No. 18-280

IN THE

Supreme Court of the United States

NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC., ROMOLO COLANTONE, EFRAIN ALVAREZ, AND JOSE ANTHONY IRIZARRY,

Petitioners,

v.

THE CITY OF NEW YORK AND THE NEW YORK CITY POLICE DEPARTMENT-LICENSE DIVISION,

Respondents.

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

BRIEF FOR *AMICI CURIAE* PUBLIC HEALTH RESEARCHERS AND SOCIAL SCIENTISTS IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

The questions presented are:

1. Whether petitioners' challenge to the City's former rule prohibiting transport of a licensed handgun through the City to a home or shooting range outside the City by persons holding a premises license is moot, because the challenged transport restrictions are no longer in effect and are precluded by state law?

2. Whether the City's former rule was consistent with (a) the Second Amendment, (b) the Commerce Clause, and (c) the constitutional right to travel?

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are social science researchers and public health experts who are widely recognized as the leading scholars in the field.[2] As scholars who have dedicated significant portions of their careers to studying the causes and patterns of American gun violence and identifying the public policies most effective in combatting it, *amici* have a strong interest in ensuring that the Court endorses a methodology for evaluating Second Amendment challenges that treats gun rights like other rights by allowing consideration of social science evidence and expert testimony as part of the constitutional analysis. *Amici* submit this brief in support of Respondent New York City's argument that the Court should evaluate challenges like Petitioners' using the consensus two-step framework that the Circuit Courts have followed, as the Second Circuit recognized was appropriate in Second Amendment cases.

SUMMARY OF ARGUMENT

Gun violence takes an enormous toll on our country. Nearly 40,000 Americans were killed with guns in 2017, the most in recent history. See Ctrs. for Disease Control & Prevention, *Web-based Injury Statistics*

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[1] In accordance with Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in any part, and that no person or entity, other than *amici* and their counsel, made a monetary contribution to fund its preparation and submission. All parties have filed blanket consents to the filing of amicus briefs.

[2] A complete list of *amici curiae* is included in the addendum to this brief, along with a brief description of their expertise and relevant experience.

Query and Reporting System (WISQARS), *Fatal and NonFatal Injury Data*, https://www.cdc.gov/injury/wisqars (last visited Aug. 6, 2019) ("CDC WISQARS"). Nearly two-thirds of these gun deaths are gun suicides, and approximately one third are gun homicides. *Id.* Given these high levels of firearm fatalities, Americans are about 10 times more likely than citizens in other high-income countries to die by gun suicide, and nearly 25 times more likely to be killed in a gun homicide than residents of peer nations. Erin Grinshteyn & David Hemenway, *Violent Death Rates in the US Compared to Those of the Other High-Income Countries, 2015*, 123 J. Preventative Med. 20, 22 (2019).

The harms of interpersonal gun violence are disproportionately felt in cities and by communities of color. Roughly half of all gun homicides in America take place in just 127 cities. Aliza Aufrichtig et al., *Want to Fix Gun Violence in America? Go Local*, Guardian, Jan. 9, 2017. Within cities, violence is clustered among racially segregated, economically disenfranchised neighborhoods. In Boston, 53% of the city's gun violence occurred in less than three percent of the city's intersections and streets. Anthony A. Braga et al., *The Concentration and Stability of Gun Violence at Micro Places in Boston, 1980–2008*, 26 J. Quantitative Criminology 33, 47 (2010). Gun violence patterns mean there are racial disparities in victimization: black Americans are 10 times more likely than white Americans to die by gun homicide. See CDC WISQARS. One study found that 27% of children living in violent urban areas met the diagnostic requirements for post-traumatic stress disorder. Kevin Fitzpatrick & Janet Boldizar, *The Prevalence and Consequences of Exposure to Violence Among African-American Youth*, 32 J. Am. Acad. Child & Adolescent Psychol. 424, 426–27, 429 (1993).

These problems are daunting, and the daily death toll horrific. But there is broad agreement on the availability of reasonable measures that can reduce these costs and increase Americans' safety. The consensus of most gun violence experts is that firearm injuries and deaths are a public health threat that can be systematically addressed, just like other epidemics where causes can be isolated and impacted communities identified. Evaluating gun violence using a "public health approach"—one that prioritizes study of the problem, early prevention, and targeted interventions—has generated a comprehensive range of sensible policy measures that have been shown to reduce firearm injuries and deaths. See generally David Hemenway & Matthew Miller, *Public Health Approach to the Prevention of Gun Violence*, 368 New Eng. J. Med. 2033, 2033–35 (2013); *Reducing Gun Violence in America: Informing Policy with Evidence and Analysis* (Daniel W. Webster & Jon S. Vernick eds., 2013).

The public health approach yields many gun-violence-prevention measures that are consistent with the Second Amendment. In its landmark decision in *District of Columbia* v. *Heller*, this Court invalidated a District of Columbia handgun ban it found was invalid "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights." 554 U.S. 570, 628 (2008). But *Heller* also identified "presumptively lawful" firearm policies that do *not* run afoul the Second Amendment, and social science confirms that many of these policies, like those that keep guns out of dangerous hands or impose conditions on firearm sales, are among the most effective in reducing gun injury and death. Since *Heller*, lower courts have struck down laws that are as or nearly as restrictive as the District of Columbia's ordinance.

But they have also correctly upheld tailored gun-violence-prevention measures that *do* pass muster under traditional standards of scrutiny—and for which there is extensive evidence showing that they help save lives.

Petitioners now urge the Court to overturn the extensive body of post-*Heller* precedent developed in the lower courts, to the extent this precedent applied heightened scrutiny to uphold gun regulations. Disclaiming the "traditionally expressed levels" of heightened scrutiny to which *Heller* referred (554 U.S. at 634), Petitioners and their *amici* argue that gun laws must be analyzed solely based on "text, history, and tradition," a constitutionally unique and ambiguous inquiry that would ignore all evidence of the public safety implications of modern gun regulations.

The Court should reject Petitioners' proposal to mandate a methodology that ignores real-world consequences and elevates the Second Amendment above all other constitutional rights. Instead, it should endorse the Court of Appeals' two-step framework, which leaves room for consideration of established data and credible evidence. This settled framework is the correct one because the Second Amendment is not an unlimited right divorced from public safety concerns. The two-step approach respects individual rights while giving lawmakers constitutionally appropriate flexibility to regulate firearms, including by adopting policies supported by social science evidence and the reasoned predictions of experts in the field.

ARGUMENT

I. SOCIAL SCIENCE RESEARCH HAS IDENTIFIED A RANGE OF PUBLIC POLICIES THAT REDUCE GUN VIOLENCE.

A. Research Finds That Handgun Licensing Laws Can Reduce Criminal And Unauthorized Access To Guns.

Handgun purchaser licensing systems are used to enforce "longstanding prohibitions on the possession of firearms by felons and the mentally ill." *Heller*, 554 U.S. at 626; see also *Berron* v. *Ill. Concealed Carry Licensing Review Bd.*, 825 F.3d 843, 847 (7th Cir. 2016) ("If the state may set substantive requirements for ownership, which *Heller* says it may, then it may use a licensing system to enforce them."). They are intended to ensure guns are only possessed by the "law-abiding citizens" and used for the "lawful purposes" that the Second Amendment protects. *Heller*, 554 U.S. at 625.

Research finds that handgun licensing laws, like the law currently in place in New York City, prevent many irresponsible or criminal actors from obtaining firearms and using them to do harm.[3] In addition to the state of New York, twelve states and the District

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[3] *Amici* offer information about the effectiveness of licensing laws not because Petitioners challenge New York City's broader handgun licensing law—they have never raised or briefed such a challenge—but because these laws are examples of a constitutional and carefully-drawn policy whose protective effect is well-documented in social science research. Note that the specific licensing restriction Petitioners challenge has since been repealed by New York City and its reenactment foreclosed by a state law, appearing to moot their case. *See* Suggestion of Mootness at 5–7, *N.Y. State Rifle & Pistol Ass'n* v. *City of New York*, No. 18–280 (July 22, 2019).

of Columbia require a license to purchase or possess handguns or other firearms. These licensing laws have important advantages over other means of verifying eligibility to possess deadly weapons. Unlike background check laws where gun sellers generally facilitate criminal history checks, licensing laws put applicants in direct contact with local law enforcement or other licensing officers who oversee the application process and background checks. See Daniel W. Webster et al., *Relationship Between Licensing, Registration, and Other Gun Sales Laws and the Source State of Crime Guns*, 7 Inj. Prev. 184, 184 (2001). License applicants in many jurisdictions must submit fingerprints and photographs to ensure an accurate, comprehensive background check that identifies all associated criminal records. *Id.*; see*, e.g.*, N.Y. Penal Law § 400.00(3). The requirement that applicants submit this information directly to local police or licensing authorities deters straw purchasers and others intent on doing harm. Webster et al., *Relationship Between Licensing*, *supra*, at 184.

A number of studies suggest that licensing laws indeed restrict gun access by violent criminals—and that they save lives. One such study found that laws requiring licenses to purchase or possess firearms were associated with an 11% reduction in gun homicides in populous urban counties. Cassandra K. Crifasi et al., *Association Between Firearm Laws and Homicide in Urban Counties*, 95 J. Urb. Health 383, 386–87 (2018).[4] This lifesaving effect was not observed in jurisdictions that require gun sellers to per-

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[4] As modified by Cassandra K. Crifasi et al.*, Correction to: Association Between Firearm Laws and Homicide in Urban Counties*, 95 J. Urb. Health 773, 773–74 (2018).

form background checks which do not include submitting fingerprints to local licensing officers. *Id.* Another study found that when Missouri repealed its handgun licensing law in 2007, the state saw an increase in gun homicides. Daniel W. Webster et al., *Effects of the Repeal of Missouri's Handgun Purchaser Licensing Law on Homicides*, 91 J. Urb. Health 293, 296–97 (2014). The opposite effect was observed after Connecticut adopted a handgun licensing law. Kara E. Rudolph et al., *Association Between Connecticut's Permit-to-Purchase Handgun Law and Homicides*, 105 Am. J. Pub. Health e49, e51 (2015).

Licensing laws also make it significantly more difficult for traffickers to supply weapons to criminals by diverting firearms from lawful commerce into the illegal market. See Daniel W. Webster et al., *Effects of State-Level Firearm Seller Accountability Policies on Firearm Trafficking*, 86 J. Urb. Health 525, 526 (2009). In 2013, researchers assessed the effect of state gun-sale regulations on interstate gun trafficking in the 48 contiguous states. After controlling for the effects of other gun laws, rates of gun ownership, and geography, they concluded that, among all of the policies examined, gun licensing laws were the "most dramatic deterrent to interstate gun trafficking." Daniel W. Webster et al., *Preventing the Diversion of Guns to Criminals Through Effective Firearm Sales Laws*, *in* REDUCING GUN VIOLENCE IN AMERICA, *supra*, at 117.

These results are not surprising in light of the robust body of evidence demonstrating that gun homicides (as well as suicides and unintentional shootings) are strongly associated with unrestricted access to

guns. Firearms create serious risks even for law-abiding owners.[5] Predictably, broader access to guns by criminals and other unauthorized or prohibited possessors can be expected to worsen these risks. That is why reasonable regulations designed to ensure that guns are not misused could significantly drive down rates of gun violence and bring America closer in line with its peer nations. See generally, *e.g.*, Lisa Hepburn & David Hemenway, *Firearm Availability and Homicide: A Review of the Literature*, 9 Aggression & Violent Behavior 417 (2004); Matthew Miller et al., *Firearms and Suicide in the United States: Is Risk Independent of Underlying Suicidal Behavior?*, 178 Am. J. Epidemiology 946 (2013); Matthew Miller et al., *Firearm Availability and Unintentional Firearm Deaths, Suicides, and Homicide Among 5-14 Year Olds*, 33 Accident Analysis & Prevention 477 (2001).

In sum, social science research finds that firearm licensing laws are an effective means of enforcing "longstanding prohibitions on the possession of firearms" by criminal wrongdoers, *Heller*, 554 U.S. at 626, by reducing criminals' access to firearms and driving down gun homicides and trafficking.

B. Social Science Findings Indicate The Effectiveness Of Numerous Other Laws.

There is a robust body of empirical evidence showing that, just like firearm licensing laws, the policies

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[5] Multiple studies demonstrate a higher risk of homicide, suicide, and unintentional gun death in gun-owning households. *See, e.g.*, Andrew Anglemyer et al., *The Accessibility of Firearms and Risk for Suicide and Homicide Victimization Among Household Members: A Systematic Review and Meta-analysis*, 160 Annals Internal Med. 101, 105–06 (2014); David Hemenway, *Risks and Benefits of a Gun in the Home*, 5 Am. J. Lifestyle Med. 502, 502–06 (2011).

Heller identified—and many more—have public safety benefits and can save lives. Social scientists studying these laws have concluded that they can contribute to reduced gun homicides, suicides, and injuries; keep guns away from criminals, gun traffickers, and other dangerous people; and protect children from gun violence. For example:

- State-level universal background check laws, which, like licensing laws, are used to enforce "longstanding prohibitions on the possession of firearms by felons and the mentally ill," *Heller*, 554 U.S. at 626, prevent guns from being diverted to the illegal gun market. Research suggests that states without universal background check laws export crime guns across state lines at a nearly 30% higher rate than states that require background checks on all gun sales.[6]

- Laws imposing additional prohibitions on possession of firearms by dangerous individuals—including those that require firearm relinquishment by domestic abusers and restrict firearms during emergency domestic violence restraining orders—are associated with a 16% reduction in intimate partner homicides with firearms and a 12–13% reduction in total intimate partner homicide.[7]

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[6] Webster et al., *Preventing the Diversion of Guns to Criminals*, *supra*, at 116–17.

[7] April M. Zeoli et al., *Analysis of the Strength of Legal Firearms Restrictions for Perpetrators of Domestic Violence and Their Associations with Intimate Partner Homicide*, 187 Am. J. Epidemiology 2365, 2369 (2018); *see also* Carolina Díez et al., *State Intimate Partner Violence-Related Firearm Laws and Intimate*

- Laws restricting the carry of loaded handguns in public (see *Heller*, 554 U.S. at 626 (noting that "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues")) are associated with lower rates of homicide and violent crime, a trend that persists over time.[8]

- Evaluations of child access prevention laws—which are intended "to prevent accidents" by penalizing unsafe gun storage around children, *id.* at 632—have found that they significantly decrease youth gun deaths. Studies find that child access prevention laws prevent gun suicides[9] and unintentional gun deaths among children,[10] as

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Partner Homicide Rates in the United States, 1991–2015, 167 Annals Internal Med. 536, 536 (2017).

[8] John J. Donohue et al., *Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data and a State-Level Synthetic Control Analysis*, 16 J. Empirical Legal Stud. 198, 200 (2019); Michael Siegel et al., *Easiness of Legal Access to Concealed Firearm Permits and Homicide Rates in the United States*, 107 Am. J. Pub. Health 1923, 1923–24 (2017); Mark Gius, *Using the Synthetic Control Method to Determine the Effects of Concealed Carry Laws on State-Level Murder Rates*, 57 Int'l Rev. L. & Econ. 1, 6 (2019); Crifasi et al., *Association Between Firearm Laws and Homicide in Urban Counties*, *supra*, at 387; Crifasi et al., *Correction to: Association Between Firearm Laws and Homicide*, *supra*, at 773–74.

[9] *See, e.g.*, Daniel W. Webster et al., *Association Between Youth–Focused Firearm Laws and Youth Suicides*, 292 J. Am. Med. Ass'n 594, 596–600 (2004).

[10] Peter Cummings et al., *State Gun Safe Storage Laws and Child Mortality Due to Firearms*, 278 J. Am. Med. Ass'n 1084, 1084–85 (1997).

well as nonfatal gun injuries among minors.[11] Even modest increases in the number of American homes safely storing firearms could prevent gun deaths due to suicide and unintentional firearm injury.[12]

- Laws setting a minimum age for handgun purchase of 21 years, which limit gun access by minors who are not yet the "responsible" citizens who enjoy core Second Amendment rights under *Heller* (see*, e.g.*, *id.* at 635), are associated with a 9% reduction in rates of firearm suicides among youth aged 18 through 20.[13]

- Extreme risk protection order laws, which are designed to prevent people who pose a threat to themselves or others from using guns to inflict such harm, appear to have successfully reduced gun suicides in Connecticut and Indiana, saving many lives.[14] These laws are now in place in seventeen states and the District of Columbia, with most states adopting the policy following the

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[11] Jeffrey DeSimone et al., *Child Access Prevention Laws and Nonfatal Gun Injuries*, 80 S. Econ. J. 5, 13, 22 (2013).

[12] Michael C. Monuteaux et al., *Association of Increased Safe Household Firearm Storage with Firearm Suicide and Unintentional Death Among US Youths*, 173 J. Am. Med. Ass'n Pediatrics 657, 661 (2019).

[13] Webster et al., *Association Between Youth-Focused Firearm Laws and Youth Suicides*, *supra*, at 598.

[14] Aaron J. Kivisto & Peter Lee Phalen, *Effects of Risk-Based Firearm Seizure Laws in Connecticut and Indiana on Suicide Rates, 1981-2015*, 69 Psychiatric Servs. 855, 861 (2018); Jeffrey W. Swanson et al., *Implementation and Effectiveness of Connecticut's Risk-Based Gun Removal Law: Does it Prevent Suicides?*, 80 L. & Contemp. Probs. 179, 204–06 (2017).

mass school shooting in Parkland, Florida.[15]

Like the regulations identified in *Heller*, the above list is not exhaustive. Many more gun policies are backed by strong evidence, and increased research on the causes of gun violence would likely support the efficacy of additional gun-violence-prevention laws. See David E. Stark & Nigam H. Shah, *Funding and Publication of Research on Gun Violence and Other Leading Causes of Death*, 317 J. Am. Med. Ass'n 84, 84–85 (2017) (as a result of federal appropriations restrictions, gun violence receives less than 2% of the funding it would be expected to receive based on the scope and toll of the problem). Courts should not be forced to ignore these public safety rationales and public health evidence when evaluating Second Amendment claims.

II. GUN LAWS SHOULD BE EVALUATED USING THE TWO-STEP APPROACH, WHICH ALLOWS FOR CONSIDERATION OF CREDIBLE DATA AND EVIDENCE IN ADDITION TO HISTORY.

In *Heller*, the Court confirmed that the Second Amendment is "not unlimited" and, as noted above, identified numerous specific gun safety laws as constitutional. *Heller*, 554 U.S. at 626–27 & n.26. The two-step methodology that has prevailed in the Courts of Appeals could be imperative to safeguard regulations like those before the Court, which *Heller* plainly intended to allow states to adopt.

To implement *Heller*'s protections for individual rights as well as its endorsement of gun regulations,

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[15] *See* Johns Hopkins Bloomberg Sch. of Pub. Health, *Extreme Risk Protection Order: A Tool to Save Lives*, https://americanhealth.jhu.edu/implementERPO (last visited Aug. 7, 2019).

most federal lower courts have adopted a two-step analytical approach. See*, e.g.*, *N.Y. State Rifle & Pistol Ass'n, Inc.* v. *Cuomo*, 804 F.3d 242, 254 (2d Cir. 2015) (the "two-step rubric flows from the dictates of *Heller* and *McDonald*" and has been adopted by the Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits). History and tradition play a critical role in the first step of this framework, where courts ask whether a challenged regulation burdens conduct within the scope of the Second Amendment as historically understood. If it does, they then select and apply an appropriate level of heightened scrutiny to determine whether the law is constitutional.

Under this two-step approach, laws that implicate firearm rights as historically understood, but do not inhibit core rights of self-defense, will typically be upheld if they survive strict or intermediate scrutiny and a traditional tailoring analysis. As part of a tailoring analysis, courts consider evidence bearing on the nature of the problem being addressed as well as research and predictive judgments about gun policies' likely effects. See*, e.g.*, *United States* v. *Booker*, 644 F.3d 12, 26 (1st Cir. 2011) (upholding restrictions on gun possession by convicted domestic abusers, whose possession of guns is "strongly and independently associated with an increased risk of homicide"); *Gould* v. *Morgan*, 907 F.3d 659, 675 (1st Cir. 2018) (upholding handgun carry permit law supported by studies showing that states with strong "licensing schemes for the public carriage of firearms experience significantly lower rates of gun-related homicides and other violent crimes"), *petition for cert. filed* (U.S. Apr. 4, 2019) (No. 18-1272); *Jackson* v. *City & Cty. of San Francisco*, 746 F.3d 953, 966 (9th Cir. 2014) (upholding safe-storage law based on "evidence that storing handguns in a locked container reduces the risk of

both accidental and intentional handgun-related deaths"); *Nat'l Rifle Ass'n* v. *Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 210 (5th Cir. 2012) (upholding gun purchase age restrictions based on evidence that 18- to 20-year-olds disproportionately use firearms in crime).

Citing the fact that many challenges to gun regulations have failed, Petitioners urge the Court to reject the two-step approach in favor of a restrictive inquiry that looks *only* to "text, history, and tradition" (which is currently considered as part of the first step), and not social science (which are currently considered at the second step). But the rate at which courts uphold laws against Second Amendment challenges is consistent with the guidance this Court announced in *Heller*. While recognizing an individual right to armed self-defense, *Heller* affirmed the lawfulness of restrictions that may inhibit armed defense under some circumstances, including "prohibitions on the possession of firearms by felons and the mentally ill," laws forbidding guns in "sensitive places," and "conditions and qualifications" on the commercial sale of arms. 554 U.S. at 626–27 & n.26. The Court also declared that its analysis in *Heller* should not be read to suggest "the invalidity of laws regulating the storage of firearms to prevent accidents," *id.* at 632, and observed that the majority of nineteenth-century courts upheld prohibitions on concealed carry. *Id.* at 626. Many failed challenges involve at least one of these presumptively constitutional categories, including a significant number of cases that involve challenges by felons convicted of illegal gun possession. Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After* Heller, 67 Duke L.J. 1433, 1478, 1507 (2018) (sixty-four percent of post-*Heller* challenges were

brought by criminal defendants). The fact that many courts have upheld gun safety laws in these circumstances is a feature, not a flaw, of the two-step approach. A wide range of regulations survive heightened scrutiny because they do not substantially burden Second Amendment rights and represent tested and effective approaches to reducing death and injury.

There are at least three additional reasons the Court should reject Petitioners' alternative methodology. Petitioners' framework treats the Second Amendment differently from other rights, fails to account for regulatory measures *Heller* deemed lawful, and constrains legislatures' latitude to make constitutionally permissible policy choices based on consideration of credible studies and data. The two-step approach suffers none of these flaws.

A. The Two-Step Approach Treats The Second Amendment Like Other Rights.

Heller and *McDonald* explained that the Second Amendment should be treated like other constitutional rights. *Heller*, 554 U.S. at 595 ("[W]e do not read the Second Amendment to protect the right of citizens to carry arms for any sort of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for any purpose.") (emphases omitted); *id.* at 626 ("Like most rights, the right secured by the Second Amendment is not unlimited"); *McDonald* v. *City of Chicago*, 561 U.S. 742, 780 (2010) (declining to treat Second Amendment as subject "to an entirely different body of rules than the other Bill of Rights guarantees") (plurality opinion); *id.* at 802 ("No fundamental right—not even the First Amendment—is absolute.") (Scalia, J., concurring).

Lower courts following *Heller* have settled on the two-step approach and heightened scrutiny because other constitutional rights are analyzed this way. Tiered scrutiny is used in cases involving voting rights (*Burdick* v. *Takushi*, 504 U.S. 428, 434 (1992)), the Fourteenth Amendment's protection for bodily integrity (*Washington* v. *Harper*, 494 U.S. 210, 223 (1990)), and, of course, the First Amendment. See*, e.g.*, *United States* v. *Chester*, 628 F.3d 673, 682 (4th Cir. 2010) ("We do not apply strict scrutiny whenever a law impinges upon a right specifically enumerated in the Bill of Rights. In the analogous First Amendment context, the level of scrutiny we apply depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right."); *Jackson*, 746 F.3d at 960 (two-step "inquiry bears strong analogies to the Supreme Court's free-speech caselaw").

There is no reason to exempt the Second Amendment from the two-step analysis used in First Amendment and other fundamental rights cases. Indeed, Petitioners and their *amici* simply fail to acknowledge that the Court's framework for First Amendment challenges recognizes that different types of speech restrictions are subject to different levels of scrutiny. Instead, Petitioners put other constitutional jurisprudence to the side and argue that because *Heller* focused on text, history, and tradition to determine that the Second Amendment protects an individual right to self-defense, traditional constitutional analysis is irrelevant—and all gun regulations must be reviewed based on text, history, and tradition alone.

This view is incorrect because it conflates Second Amendment rights with regulations implicating those rights. The scope of gun *rights* should certainly be defined with reference to history, see *Heller* v. *District of*

Columbia, 670 F.3d 1244, 1282 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("*Heller* and *McDonald* rejected the use of" heightened scrutiny "in fleshing out the scope of the Second Amendment right"), as the prevailing framework does at step one. But gun *regulations* need not have an exact historical analogue to be consistent with the historical conception of a "well-regulated right." U.S. Const. amend. II; *Brown* v. *Entm't Merchs. Ass'n*, 564 U.S. 786, 835 n.2 (2011) (Thomas, J., dissenting) ("To note that there may not be 'precedent for [such] state control' . . . 'is not to establish that [there] is a constitutional right'") (quoting *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 373 (1995) (Scalia, J., dissenting)). Otherwise, the lack of a historical antecedent alone would have been reason enough to strike down the District's handgun ban, and the *Heller* Court would not have needed to say that the handgun ban was invalid "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights." 554 U.S. at 628.

B. The Two-Step Approach Respects The Core Rights And Presumptively Lawful Measures Described In *Heller*.

Heller also explained that the Second Amendment contains a "core protection" for "law-abiding, responsible citizens to use arms in defense of hearth and home." 554 U.S. at 634–35. The existence of a "core protection" means other conduct falls outside the "core" of the Second Amendment—or outside the scope of the Amendment entirely. See *id.* at 635 (referencing "exceptions" to the Second Amendment, or, "regulations of the right that we describe as permissible").

This makes sense because *Heller* provides a non-exhaustive list of "presumptively lawful regulatory measures" that do not offend the Second Amendment,

including prohibitions on gun possession by felons and the mentally ill. These measures are lawful even though they implicate and limit the use of firearms for self-defense. *Id.* at 626–27 & 627 n.26 (listing examples of regulations the decision was not intended to disturb); *McDonald*, 561 U.S. at 786 ("We repeat [*Heller*'s] assurances here. Despite municipal respondents' doomsday proclamations, incorporation does not imperil every law regulating firearms.") (plurality opinion).

But as the Fourth Circuit observed, *Heller* listed these measures "without alluding to any historical evidence that the right to keep and bear arms did not extend to felons, the mentally ill or the conduct prohibited by any of the listed gun regulations." *Chester*, 628 F.3d at 679. In fact, many of the presumptively lawful regulations lack historical roots. See*, e.g.*, C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 Harv. J.L. & Pub. Pol'y 695, 698–99 (2009) (federal felon-possession ban is "hardly 'longstanding'"); *Tyler* v. *Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 690 (6th Cir. 2016) (en banc) (there is "at best ambiguous historical support" for restrictions on gun possession after an involuntarily mental commitment); *Jackson*, 746 F.3d 963 (firearm "storage regulations . . . are not part of a long historical 'tradition of proscription'").

In other words, although there may be some "historical justifications" (*Heller*, 554 U.S. at 635) for the list of laws *Heller* identified as "presumptively lawful regulatory measures," history alone cannot account for the list. And requiring courts to look *only* to history for an answer about gun laws' constitutionality jeopardizes regulations not because they are unconstitu-

tional, but because judges "face institutional challenges in conducting a definitive review of the relevant historical record." *Nat'l Rifle Ass'n*, 700 F.3d at 204. Judges face additional institutional challenges when attempting to discern historical analogies for regulations of modern weapons and accessories that enhance criminal shooters' killing power to levels that were not possible at America's founding. History's failure to supply definitive answers, including with respect to "presumptively lawful regulatory measures" and regulations of new firearm technology, counsels in favor of applying the more comprehensive two-step framework Respondents advocate for and the lower courts have uniformly applied.

C. The Two-Step Approach Respects Legislative Competence To Weigh Data And Respects The Separation Of Powers.

The public policies described in this brief are a starting point, but for federal, state, and local lawmakers, gun violence remains "a complex problem with many hard questions and few easy answers." *Columbia Broad. Sys., Inc.* v. *Democratic Nat'l Comm.*, 412 U.S. 94, 103 (1973) (describing problem motivating speech regulation this way).

Complexity arises because certain policies have the potential to save lives, but when jurisdictions do not adopt them uniformly, guns may flow from states with stronger laws to those with weaker laws. See*, e.g.*, Erik J. Olson et al., *American Firearm Homicides: The Impact of Your Neighbors*, 86 J. Trauma & Acute Care Surgery 797, 797–800 (2019) (nearly two-thirds of crime guns recovered in states with strong gun laws were originally sold in states with weaker gun laws). Policymakers are also presented with hard questions when firearm technology creates new dangers, like

untraceable firearms created with 3D printers, or deadly modern hardware employed by mass shooters, including silencers, bump stocks, and 40-, 50- or 100-round ammunition magazines. Some of these public health threats have outpaced empirical research on the effectiveness of laws regulating them, making it essential for lawmakers to be given leeway to consider reasoned predictions of experts based on similar gun policies and broader public health evidence.

All this demonstrates an additional advantage of the two-step approach: it respects legislatures' institutional competence to "amass and evaluate the vast amounts of data bearing upon legislative questions." *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 195–96 (1997). The two-step approach also respects the separation of powers and the ability of states to be laboratories of democracy.[16] A tailoring analysis where courts consider legislative rationales is the best way to ensure judges do not assume a policymaking role—which they would risk doing if they undertook to evaluate fundamentally ambiguous historical evidence to decide if a gun policy is sufficiently longstanding. Consistent with how heightened scrutiny is applied in other contexts, the Second Amendment two-step approach does not ask judges to be legislators. Rather, it asks them to assess whether policymakers reasonably credited public health research or credible expert testimony, and whether that evidence demonstrates narrow or reasonable tailoring. This is an assessment judges are institutionally well-suited to make, and which they, indeed, routinely do make. *E.g., City of Los Angeles* v. *Alameda Books*, *Inc.*, 535 U.S. 425, 439–40 (2002) (plurality opinion) (courts must give

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[16] *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

cities leeway to "experiment with solutions" not "implemented previously" without specific supporting data); *Paris Adult Theatre I* v. *Slaton,* 413 U.S. 49, 60 (1973) ("We do not demand of legislatures 'scientifically certain criteria of legislation.'").

By contrast, courts' sole reliance on text, history, and tradition would require judges to become historians, a role falling well outside judicial competence for which their education and training would leave them ill-prepared. And it would usurp the legislative function by depriving lawmakers of the ability to address grave public safety concerns with solutions that are supported by public health evidence. Should that approach supplant heightened scrutiny, it would dramatically circumscribe "state and local experimentation with reasonable firearms regulations" in ways *Heller* and *McDonald* promised would not happen. See *McDonald*, 561 U.S. at 784–85 (plurality opinion); *Kolbe* v. *Hogan*, 849 F.3d 114, 150 (4th Cir.) (en banc) (Wilkinson, J., concurring) ("To say in the wake of so many mass shootings in so many localities across this country that the people themselves are now to be rendered newly powerless, that all they can do is stand by and watch as federal courts design their destiny—this would deliver a body blow to democracy as we have known it since the very founding of this nation."), *cert. denied*, 138 S. Ct. 469 (2017).

On a local level, adopting Petitioners' approach would directly jeopardize the immense progress that New York City has made toward reducing gun deaths and keeping its residents safe. On a national level, instead of being able to respond to grave public safety threats with flexible policymaking—selecting among regulatory responses that reflect experts' informed judgments while respecting core Second Amendment

rights—lawmakers would be limited to those regulations sufficiently similar to ones adopted in the past. The American people would be far less safe as a result.

CONCLUSION

For the foregoing reasons, the Court should reject Petitioners' methodological framework for the Second Amendment. The Court should treat gun rights like other rights by allowing consideration of social science and public health evidence as part of a heightened scrutiny analysis.

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ADDENDUM

LIST OF *AMICI CURIAE*

Charles Branas, PhD, is Gelman Endowed Professor and Chair, Department of Epidemiology at the Columbia University Mailman School of Public Health. Dr. Branas has conducted research that extends from urban and rural areas in the US to communities across the globe, incorporating place-based interventions and human geography. He has led win-win science that generates new knowledge while simultaneously creating positive, real-world changes and providing health-enhancing resources for local communities. His pioneering work on geographic access to medical care has changed the healthcare landscape, leading to the designation of new hospitals and a series of national scientific replications in the US and other countries for many conditions: trauma, cancer, stroke, etc. His research on the geography and factors underpinning gun violence has been cited by landmark Supreme Court decisions, Congress, and the NIH Director. Dr. Branas has also led large-scale scientific work to transform thousands of vacant lots, abandoned buildings and other blighted spaces in improving the health and safety of entire communities. These are the first citywide randomized controlled trials of urban blight remediation and have shown this intervention to be a cost-effective solution to persistent urban health problems like gun violence. He has worked internationally on four continents and led multi-national efforts, producing extensive cohorts of developing nation scientists, national health metrics, and worldwide press coverage.

Education:

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PhD, 1998, Johns Hopkins University, Bloomberg School of Public Health

MS, 1993, Drexel University

BA, 1990, Franklin and Marshall College

John J. Donohue III, PhD, is C. Wendell and Edith M. Carlsmith Professor of Law at Stanford Law School. Professor Donohue has been one of the leading empirical researchers in the legal academy over the past 25 years. Professor Donohue is an economist as well as a lawyer and is well known for using empirical analysis to determine the impact of law and public policy in a wide range of areas, including civil rights and antidiscrimination law, employment discrimination, crime and criminal justice, and school funding. Professor Donohue previously was a member of the law school faculty from 1995–2004.

Before rejoining the Stanford Law School faculty in 2010, Professor Donohue was the Leighton Homer Surbeck Professor of Law at Yale Law School. He recently co-authored Employment Discrimination: Law and Theory with George Rutherglen. Earlier in his career, he was a law professor at Northwestern University as well as a research fellow with the American Bar Foundation. Additionally, he clerked with Chief Justice T. Emmet Clarie, of the U.S. District Court of Hartford, Connecticut. He is a member of the American Academy of Arts and Sciences, and the former editor of the American Law and Economics Review and president of the American Law and Economics Association.

Education:

BA, 1974, Hamilton College

JD, 1977, Harvard Law School

PhD (Economics), 1986, Yale

David Hemenway, PhD, Professor of Health Policy, is Director of the Harvard Injury Control Research Center. He formerly spent a week each year at the University of Vermont as a James Marsh Visiting Professor-at-Large.

Dr. Hemenway teaches classes on injury and on economics. At HSPH he has won ten teaching awards as well as the inaugural community engagement award.

Dr. Hemenway has written widely on injury prevention, including articles on firearms, violence, suicide, child abuse, motor vehicle crashes, fires, falls and fractures. He headed the pilot for the National Violent Death Reporting System, which provides detailed and comparable information on suicide and homicide. In 2012 he was recognized by the Centers for Disease Control & Prevention as one of the "twenty most influential injury and violence professionals over the past twenty years."

Education:

BA, 1966, Harvard University

PhD, 1974, Harvard University

Jeffrey Swanson, PhD, is Professor in Psychiatry and Behavioral Sciences at Duke University School of Medicine. He earned a PhD in sociology from Yale University and completed a postdoctoral fellowship in mental health services research at Duke and the University of North Carolina at Chapel Hill. Dr. Swanson is the author or coauthor of over 200 publications focused on the epidemiology of violence and serious mental illnesses; effectiveness of community-based interventions and services for adults with schizophrenia

and other serious psychiatric disorders; laws and policies to reduce firearms violence; involuntary outpatient commitment; and psychiatric advance directives. He received the 2011 Carl Taube Award from the American Public Health Association and the 2010 Eugene C. Hargrove, MD Award from the North Carolina Psychiatric Foundation, both for outstanding career contributions to mental health research. He was awarded a NARSAD Distinguished Investigator Grant from the Brain and Behavior Foundation in 2013, and an Independent Research Scientist Career Award from the National Institute of Mental Health in 2004. Dr. Swanson is currently Co-Director of the NIMH-funded UNC-Chapel Hill/Duke Postdoctoral Training Program in Mental Health and Substance Abuse Services and Systems Research. He is principal investigator of a multi-state study on firearms laws, mental illness and prevention of violence, co-sponsored by the National Science Foundation, the Robert Wood Johnson Foundation's Program on Public Health Law Research (PHLR), and the Brain and Behavior Foundation. He is a key consultant and member of the PHLR program's Methods Core. He was a member of the John D. and Catherine T. MacArthur Foundation Research Network on Mandated Community Treatment. Dr. Swanson has served as a consultant to policymakers at the state and national levels, health care institutions, foundations, corporate research and legal firms.

Education:

MA, 1980, Yale University

PhD, 1985, Yale University

April M. Zeoli, PhD, is an Associate Professor in the School of Criminal Justice at Michigan State University. She earned her PhD from the Johns Hopkins Bloomberg School of Public Health, where she studied health and public policy, specializing in violence prevention. Dr. Zeoli conducts interdisciplinary research, with a goal of bringing together the fields of public health and criminology and criminal justice. Her main field of investigation is the prevention of intimate partner violence and homicide through the use of policy and law. Specifically, she is interested in the role of firearms in intimate partner violence and homicide, as well as the civil and criminal justice systems responses to intimate partner violence. Recently, she evaluated the association of state-level intimate partner violence-related legal restrictions on firearm purchase and possession with intimate partner homicide rates, finding that some of these laws may reduce intimate partner homicide rates. She is currently studying the implementation of firearm relinquishment procedures for those intimate partner violence offenders who can no longer legally possess them. She is also studying the criminal histories of those who go on to commit intimate partner homicide to identify potential intervention points.

Dr. Zeoli is on the editorial board of the scholarly journal Injury Prevention, and serves as the research expert for the National Domestic Violence and Firearms Resource Center.

Education:

BA, 1998, University of Michigan

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