir. Jul. 17, 2014).

En banc review it seems is only "not favored" for decisions in which the Second Amendment is not favored either—at least in the Ninth Circuit. *But see* Fed. R. App. P. 35 (a). In all events, the above cases are mere examples of the many ways that courts have avoided Second Amendment scrutiny. It is not exhaustive, but it shows how far astray many lower courts have gone in their treatment of the Second Amendment as a second-class right.

2. Lower Courts Have Altered Means-end Scrutiny to Create a Second Amendment Specific Scrutiny That Is More Subjective and Much Less Rigorous on the Government

On the other side of the coin, many lower courts skip the first step of the analysis and simply assume, without deciding, that the Second Amendment protects the burdened conduct. *See, e.g.*, *Kolbe*, 849 F.3d 114; *Jackson*, 746 F.3d 953; *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81 (2d Cir. 2012); *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244 (D.C. Cir. 2011). This is not the courts being charitable. To the contrary, doing so ensures they need not confront the Second Amendment's text and history, teleporting them directly to the second step, where the real opportunities to manipulate the analysis reside. Indeed, at the second step, courts determine whether strict or intermediate scrutiny applies and then evaluate the challenged restriction under that standard. The result, however, is usually a foregone conclusion. Intermediate scrutiny will apply, and it will be satisfied.

This is exactly what happened in *Kachalsky* and again in this case, which essentially incorporates *Kachalsky*'s reasoning. *Kachalsky*, 701 F.3d at 89, 93-101; *N.Y. State Rifle & Pistol Ass'n v. Beach* (*NYSRPA*), 818 F. App'x 99, 100 (2d Cir. 2020). For the reasons discussed below, the Court should reject the "judge-empowering 'interest-balancing inquiry' " employed by the Second Circuit and many of its sisters.

a. With few exceptions, lower courts choose intermediate scrutiny when evaluating Second Amendment claims

In the years since the Court decided *Heller*, very few Second Amendment challenges have ever been subject to the probing analysis of strict scrutiny. Instead, almost without exception, the circuit courts have found it appropriate to settle on intermediate scrutiny whenever faced with a law restricting the fundamental right to keep and bear arms. This is a striking departure from the default that strict scrutiny applies to restrictions on fundamental rights, *see, e.g.*, *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 54 (1983), and (worse yet) from *Heller* itself. As then-Circuit Judge Kavanaugh observed in his *Heller II* dissent,

> Even if it were appropriate to apply one of the levels of scrutiny after *Heller*, surely it would be strict scrutiny rather than the intermediate scrutiny test adopted by the majority opinion here. *Heller* ruled that the right to possess guns is a core enumerated constitutional right and *rejected Justice Breyer's suggested Turner Broadcasting intermediate scrutiny approach*.

670 F.3d at 1284 (Kavanaugh, J., dissenting) (emphasis added); *see also id.* ("[I]t is a severe stretch to read *Heller*, as the majority opinion does, as consistent with an intermediate scrutiny balancing test.").

Considering all this, it is both astounding and alarming that virtually every Second Amendment claim since *Heller* has warranted no more than intermediate scrutiny. Indeed, it reveals the lower courts' animus toward the Second Amendment and their ability to sway the analysis to uphold almost any gun-control measure they meet. This manipulation in favor of intermediate scrutiny often takes one or both of two forms: (1) artificially limiting the "core" of the Second Amendment right; and (2) understating the severity of the burden any given restriction places on it.

First, many courts have avoided strict scrutiny simply by narrowly construing "core" Second Amendment conduct as only the precise conduct at issue in *Heller*—that is, firearm possession in the home by law-abiding citizens for use in defense of self and others. *See, e.g.*, *Gould*, 907 F.3d 659 (holding that the core of the right is limited to in-home self-defense and that public carry is at the periphery of the Second Amendment where intermediate scrutiny applies); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013) (holding that intermediate scrutiny applies to laws that burden any right to keep and bear arms outside the home). The Second Circuit did just that in *Kachalsky* and *NYSRPA*, finding that *Heller* defines the Second Amendment's "core" as the "right of law-abiding, responsible citizens to use arms in defense of hearth and home." Thus, the court held, "applying less than strict scrutiny when the regulation does not burden the 'core' protection of self-defense in the home makes eminent sense...." *Kachalsky*, 701 F.3d at 93-94. The lower court's error is patent.

The *Heller* majority does not limit the "core" of the Second Amendment to the home. To the contrary, it speaks of the "core lawful purpose of self-defense" without limitation. *Heller*, 554 U.S. at 630. It is, in fact, the dissent that creates the home-bound limitation the circuits have seized upon. *Id.* at 720 (Breyer, J., dissenting) ("The majority ... describes the [Second] Amendment as 'elevat[ing] above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.' What is its basis for finding that to be the core of the Second Amendment right?") (citations omitted). To be sure, the majority found "the need for defense of self, family, and property is *most acute*" in the home, *id.* at 628 (emphasis added), where one's right to defend self, family, and property converge. But it neither suggests nor implies that the fundamental right to self-defense ends at one's threshold, or that it exits the "core" of the Second Amendment when we exit our homes. Suggesting otherwise, the Second Circuit (along with its sister circuits) is out of step with the Court's precedents.

But even when laws *are* found to burden conduct falling within this narrow view of the Second Amendment's core, lower courts wishing to settle on intermediate scrutiny have one more arrow in their quiver—the "severity of the burden." Often, courts will consider anything less than a complete ban on core lawful conduct to be a minimal burden on the right warranting no more than intermediate scrutiny. *See, e.g.*, *Worman v. Healey*, 922 F.3d 26 (1st Cir. 2019) (applying intermediate scrutiny to ban on common arms); *N.Y. State Rifle & Pistol Ass'n v.*

Cuomo, 804 F.3d 242, 262-64 (2d Cir. 2015) (same); *Heller II*, 670 F.3d at 1264 (same); *Bauer,* 858 F.3d 1216 (applying intermediate scrutiny to fee imposed as prerequisite to possessing firearms); *Kwong v. Bloomberg*, 723 F.3d 160 (2d Cir. 2013) (same). This is so even though *Heller* nowhere suggests "that a law must rise to the level of the absolute prohibition at issue in that case to constitute a 'substantial burden.' " *Jackson v. City and Cnty. of San Francisco*, 576 U.S. 1013, 1016 (2015) (Thomas, J., dissenting from denial of certiorari).

In *Jackson*, for instance, the Ninth Circuit upheld a San Francisco ordinance requiring handguns possessed in the home to remain either disabled by a trigger lock or in a locked container unless physically on one's person. 746 F.3d at 958. While acknowledging that the ordinance "burdens the core of the Second Amendment right," the court still found intermediate scrutiny appropriate, holding that the burden of the city's locked-storage requirement was not substantial. *Id.* at 964-65. In fact, the court described the burden imposed as "*minimal*" despite acknowledging that removing a handgun from a locked container would cause a delay of "a few seconds"—ignoring evidence that in self-defense situations those precious seconds "could easily be the difference between life and death." *Id.* at 966; *Jackson*, 576 U.S. at 1016 (Thomas, J., dissenting from denial of certiorari).

The *Jackson* court also applied intermediate scrutiny when analyzing San Francisco's ordinance banning the sale of "hollow point" ammunition in the city. 746 F.3d at 967. The court reasoned that the burden was not substantial because there was "no

evidence in the record indicating that ordinary bullets are ineffective for self-defense"—as if that were relevant—and that the plaintiffs could always buy hollow point ammunition *outside* the city. *Id.* at 968. Of course, this fails to explain what happens when other cities likewise ban the sale of hollow points or San Francisco chooses to also restrict so-called "ordinary bullets."

In sum, lower courts have gone out of their way to avoid subjecting restrictions on Second Amendment conduct to meaningful scrutiny. In the context of other rights, courts often find "penumbras, formed by emanations from those guarantees that help give them life and substance." *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965). The Second Amendment, according to these courts, is not only hollow but it casts no shadows either.

b. The intermediate scrutiny that lower courts apply in second amendment cases is a watered-down test more like rational basis review

Arguably worse than treating intermediate scrutiny as the default standard for analyzing restrictions on the fundamental right to keep and bear arms, however, is the way lower courts contort the intermediate scrutiny standard, ensuring that almost no gun-control measure could fail it. Indeed, almost every court purporting to apply "intermediate scrutiny" has instead applied a toothless form of review more like rational basis. But the Court has expressly rejected that standard as inappropriate for

evaluating government restrictions on enumerated rights, including the right to arms. *Heller*, 554 U.S. at 628, n.27.

Under heightened review, a challenged law is *presumed* unconstitutional, and the state bears the burden of justifying the law's validity. *See, e.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). Under a faithful application of intermediate scrutiny, as explained by the Court, the burden is on the government to prove a "substantial relationship" between the law and an important government objective. *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

What's more, as the Court recently confirmed, even a "legitimate and substantial" governmental interest "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Ams. for Prosperity v. Bonta*, -- U.S. --, 2021 U.S. LEXIS 3569, at *5 (2021). To be sure, under intermediate scrutiny, the state need not adopt the "least restrictive means." *Id.* at *19. But the government's means must be "narrowly tailored to [its] asserted interest." *Id.*; *see also Packingham v. North Carolina*, -- U.S. --, 137 S. Ct. 1730, 1736 (2017) ("[A] law must be narrowly tailored to serve a significant governmental interest."). This test ensures that the encroachment on liberty does not "burden substantially more [protected conduct] than is necessary to further the government's legitimate interests." *McCullen v. Coakley*, 573 U.S. 464, 486 (2014).

In the Second Amendment context, however, circuit courts have described intermediate scrutiny in starkly weaker terms. For instance, in *Association of New Jersey Rifle & Pistol Clubs v. Grewal* (*ANJRPC*),

910 F.3d 106, 119 (3d Cir. 2018), *followed by* 974 F.3d 237, 260 (3d Cir. 2020), the Third Circuit held that "the government must assert a significant, substantial, or important interest; there must also be a *reasonable* fit between the asserted interest and the challenged law, such that the law does no burden more conduct than is *reasonably* necessary." (emphasis added). And in *New York State Rifle & Pistol Association v. City of New York*, 883 F.3d 45, 62 (2d Cir. 2018), the Second Circuit held that, under intermediate scrutiny, "the fit between the challenged regulation [and the government interest] need only be substantial, not perfect…. So long as the defendants produce evidence that fairly supports their rationale, the laws will pass constitutional muster." *Cf. NYSRPA*, 140 S. Ct. at 1541 (2020) (Alito, J., dissenting from finding mootness) (discussing "heightened scrutiny" and noting that "there was nothing heightened about what [the lower courts] did"). As these cases show, most circuits dispense with the exacting requirement of "narrow tailoring" in favor of a mere "reasonable fit," a standard that sounds suspiciously like rational basis. After all, in Second Amendment case law, there seems to be no substantive difference between being rationally related to a legitimate government interest, and "reasonably fitting" an important one.

What's more, in the wake of the courts' reticence to expand *Heller* beyond its narrow facts and their eagerness to sustain nearly any sort of gun control short of a flat ban on firearm possession, a consistent theme has emerged—"substantial deference" to the will of legislative majorities. *See, e.g.*, *Kolbe*, 849 F.3d at 140 ("The judgment made by the General Assembly of Maryland […] is precisely

the type of judgment that legislatures are allowed to make without second-guessing by a court."); *Peña v. Lindley*, 898 F.3d 969, 979 (9th Cir. 2018) ("We do not substitute our own policy judgment for that of the legislature," "we 'owe [the legislature's] findings deference."); *Drake*, 724 F.3d at 440 ("We refuse … to intrude upon the sound judgment and discretion of the State of New Jersey."). Ultimately, this extreme deference has led to courts singling out the right to keep and bear arms for especially unfavorable treatment in defiance of the Court's admonishment against treating the Second Amendment "as a second-class right." *McDonald*, 561 U.S. at 780 (plurality op.).

The claim is that courts lack authority to disturb the "predictive judgments" of the legislature; that so long as the government can produce some evidence reasonably supporting its gun-control laws, separation of powers mandates substantial deference to the legislature's will. But such broad deference essentially forecloses any meaningful judicial review. As the Court explained in *Obergefell v. Hodges*, --U.S.--, 135 S. Ct. 2584 (2015), "when the rights of persons are violated, the Constitution requires redress by the courts, [despite] the more general value of democratic decision-making." *Id.* at 2605 (internal quotation marks and citation omitted). While it is not the role of courts to replace the judgment of the legislature with their own, that does not mean that they must (or even should) rubber stamp whatever the legislature decrees. *See Heller II*, 670 F.3d at 1259 (quoting *Turner Broad. Sys., Inc. v. FCC* (*Turner II*), 520 U.S. 180, 195 (1997); *Turner Broad. Sys. v. FCC* (*Turner I*), 512 U.S. 622, 666 (1994) (plurality op.)) (internal quotations omitted) (recognizing that, even with

"substantial deference," the government "is not thereby insulated from meaningful judicial review").

Rather, it is the courts' role to "assure that, in formulating its judgments, [the legislature] has drawn reasonable inferences based on substantial evidence." *Turner I*, 512 U.S. at 666. This necessarily requires courts to carefully consider the government's evidence and make an independent judgment about the reasonableness of the inferences drawn from it. *See Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989); *see also Turner I*, 512 U.S. at 666-68 (granting legislative deference but reversing judgment because Congress had not presented substantial evidence supporting its claims). Unfortunately, this sort of searching review has not been characteristic of most decisions upholding government restrictions on the Second Amendment.

To the contrary, as some astute courts have observed, the exceedingly deferential form of scrutiny that has been the hallmark of most circuits' post-*Heller* decisions "is near-identical to the freestanding 'interest-balancing inquiry' that Justice Breyer proposed—*and that the majority explicitly rejected*—in *Heller*." *Peruta*, 742 F.3d at 1176 (emphasis added); *see also, e.g.*, *Heller II*, 670 F.3d 1244, 1276-80 (2011) (Kavanaugh, J., dissenting). "Yet, *Turner* deference arguments live on like legal zombies lurching through Second Amendment jurisprudence." *Duncan*, 366 F. Supp. 3d at 1166, *affirmed by* 970 F.3d 1133 (9th Cir. 2020), *reh'g granted by* 988 F.3d 1209 (9th Cir. 2021).

In short, since *Heller*, a Second Amendment analytical framework has emerged that all but guarantees not only that intermediate scrutiny will apply, *but also that nearly every gun-control measure*

will survive it. This analysis is in no sense a heightened standard of review. It is in effect rational basis review, a level of scrutiny that *Heller* undeniably forecloses. 554 U.S. at 628, n.27. There would almost certainly be different results in at least some of these cases had the courts applied real heightened scrutiny or, better yet, decided to "undertake a complete historical analysis of the scope and nature of the Second Amendment right …." *Peruta*, 742 F.3d at 1173.

B. The Right to Publicly Bear Arms Has Been Rendered Illusory in Several Jurisdictions Employing Such Analytical Ruses

Petitioners establish how the Second Circuit's analysis wrongly gave short shrift to the carry right. Pet'r's Br. 20. And while most jurisdictions honor the right to publicly carry arms for self-defense, the Second Circuit is hardly alone in so diminishing that right. Aside from the Third Circuit's cursory dismissal of Second Amendment protection for the right to publicly carry in *Drake v. Filko*, discussed above, at least three other circuits have wrongly discounted that right. *See*, *e.g.*, *Gould*, 907 F.3d 659 (holding that the "core" Second Amendment right is limited to in-home self-defense and law restricting public carry met intermediate scrutiny); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013) (holding that Maryland's "good and substantial reason" requirement for obtaining a carry permit is reasonably adapted to a substantial governmental interest); *Peterson v. Martinez*, 707 F.3d 1197 (10th Cir. 2013) (construing challenge as seeking Second Amendment right to

concealed carry and holding that no such right exists); *Hightower v. City of Boston*, 693 F.3d 61 (1st Cir. 2012) (holding that concealed carry licensing regime was presumptively lawful under *Heller*). Lower courts have thus particularly disrespected the carry right.

Indeed, one of the worst examples of lower court analytical ruses is the Ninth Circuit's treatment of the right to carry. In a case effectively identical to the one here, plaintiffs, including Amicus CRPA, challenged denials of their concealed carry licenses, arguing that the "good cause" policy of the licensing authority—a county sheriff—offended the Second Amendment by not recognizing one's desire for general self-defense. *Peruta*, 824 F.3d at 924. The plaintiffs expressly stated that they sought concealed carry licenses because there was no other way to lawfully carry in California, due to the state prohibiting open carry and not making open carry licenses legally available to them. *Id.* at 927. Correctly applying the Court's textual and historical analysis in *Heller*, a panel of the Ninth Circuit agreed with the plaintiffs. *Peruta*, 742 F.3d 1144, *rev'd en banc*, 824 F.3d 919.

What happened next is best summarized by Justice Thomas in dissenting from the Court's denial of certiorari:

> The Ninth Circuit sua sponte granted rehearing en banc and, by a divided court, reversed the panel decision. In the en banc court's view, because petitioners specifically asked for the invalidation of the sheriff's "good cause" interpretation, their legal challenge was limited to that aspect of

> the applicable regulatory scheme. The court thus declined to "answer the question of whether or to what degree the Second Amendment might or might not protect a right of a member of the general public to carry firearms openly in public." It instead held only that "the Second Amendment does not preserve or protect a right of a member of the general public to carry *concealed* firearms in public."

Peruta v. California, 137 S. Ct. 1995, 1997 (2017) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari) (citations omitted). The en banc panel so ruled despite the plaintiffs expressly declaring their willingness to carry in whatever manner the state would allow them to, which happened to be concealed under a license. *Peruta*, 824 F.3d at 952-55 (Callahan, C.J., dissenting).

In other words, the Ninth Circuit voluntarily ordered the panel's favorable ruling for the plaintiffs to be reheard en banc and then disingenuously reframed the question that the plaintiffs presented so as to avoid the actual issue. This is not just Amici's interpretation. Justice Thomas concluded that

> The en banc court's decision to limit its review to whether the Second Amendment protects the right to concealed carry—as opposed to the more general right to public carry—was untenable. Most fundamentally, it was not justified by the terms of the complaint, which called into question

> the State's regulatory scheme as a whole.

Peruta, 137 S. Ct. at 1997 (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari). He added that "[h]ad the en banc Ninth Circuit answered the question actually at issue in this case, it likely would have been compelled to reach the opposite result." *Id.* at 1998.

The en banc panel did not limit its disrespect of the carry right there. It alternatively held that "[e]ven if we assume that the Second Amendment applies, California's regulation of the carrying of concealed weapons in public survives intermediate scrutiny because it promotes a substantial government interest that would be achieved less effectively absent the regulation." *Peruta*, 824 F.3d at 942 (internal quotation to concurrence omitted). According to the Ninth Circuit, therefore, the government can deny people the only form of carry allowed under state law based solely on the government's convenience. As explained above, that fails the demands of *any* true heightened scrutiny.

To make matters worse, the en banc panel ended its decision by announcing that "we need not, and do not, answer the question of whether or to what degree the Second Amendment might or might not protect a right of a member of the general public to carry firearms openly in public." *Id.* at 942. Then when a panel ruled in a subsequent case that Hawaii's carry restrictions—which are effectively the same as New York's and California's—violates the Second Amendment because they ban *open* carry, the Ninth Circuit *again* ordered the matter to be heard en banc. And *again*, the en banc panel reversed! *Young*

v. Hawaii, 992 F.3d 765 (9th Cir. 2021). Its reasoning was that "[t]here is no right to carry arms *openly* in public; nor is any such right within the scope of the Second Amendment." *Id.* at 821 (emphasis added). But, as with the plaintiffs in *Peruta*, Mr. Young was not asking for a declaration that there is a right to *openly* carry specifically. The only reason the panel so cabined the relief he sought was because *Peruta* forced it to by removing concealed carry from Second Amendment protection. *Young*, 992 F.3d at 860 (9th Cir. 2021) (O'Scannlain, J., dissenting).

In sum, the Ninth Circuit has artificially construed carry-restriction challenges as narrowly requesting a specific form of carry, then analyzed each form of carry in a vacuum, and found no right to any specific form of carry. This piecemeal approach has allowed the Ninth Circuit to dodge the actual question presented in these cases: Does the Second Amendment protect *some* form of public carry? As a result, the Ninth Circuit's holdings effectively mean that "while the Second Amendment may guarantee the right to *keep* a firearm for self-defense within one's home, it provides no right whatsoever to *bear*—i.e., to carry—that same firearm for self-defense *in any other place*." *Id.* at 829 (O'Scannlain, J., dissenting). "In so holding, the [Ninth Circuit] reduces the right to 'bear Arms' to a mere inkblot." *Id.*

The Court's ruling here should therefore rein in lower courts from recasting plaintiffs' claims to avoid Second Amendment scrutiny or applying forms of scrutiny that relieve the government of its evidentiary burdens. But that is not all. The ruling here should also reaffirm the Court's declaration that the carry right is a robust right that entitles law-

abiding adult citizens to be "armed and ready" for self-defense in some manner, *in case* of confrontation *anywhere* in public that is not a "sensitive place." *Heller*, 554 U.S. at 584, 626-27 & n.26. Litigation filed since *Peruta* shows why that clarification is necessary.

Responding to the Ninth Circuit's disingenuous disposal of *Peruta*, several individuals, joined by Amicus CRPA, sued challenging not only a county sheriff's denial of their concealed carry licenses under a subjective "good cause" standard, but also all of California's other carry restrictions, whether open or concealed, that make such licenses necessary. *Flanagan v. Harris,* No.16-06164, 2018 U.S. Dist. LEXIS 82844 (C.D. Cal. May 7, 2018). Their broad challenge is designed to ask the Ninth Circuit to finally answer whether it will recognize the Second Amendment as protecting some form of public carry.

Bound by *Peruta*, the district court in *Flanagan* dismissed the plaintiffs' claims to the extent that they challenged concealed carry restrictions. *Flanagan v. Harris*, No. 16-06164, 2017 U.S. Dist. LEXIS 28503, at *13 (C.D. Cal. Feb. 23, 2017). The court then upheld the remaining challenged laws under the typical watered-down version of "intermediate scrutiny" commonly afforded Second Amendment challenges in Ninth Circuit courts. *Flanagan,* 2018 U.S. Dist. LEXIS 82844, at *14-28. Foreshadowing the next iteration of devices to avoid respecting the carry right, the district court also suggested that California's narrow affirmative defense to criminal prosecution for someone who publicly carries a firearm in the face of "immediate, grave danger" satisfies the Second Amendment's mandates. *Id.* at *16. But the defense

is illusory. Under California law, an individual is generally prohibited from having even an unloaded firearm on or near his person in public to load should "immediate, grave danger" arise. *See id.* §§ 26350 (prohibiting open carry of unloaded firearms) and 25400 (prohibiting concealed carry of firearms, even if unloaded). As the *Peruta* panel observed when rejecting the same argument, "where the fleeing victim would obtain a gun during that interval is apparently left to Providence." *Peruta*, 742 F.3d at 1147, n.1. Thus, exceptions to carry restrictions "for situations of 'immediate, grave danger' offer no solace to an individual concerned about protecting self and family from unforeseen threats in public." *Peruta*, 824 F.3d at 951.

Undaunted by that reality, California is now urging the Ninth Circuit to accept the premise that its so-called "exception" to carry restrictions where "immediate, grave danger" exists, along with the ability to openly carry firearms in remote, unpopulated locations where discharging firearms is lawful, is beyond what the Second Amendment expects of it. Answering Brief for the State Appellee at 50, No. 18-55717 (9th Cir. Nov. 20, 2018), ECF No. 30. So in anticipation of this next round of analytical ruses, the Court should rule in a way that puts lower courts on notice that laws preventing law-abiding adults from being able to carry in anticipation of attack or from carrying anywhere except in the middle of the forest, cannot satisfy the Second Amendment's mandates. Otherwise, cases like *Flanagan* will no doubt be seeking the Court's future intervention.

II. The Weak Analyses Lower Courts Employ Have Led to Legislatures Disrespecting the Second Amendment, Perpetuating the Cycle of Petitions to The Court Raising Second Amendment Issues

There is reason beyond just disrespect of the right to carry for the Court to provide lower courts the additional guidance they claim to need. Following watershed decisions from the Court like those in *Heller* and *McDonald*, one would expect legislatures to revisit their existing laws and amend them in deference to the Second Amendment. Not only have few, if any, jurisdictions undertaken such an effort, but several have instead substantially increased those burdens. As explained above, courts have gone to suspiciously great lengths to uphold most laws challenged under the Second Amendment, telegraphing to legislatures hostile to the Second Amendment that there will be no repercussions for infringing the Peoples' right to keep and bear arms.

Take Amicus CRPA's home state of California, for instance. Since 2008, California has enacted scores of bills and one voter initiative sponsored by its current governor further restricting firearms. Under these new laws, California residents must pass a written test to be eligible to acquire a firearm for which they must pay a $25 fee, register all firearm transactions with the state, and obtain permission from the state before making any home-built firearm, to name a few. Those laws also expanded (again) the definition of "assault weapon" to apply to commonly owned rifles, requiring owners to register them and pay a fee as a condition of continued possession. Californians must now also conduct any

ammunition transaction in-person, through a licensed vendor and undergo a background check for any ammunition purchase. And the age to purchase long-guns has been raised—just to name a few more. *See* California Department of Justice, Division of Law Enforcement, *New and Amendment Firearms/Weapons Laws* (Nos. 2008-BOF-03, 2009-BOF-05, 2010-BOF-04, 2010-BOF-05, 2012-BOF-01, 2013-BOF-01, 2014-BOF-01, 2015-BOF-01, 2016-BOF-02, 2018-BOF-01, 2019-BOF-01, 2021-BOF-01), *available at* https://oag.ca.gov/firearms/infobuls. This does not account for the hundreds of firearm-related bills proposed each year in the California legislature, including one pending that would impose a tax on firearm ownership.

California is not alone in its crusade against the Second Amendment. In 2013, New York enacted a series of laws requiring background checks for ammunition transactions and prohibiting various popular firearms it classifies as "assault weapons" or any magazine loaded with more than seven rounds of ammunition. Sess. Law News of N.Y. Ch. 1 (S. 2230). That same year, Colorado enacted its own ban against selling, transferring, or possessing any magazine able to hold more than 15 rounds. Colo. Legis. Serv. Ch. 48 (H.B. 13-1224). And in 2016, Massachusetts Attorney General Maura Healey issued an "Enforcement Notice" that expanded state laws prohibiting certain common types of firearms the legislature arbitrarily classified as "assault weapons." Office of the Attorney General, *Enforcement Notice: Prohibited Assault Weapons*, https://www.mass.gov/files/documents/2018/11/13/assault-weapons-enforcement-notice.pdf (July 20, 2016).

In sum, lower courts' perceived lack of clarity from the Court in analyzing Second Amendment claims almost certainly results in more strict gun laws, which in turn will almost certainly result in more litigation seeking the Court's guidance.

CONCLUSION

For these reasons, the Court should not only reverse the Second Circuit's decision but should do so by setting forth standards that make clear beyond cavil that the Second Amendment is not to be treated as a "second-class" constitutional guarantee. *See McDonald*, 561 U.S. at 780.

Respectfully submitted,

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