No. 17-905

In The
Supreme Court of the United States

OFFICER ROBERT MAHONEY, et al.,

Petitioners,

vs.

CITY OF SEATTLE, WASHINGTON; ED MURRAY; JENNY DURKAN, Mayor, City of Seattle; and PETER HOLMES, Seattle City Attorney,

Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Since January 2014, the Seattle Police Department ("SPD") has directed its officers to follow a federal court-approved Use of Force policy ("UF Policy"). The UF Policy was developed under a Consent Decree in a still-pending 34 U.S.C. § 12601 lawsuit that the United States Department of Justice ("DOJ") brought against the City of Seattle. The SPD officers who are Petitioners here allege that the first court-approved UF Policy (which has since been amended) violates their constitutional rights. With that background, the questions presented are as follows:

1. Did the Ninth Circuit, after "assuming" that the UF Policy is subject to the Second Amendment, correctly apply intermediate scrutiny to analyze Petitioners' claim that the UF Policy violates their Second Amendment rights when: (a) the UF Policy regulates Petitioners' use of department-issued firearms while acting in the course and scope of their official duties as police officers; and (b) the UF Policy allows officers to use their department-issued firearms in self-defense?

2. Did the Ninth Circuit correctly hold that a UF Policy that was adopted to address government objectives of both public safety and police officer safety, and which contains specific provisions to protect the safety of police officers, survives intermediate scrutiny?

QUESTIONS PRESENTED – Continued

3. Did the Ninth Circuit misapply federal pleading standards when it assessed Petitioners' Second Amendment claims by reference to the language of the UF Policy?

4. Did the Ninth Circuit correctly affirm the district court's conclusion that there is no freestanding fundamental right to self-defense under the Fourteenth Amendment?

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This case does not warrant review. The decision below is consistent with both the Second Amendment and *District of Columbia v. Heller*, 554 U.S. 570 (2008), in which the Court held that the Second Amendment protects an individual right to bear arms for the purpose of self-defense in the home. In analyzing whether any hypothetical burden on the Second Amendment rights of police officers imposed by the UF Policy is constitutionally permissible, the court of appeals took an approach that is consistent with *Heller* and presents no conflict with any other circuit. The court of appeals' analysis was guided by the now familiar two-step inquiry adopted by a majority of federal appellate circuits applying *Heller*, including the Ninth Circuit. *See Silvester v. Harris*, 843 F.3d 816, 820-21 (9th Cir. 2016), *cert. denied sub nom. Silvester v. Becerra*, 583 U.S. ___ (Feb. 20, 2018). Petitioners do not challenge the use of the two-step inquiry to resolve their claim. Petitioners argue only that the court of appeals erred in applying an incorrect level of scrutiny and by concluding that the UF Policy does not violate Petitioners' constitutional rights. As explained below, there is no reason to revisit that conclusion by taking up the first three questions proposed by Petitioners.

Petitioners' additional questions are no more worthy of review. Neither Fed. R. Civ. P. 12(b) nor this Court's precedent required the court of appeals to disregard the text of the UF Policy and rely instead on the characterizations of the policy offered by Petitioners in

their complaint. Finally, there is no reason or basis for the Court to accept review and educe a new free-standing right to self-defense from the penumbra of the Fourteenth Amendment.

In addition, this case is a poor vehicle to address the questions offered by Petitioners. The UF Policy that Petitioners seek to strike down was developed under the terms of a Consent Decree between the City of Seattle and DOJ that is the subject of pending federal litigation. *United States v. City of Seattle*, Case No. 2:12-cv-1282JLR (W.D. Wash.). The UF Policy is an evolving document that remains under the active review and supervision of the federal court overseeing the Consent Decree. Petitioners, through their union, have a right to participate in the Consent Decree proceedings and provide input regarding the UF Policy but have elected not to do so. Petitioners' attempt to void the UF Policy through a collateral attack in separate litigation, based on allegations in a pleading rather than a developed factual record, provides a poor vehicle for review by this Court.

The Petition should be denied.

STATEMENT OF THE CASE

Background of Use of Force Policy

In March 2011, DOJ opened an investigation into the use of force by SPD, alleging that nearly 20 percent of the uses of force by Seattle police officers were

excessive. D. Ct. Dkt. 13 at ¶ 9, Ct. App. Dkt. 5-2 (Excerpts of Record) at 22 (First Amended Complaint). In 2012, DOJ filed a lawsuit against the City in the U.S. District Court for the Western District of Washington pursuant to 34 U.S.C. § 12601. *See United States v. City of Seattle*, Case No. 2:12-cv-1282JLR (W.D. Wash.), Dkt. 1. Although the City did not admit or agree with DOJ's allegations, it entered into a settlement agreement with DOJ (the "Consent Decree"). D. Ct. Dkt. 13 at ¶ 12, Ct. App. Dkt. 5-2 at 22-23. District Court Judge James Robart approved the Consent Decree in July 2012 and has maintained jurisdiction of the case since then. D. Ct. Dkt. 13 at ¶¶ 9, 12, Ct. App. Dkt. 5-2 at 22-23.[1]

As the Consent Decree required, the City, DOJ, and court-appointed Monitor Merrick Bobb submitted a Consensus Use of Force Policy to the Consent Decree court. D. Ct. Dkt. 13 at ¶¶ 8, 14, Ct. App. Dkt. 5-2 at 22-23. The UF Policy set forth SPD's policies regarding use of force by its officers, addressing (among other subjects) general principles relating to the use of force; the use of appropriate de-escalation tactics to reduce the need for force; when deadly force may be used; the circumstances under which firearms and other force tools may be used; and procedures relating to the investigation and review of uses of force by officers. Ct. App. Dkt. 5-2 at 53-149 (UF Policy). The UF Policy's core principles stated that the policy applies to police

[1] To avoid confusion with the district court that decided this case, for purposes of this response Judge Robart's court is referred to herein as the "Consent Decree court."

officers undertaking a public policing mission for the City of Seattle and that the use of force by officers is sometimes necessary and unavoidable. *Id*. at 53-54.

During the creation of the UF Policy, select SPD officers were invited to submit comments through their union and through a departmental website. D. Ct. Dkt. 13 at ¶ 18, Ct. App. Dkt. 5-2 at 24. Neither the officers who have submitted this Petition nor their union have sought to participate in the Consent Decree proceedings to object to the UF Policy, to provide input as to how the policy is working, or for any other purpose.

The Consent Decree court approved the UF Policy in December 2013, finding it constitutional. D. Ct. Dkt. 13 at ¶ 8, Ct. App. Dkt. 5-2 at 22. Specifically, the court noted that its role was "to ensure that the Proposed Policies conform to the requirements of the Consent Decree, the United States Constitution, and judicial decisions interpreting the City's constitutional obligations." *United States v. Seattle*, Case No. 2:12-cv-1282JLR, Dkt. 115 (Dec. 17, 2013) (Order Approving Consensus Use of Force Policies). The UF Policy went into effect on January 1, 2014. D. Ct. Dkt. 13 at ¶ 8, Ct. App. Dkt. 5-2 at 22.

In the years since the UF Policy was approved, the Consent Decree court has supervised the implementation and modification of the UF Policy. *See generally docket for United States v. Seattle*, Case No. 2:12-cv-1282JLR. In this role, the court approved one set of changes to the UF Policy, *id*., Dkt. 225, and the policy

remains subject to possible further modifications, *id*., Dkt. 388-1. The Consent Decree court has also been presented with regular reports on the efficacy of the UF Policy. *See id.*, Dkts. 231, 247, 360, 362, 383, 443.

In January 2018, the Consent Decree court declared the City to be in full and effective compliance with the Consent Decree, satisfying the first of two required phases of the Consent Decree. *United States v. City of Seattle*, Case No. 2:12-cv-1282JLR, Dkt. 439, 2018 WL 348372 at * 1 (W.D. Wash. Jan. 10, 2018) (Order Finding Initial Compliance with the Consent Decree). In so ruling, the court found that over the course of two years, the use of force by SPD declined over a broad range of indicators while crime rates in Seattle remained flat. *Id*. at * 5. The court credited the "dramatic improvements" in SPD's use of force to the "diligent and ongoing work of the SPD – both its rank and file officers and its command staff." *Id.* The court observed that SPD's efforts "are receiving national attention and are making a difference in the level of trust the community places in SPD." *Id*.

Following this finding, the Consent Decree court continues to exercise jurisdiction to ensure the City sustains its compliance with the Consent Decree. The January 10, 2018 order accordingly instructs the parties to continue "develop[ing] and refin[ing] . . . policies and procedures in accordance with constitutional principles," subject to the continuing oversight of the court. *Id*. at * 6.

Facts and Procedural History

This Petition is not an appeal from the still-pending Consent Decree proceedings. Instead, this case was initiated by 126 Seattle police officers who brought a separate action to challenge the UF Policy. *See* D. Ct. Dkt. 1. In the Amended Complaint filed in August 2014, 102 of the original plaintiffs alleged that the UF Policy violated their rights under the Second, Fourth, Fifth and Fourteenth Amendments by, among other things, constraining their options in defending themselves against potentially dangerous suspects. D. Ct. Dkt. 13, Ct. App. Dkt. 5-2 at 20-52. The Amended Complaint asked the district court to stop the implementation of the UF Policy and to declare it unconstitutional. *Id*. at ¶¶ 75-78, Ct. App. Dkt. 5-2 at 47.

Both the City and the Monitor moved to dismiss the Amended Complaint under Fed. R. Civ. P. 12(b)(6). In October 2014, the district court granted both motions and dismissed the Amended Complaint with prejudice. *See* Pet. App. 23-41 (Order on Motions to Dismiss). 92 of the 102 Officers who had filed the Amended Complaint appealed to the U.S. Court of Appeals for the Ninth Circuit. In a unanimous decision by U.S. District Court Judge William Hayes, sitting by designation, joined by Judges Carlos Bea and N.R. Smith, the court of appeals affirmed. *See* Pet. App. 1-22 (Opinion).

The court of appeals resolved the Second Amendment challenge by applying the two-step inquiry adopted by the Ninth Circuit after *Heller* and

McDonald v. City of Chicago, 561 U.S. 742 (2010). *Id*. at 8. In the first step, the court assumed without deciding that the UF Policy burdens conduct protected by the Second Amendment. *Id*. at 11. For purposes of this response only, the City does not contest the court of appeals' assumption.[2] In the second step, the court of appeals determined that the UF Policy does not impose a substantial burden on the Second Amendment right to use a firearm for the core lawful purpose of self-defense and that the UF Policy is not such a severe restriction that it amounts to a destruction of the right. The court therefore applied intermediate scrutiny to the UF Policy and found the City's objective of ensuring the safety of the public and its police officers to be important and that there was a reasonable fit between this objective and the UF Policy.[3] Because the UF Policy satisfied intermediate scrutiny, the court did not address the broader question of whether the Second Amendment applies at all to police officers carrying city-issued firearms while on duty.

The court of appeals summarily disposed of Petitioners' other claims, finding as is relevant here, that the Fourteenth Amendment provides no freestanding

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[2] The City notes, however, that Petitioners erroneously characterize this assumption as a "holding." *See* Pet. 11.

[3] The court applied the two-step Second Amendment inquiry and intermediate scrutiny to facts alleged in Petitioners' First Amended Complaint. The court also took judicial notice of the amended version of the UF Policy and the docket sheet from the Consent Decree litigation.

fundamental right to self-defense outside the Second Amendment.

REASONS FOR DENYING THE PETITION

The Petition should be denied because it presents a claim of error on a question of limited scope and application that is tied specifically to Seattle's UF Policy and the record in this case.

First, the decision below faithfully applied *Heller* to the record in this case. Petitioners do not argue that the Ninth Circuit's two-step inquiry for Second Amendment claims was the wrong legal test to apply to their claims. Petitioners simply quarrel with the court's decision in the second step to apply intermediate scrutiny and find the UF Policy constitutional. Neither *Heller* nor any other decision of this Court required a decision to the contrary.

Second, this case is a poor vehicle for this Court to resolve the questions presented. The Consent Decree court has continuing jurisdiction over the implementation and potential modification of the UF Policy. Based on a multi-year factual record, that court recently found the City to be in full and effective compliance with the Consent Decree. *See United States v. Seattle*, Dkt. 439, 2018 WL 348372. The UF Policy has changed since the Amended Complaint was filed, and additional changes would be permitted under the Consent Decree. There is no compelling reason for this Court to accept review to decide issues based (as Petitioners

urge) only on allegations in a pleading, when those issues can – even now – be addressed in the Consent Decree proceedings with the benefit of a developed factual record. Far from being an appropriate vehicle to decide novel Second Amendment issues, this case is not even the best vehicle to decide the narrow question of how SPD can constitutionally guide the use of force by its officers.

Third, no conflict exists among the lower courts on the appropriate level of constitutional scrutiny to apply to policies controlling the use of government-issued firearms by police officers during the course of their employment. In fact, neither the court below nor any other federal court of appeals has addressed this issue, much less decided it.

Finally, the other issues asserted by the Petition are without merit. The courts below followed the civil rules by dismissing Petitioners' complaint because the facts as alleged and those readily determinable on the face of the UF Policy demonstrated that no relief was possible. And the court of appeals correctly decided that there is no freestanding right to self-defense flowing from the Fourteenth Amendment.

For each of these reasons, the Petition should be denied.

I. The Court of Appeals Faithfully Applied *Heller*.

Petitioners first urge this Court to accept review to hold that *Heller*'s self-defense rationale applies outside the home and with equal force to public employees carrying publicly-issued weapons as part of their duties. Petitioners then contend that strict scrutiny is required of any policy that regulates the use of force by police officers because police officers must "consistently engage with the public in unpredictable circumstances." Pet. 17. *Heller* did not address, let alone resolve, any of the issues the Petition raises. In essence, Petitioners seek to vastly expand *Heller*. The Petition should be denied because the court of appeals faithfully applied *Heller* and because Petitioners' challenge is little more than a disagreement with a fact-bound application of *Heller* to the record in this case.

A. The *Heller* Decision.

The Court framed the issue in *Heller* as follows: "We consider whether a District of Columbia prohibition on the possession of usable handguns in the home violates the Second Amendment to the Constitution." 554 U.S. at 573. *Heller* noted that the District's law struck at the core of the Second Amendment right, which was "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 635.

Heller did not define or even attempt to "clarify the entire field" of the Second Amendment, *id.* at 635, and

its holding was a narrow one: "In sum, we hold that the District's ban on handgun possession *in the home* violates the Second Amendment, as does its prohibition against rendering any lawful firearm *in the home* operable for the purpose of *immediate* self-defense." *Id.* at 635 (emphasis added); *see also McDonald*, 561 U.S. at 791 ("In *Heller*, we held that the Second Amendment protects the right to possess a handgun *in the home* for the purpose of self-defense.") (emphasis added). *Heller* does not support the proposition that the Second Amendment applies to public employees carrying government-issued arms while on official duty. *Heller*, 554 U.S. at 595 ("we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation") (emphasis in original).

B. The Court of Appeals Did Not Limit the *Heller* Decision or Decide the Scope of the Second Amendment.

Petitioners do not claim that the court of appeals ignored *Heller*. Rather, they argue only that it reached the wrong result on the record presented in this case. This argument fails, and the Petition does not require review by this Court because the court of appeals correctly answered the limited question before it.

The court of appeals framed the question in this case narrowly by asking whether the UF Policy "violates the Second Amendment right of police officers to use firearms for the core lawful purpose of self-defense." Pet. App. 6. The court answered this question

using the two-step inquiry adopted by the Ninth Circuit, along with most appellate circuits,[4] following *Heller* and *McDonald*. Pet. App. 8-9 (citing *Silvester*, 843 F.3d at 820-21). Using this two-step approach, the Court first asked whether the UF Policy burdened conduct protected by the Second Amendment and then what level of scrutiny to apply to the UF Policy.

The court of appeals answered the first question by assuming without deciding that the Second Amendment was burdened by the UF Policy. Pet. App. 11. The court of appeals did not limit *Heller*, or even "purport to rule definitively" on the threshold question of whether the Second Amendment applies at all to the on-duty use of city-issued firearms by police officers. Pet. App. 11. The court of appeals instead noted that

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[4] This two-step approach is also used to decide Second Amendment Claims by the Second, Third, Fourth, Fifth, Sixth, Seventh, Tenth, Eleventh, and D.C. Circuits. *See, e.g.*, *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 254 (2d Cir. 2015), *cert. denied sub nom. Shew v. Malloy*, 136 S. Ct. 2486, 195 L. Ed. 2d 822 (2016); *GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Eng'rs*, 788 F.3d 1318, 1322 (11th Cir. 2015); *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012), *cert. denied*, 134 S. Ct. 1364, 188 L. Ed. 2d 296 (2014); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012), *cert. denied*, 68 U.S. 922, 133 S. Ct. 375, 184 L. Ed. 2d 222 (2012); *Heller v. District of Columbia*, 670 F.3d 1244, 1251-58 (D.C. Cir. 2011); *Ezell v. City of Chicago*, 651 F.3d 684, 701-04 (7th Cir. 2011); *United States v. Reese*, 627 F.3d 792, 800-05 (10th Cir. 2010), *cert. denied*, 563 U.S. 990, 131 S. Ct. 2476, 179 L. Ed. 2d 1214 (2011); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010), *cert. denied*, 562 U.S. 1158, 131 S. Ct. 958, 959, 178 L. Ed. 2d 790 (2011).

the UF Policy is not one of the "presumptively lawful regulatory measures" identified by the *Heller* opinion. Pet. App. 10 (quoting *Heller*, 554 U.S. at 627 n. 26). Based on the "lack of historical evidence in the record" before it, the court declined to decide whether the UF Policy was otherwise outside the historical scope of the Second Amendment. Pet. App. 11.

The court of appeals did not need to use a different analytical approach to decide this case. In fact, Petitioners do not challenge the use of the two-step inquiry. Petitioners instead ask this Court to bypass the court of appeals' assumption and affirmatively find in the first step that the Second Amendment protects the right of police officers to carry government-issued firearms in the course of their public duties. Petitioners are not aggrieved by that assumption in their favor. For that reason alone, this Court does not need to decide this issue.

Even were the Court to reach this issue, Petitioners do not cite, and the City is not aware of, any case law controlling or even addressing whether the Second Amendment applies here. In the absence of controlling case law, courts can assume a constitutional right applies and analyze whether a challenged governmental employment policy infringes that right. *See Nat'l Aeronautics & Space Admin. v. Nelson*, 562 U.S. 134, 138, 151-52 (2011). The court of appeals did not err in assuming the Second Amendment applied to the UF Policy where an "exhaustive historical analysis" was not practical.

In any event, even had the court of appeals definitively found that the Second Amendment applied to the UF Policy in the first step, the court's analysis in the second step would have been unchanged because the UF Policy does not violate that right. There is no compelling reason for this Court to accept Petitioners' invitation to decide definitively an issue that would not change the outcome of their case.

C. The Court of Appeals Correctly Applied *Heller* By Deciding to Apply Intermediate Scrutiny.

The court of appeals similarly followed this Court's precedent in the second step of its analysis by determining intermediate scrutiny was sufficiently protective of any Second Amendment rights burdened by the UF Policy. The court of appeals again took a protective view of the Second Amendment and began its analysis with this Court's statement that the Second Amendment protects the right to use arms for the "core lawful purpose of self-defense." *Heller*, 554 U.S. at 630.[5] The court of appeals then determined that the UF Policy did not severely burden this core right and applied intermediate scrutiny. This result is consistent with

[5] The City respectfully disagrees with the court of appeals' decision to the extent it suggests that the Second Amendment protects the "core lawful purpose of self-defense" beyond the right to keep a handgun in the home. Again, this Petition does not require resolution of this question because the UF Policy was found to not burden improperly this core purpose.

the "near unanimity in post-*Heller* case law." *Silvester*, 843 F.3d at 823.

Petitioners' challenge to the court of appeals' fact-bound application of the principles set forth in *Heller* is not worthy of this Court's consideration. First, the court of appeals did not attempt to limit or clarify the core of the Second Amendment right. The court of appeals instead recognized that the UF Policy is an employment regulation governing the conduct of on-duty public employees rather than a law of general application. In that limited and proprietary context, the City needs a "significant degree of control" over its employees' conduct that justifies limitations on constitutional freedoms. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). *See also Engquist v. Oregon Dep't of Agr.*, 553 U.S. 591, 599, (2008) (the "government has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large"). The City plainly has a compelling interest in regulating the use of force by its police officers.

Second, the court of appeals looked to the face of the UF Policy to correctly find that it does not substantially burden Petitioners' Second Amendment Rights, because it allows officers to use force in self-defense. Pet. App. 16. This was a limited ruling based on the record in this case. In fact, Petitioners' own reasoning precludes a finding that the UF Policy is a substantial burden on officers' core self-defense rights. Petitioners recognize, as they must, that even absent the UF Policy, police officers are "permitted to use force only when

objectively reasonable." Pet. 15. The UF Policy is consistent with this generally applicable restriction because it allows officers to use force when "objectively reasonable." Ct. App. Dkt. 5-2 at 54 (UF Policy).

The court of appeals did not answer, and this case does not present, the question of whether some limitations on the use of firearms by public employees at work beyond those contained in the UF Policy could become significant enough to warrant strict scrutiny. *See* Pet. App. 16.

Petitioners' arguments to the contrary fail to establish that the court of appeals violated this Court's precedent by failing to apply strict scrutiny. Petitioners cite no case law limiting discretion under *Garcetti*, 547 U.S. at 418, when public employees must interact with the public. Pet. App. 17. If that novel position were adopted, it would lead to the absurd result that governmental employers would only be able to control public servants to the extent they do not take any action that affects the public. Fortunately for the public, that is not the law. *See Nelson*, 562 U.S. at 153 (rejecting strict scrutiny for employment policies carrying out "important work" of "American taxpayer" funded space policy).

Nor is strict scrutiny required by cases limiting the liability of a public (or quasi-public) entity whose employees acted in self-defense. *See Terry v. Ohio*, 392 U.S. 1, 11 (1968); *New Orleans & N.E.R. Co. v. Jopes*, 142 U.S. 18, 27 (1891); *Plakas v. Drinski*, 19 F.3d 1143, 1150 (7th Cir. 1994). None of those cases announced

any limit on how the public entity could avoid liability in the first place by instructing employees to avoid causing injury when possible. Finally, *Brown v. United States*, 256 U.S. 335, 344 (1921), cited by Petitioners, is entirely inapplicable because the court of appeals did not address whether self-defense is available to officers as a defense against criminal homicide under the UF Policy.

Nothing in the court of appeals' decision to apply intermediate scrutiny to analyze Petitioners' Second Amendment challenge offends the Second Amendment or is inconsistent with controlling case law.

D. The Court of Appeals Correctly Affirmed the Dismissal of the Second Amendment Claim after Applying Intermediate Scrutiny.

Applying the appropriate standard of intermediate scrutiny, the court of appeals correctly dismissed Petitioners' Second Amendment claims. Consistent with this Court's precedent, the court examined whether the City's stated objective was significant, substantial or important and whether there was a reasonable fit between the UF Policy and that state objective. Pet. App. 17. *See Nelson*, 562 U.S. at 155 (employment regulations were Constitutional because they were "reasonable in light of the Government interests at stake [and] subject to substantial protections"). Based on the allegations presented in the First Amended Complaint, the court of appeals correctly

found that the UF Policy served the important government interest of public and police officer safety and was a reasonable fit to achieve those goals. Pet. App. 18-19.

Neither Civil Rule 8 nor Civil Rule 12 required the court of appeals to reach a different result under intermediate scrutiny. *See* Fed. R. Civ. P. 8(a), 12(b). As this Court has made clear, Rule 8 pleading requirements are not satisfied by "labels and conclusions" and "naked assertions." *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009) (brackets removed). A complaint cannot therefore survive a motion to dismiss based only on speculative allegations. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In effect, Petitioners ask this Court to limit *Iqbal* and *Twombly* and hold that their interpretations of the text of the UF Policy and four-year-old predictions about how the UF Policy would be implemented must be accepted as true, no matter how inconsistent they may be with other documents of which the court has taken judicial notice, including the UF Policy and the docket in the Consent Decree proceedings. *See* Pet. 22.

There is no reason to expand Rule 8 for Petitioners. The First Amended Complaint contains mischaracterizations of the UF Policy text.[6] And the dire

[6] By way of illustrative example, Petitioners allege, "The clear, though incorrect, implication of the UF Policy is that any use of force requires heightened justification beyond what would be a reasonable response to the situation." D. Ct. Dkt. 13 at ¶ 53, Ct. App. Dkt. 5-2 at 37. In fact, the UF Policy states, "An officer shall use only the force reasonable, necessary, and proportionate

predictions in the Amended Complaint[7] stand in stark contrast to the Consent Decree court's recent decision measuring the City's progress against the "goal of ensuring constitutional policing that protects officers, provides for public safety, and has the community's confidence" and finding the City in full and effective compliance with the Consent Decree. *United States v. Seattle*, Dkt. 439, 2018 WL 348372, at * 5. The court of appeals correctly took judicial notice of the UF Policy and Consent Decree docket. Fed. R. Evid. 201(b); *see also* 5B Wright & Miller § 1364 (3d ed. 2004). Neither Rule 8 nor Rule 12 barred it from doing so.

Finally, dismissal of Petitioners' First Amended Complaint does not foreclose Petitioners' ability to seek to correct what they perceive to be factual errors underpinning the UF Policy. If Petitioners believe that the Consent Decree court is wrong about the danger they face under the UF Policy or the best way to implement use-of-force policies for SPD, they have the right through their union to participate in that case. *See*

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to effectively bring an incident or person under control, while protecting the lives of the officer or others." Ct. App. Dkt. 5-2 at 57 (UF Policy).

[7] For example, Petitioners alleged (in 2014) "that since they filed their original complaint, assaults against SPD officers have increased significantly. Evidence of police injuries is mounting . . . First-responding officers, required by the UF Policy to delay and avoid resorting to force, are left unreasonably vulnerable when backup fails to come, or comes late, and these delay and avoidance tactics fail to bring the threat under control in a timely and decisive manner." D. Ct. Dkt. 13 at ¶ 22, Ct. App. Dkt. 5-2 at 26.

United States v. City of Los Angeles, 288 F.3d 391, 398-402 (9th Cir. 2002).[8]

E. There is No Basis to Find a Freestanding Fundamental Right to Self-Defense.

Petitioners' final argument invites this Court to find a new fundamental constitutional right to self-defense, unconnected to the Second Amendment and sweeping broadly beyond the historical limitations recognized in the *Heller* decision. Pet. 31 (arguing the fundamental right to self-defense applies "whenever, wherever, and however" an individual is confronted by life-threatening danger). This argument fails because Petitioners present no evidence from this "Nation's history and practice" that such a "free-floating and categorical" right exists. *Kerry v. Din*, 135 S. Ct. 2128, 2135 (2015) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 723-24 (1997)). At most, *Heller* and the lower court decisions cited by Petitioners demonstrate that the Second Amendment encompasses in some measure the right of self-defense. *See Wrenn v. D.C.*, 864 F.3d 650, 657 (D.C. Cir. 2017) (examining whether the Second

[8] Consistent with its position below, the City is not arguing that Petitioners did not have the right to mount a collateral challenge or that this case should have been subject to consolidation or abstention below. Petitioners had the right to bring this action, and the City consistently urged the lower courts to decide this case on its merits. This Court, however, should not accept review to allow Petitioners to use this case to advance constitutional theories based on allegations in a pleading, when another court could address the Petitioners' safety concerns with the benefit of a developed factual record.

Amendment's "'core' extends to publicly carrying guns for self-defense").

In any event, Petitioners recognize that any new Fourteenth Amendment self-defense right would be subject to the same "reasonable" limits as the right under Second Amendment. Pet. 31. There is no reason for this Court to find a broad new right, especially when that new right would be equally susceptible to limitation in the context of public employment.

II. This Case Is a Poor Vehicle to Address the Questions Presented.

For the reasons discussed above, this case is a poor vehicle for the Court to answer the questions of whether the Second Amendment applies to police officers carrying firearms during public employment and, if so, whether it is susceptible to reasonable regulation to protect the officers and the public. This case challenges a UF Policy that is evolving under judicial supervision by another federal court, which has the benefit of a developed factual record compiled over several years concerning the efficacy of the policy. Petitioners' concerns about safety and self-defense can be addressed in those proceedings. There is no compelling reason for this Court to grant review to decide novel constitutional issues, particularly in the absence of the factual record developed in the Consent Decree proceedings.

III. Lower Courts Are Not in Conflict.

As far as the City is aware, post-*Heller*, no United States court of appeals has ruled that the Second Amendment applies to the use of city-issued firearms by police officers while on duty. Petitioners do not point to any such authority.[9] And as discussed above, the court of appeals did not resolve that issue here.

To the extent lower courts have considered related issues, there is no conflict. *See Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015) (proprietary decisions of governmental entities assumed to burden the Second Amendment are subject to intermediate scrutiny).

Because this Petition presents an issue that has not been decided in the first instance by any lower court, and there is no present conflict among the lower courts, the Petition should be denied.

[9] Petitioners instead cite a series of decisions addressing the unrelated issue of whether the general public has the right to carry their own firearms outside the home. Pet. 11-16.

CONCLUSION

For these reasons, the Petition should be denied.

Respectfully submitted this 26th day of February 2018.

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