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 OF 139 MEMBERS OF THE UNITED STATES HOUSE OF REPRESENTATIVES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici curiae are 139 Members of the United States House of Representatives who believe it is essential that the judicial branch affords appropriate deference to legislative judgments regarding gun safety legislation. As Members of the United States Congress, *amici* must often make difficult legislative judgments based on conflicting social science data and in the face of constituents' competing interests and policy preferences. *Amici* are members of the most democratically accountable branch of the federal government and thus have a particular interest in encouraging courts to grant flexibility to legislatures making these difficult legislative judgments. Given their interest in preserving the legislatures' flexibility to enact meaningful gun safety legislation, *amici* submit this brief to provide important context regarding how the Court's interpretation of the Second Amendment will affect the work of *amici* and other legislative bodies around the country.

The names of individual *amici* are listed in the Appendix.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), this Court explained that the "core protection" of the Second Amendment is the "right of law-abiding,

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than *amici curiae* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented in writing to the filing of this brief.

responsible citizens to use arms in defense of hearth and home." *Id.* at 634-35. While our nation's legislatures have long respected the right of law-abiding citizens to keep arms in the home for responsible self-defense, they have also carefully regulated arms in public—requiring, for example, a showing of good cause to carry a gun publicly—since the early 1800s. *See, e.g.*, Saul Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities*, 39 Fordham Urb. L.J. 1695, 1719-25 (2012) (describing restrictive public carry laws passed by numerous states between 1835 and 1878); *see also* Joseph Blocher, *Firearm Localism*, 123 Yale L.J. 82, 111-21 (2013) (describing history of urban gun regulations). These and other regulations are in recognition of the fact that the core Second Amendment right does not extend to carrying weapons in public.

When laws implicate constitutional provisions but do not substantially burden their core guarantees, courts generally apply intermediate scrutiny to assess the constitutionality of those laws, whether in the context of the First Amendment, the Second Amendment, or the Equal Protection Clause. That test requires the challenged law to be "substantially related to an important governmental objective" to pass constitutional muster. *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Applying intermediate scrutiny review, courts more fairly balance the protection of constitutional liberties with the legislatures' right and obligation to legislate, including in response to modern threats to public safety. But intermediate scrutiny is not a rubber stamp for gun safety (or any other) legislation: When governments cannot establish a "substantial relation"

between a particular regulation and important governmental interests, courts do not hesitate to strike down the regulation at issue. *See, e.g.*, *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011).

This Court should adopt this well-established framework and expressly hold that laws that do not substantially burden the core Second Amendment right, as delineated in *Heller*, are subject to intermediate scrutiny. Particularly in the life-or-death context of gun safety legislation, intermediate scrutiny is the right test. It allows legislatures to make policy judgments based on imperfect information that may well save lives, yet is sufficiently rigorous to ensure that individual liberty cannot be cast aside without sufficient reason.

If this Court reaches the question of the constitutionality of the former New York City premises license rule at issue in this case (the "Rule"),[2] the Court ought to determine that the Rule burdened only non-core Second Amendment rights, is thus subject to intermediate scrutiny, and satisfies that test, as the Second Circuit correctly held. But even more importantly, and regardless of how this Court applies the rule it announces to the facts of this case, it is critical for the sake of legislative flexibility—as well as to provide guidance to the courts below—that this Court expressly confirm that regulations that burden core

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[2] After this Court granted *certiorari*, the City of New York amended the challenged Rule and the State of New York passed legislation that would in any event preempt the challenged Rule. *See* Resp. Br. at 8-9, 13-16; Suggestion of Mootness at 5-7, *N.Y. State Rifle & Pistol Ass'n v. City of New York*, No. 18-280 (July 22, 2019).

rights should be strictly scrutinized while regulations that burden non-core Second Amendment rights should be evaluated under intermediate scrutiny.

For their part, Petitioners seek to revamp the dichotomy between core and non-core rights that *Heller* itself invoked and that the Courts of Appeals have predominantly applied in the last decade. Specifically, Petitioners ask this Court to use this now apparently moot case to cast aside intermediate scrutiny in assessing gun safety legislation that touches on non-core Second Amendment rights. Rather, Petitioners ask this Court to apply strict—not intermediate—scrutiny to *all* gun safety legislation that affects even rights peripheral to the core Second Amendment guarantee, which test would require the government to show that a challenged gun safety regulation is "necessary" to accomplish a "compelling" governmental purpose and is the "least restrictive" regulation possible. Alternatively, Petitioners would have this Court limit legislatures nationwide to enacting gun safety legislation solely if that legislation reflects an analogous regulation that existed in 1789.

Both of Petitioners' tests would risk the invalidation of broad swaths of common-sense gun safety legislation and would tie the hands of legislatures throughout the nation—a result the Founders could never have envisioned. Indeed, in adopting the Second Amendment, the Founders recognized the legislative right to promote a "*well regulated* militia," which is "necessary to the security of a free State." U.S. Const. amend. II (emphasis added). If anything, where legislation carries lethal implications, legislatures deserve *more* flexibility and deference, not less. "The Constitution is not a suicide pact." *Edmond v.*

Goldsmith, 183 F.3d 659, 663 (7th Cir. 1999) (Posner, C.J.). This Court should not adopt an analytical framework that makes it one. *See Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) (rejecting that "all local attempts to maintain order are [unconstitutional] impairments of the liberty of the citizen").

Amici, as Members of Congress, categorically reject Petitioners' attempts to ratchet up the scrutiny courts apply to gun safety regulations. *Amici* know first-hand the pain that gun violence has inflicted upon their communities back home and throughout our nation. From Columbine to Sandy Hook to Tree of Life Synagogue and—more recently—to the mass shootings in Dayton and El Paso earlier this month, *amici* have mourned with their friends and neighbors back home when tragedy struck. They have also had the experience of fighting for gun safety regulations—including those that enjoy widespread public support—in Washington. That battle is difficult enough: Indeed, if the murder of 20 Sandy Hook elementary school students and six educators in Newtown, Connecticut could not galvanize sufficient support for common-sense safety solutions (in that case, a universal background check law), it is hard to imagine what can.

This Court should not make enacting such legislation even harder than it already is today. The Constitution does not require courts to strictly scrutinize any and all regulation that touches upon rights peripheral to the core Second Amendment guarantee. And the Constitution does not limit legislatures—whether national, state, or local—to exercising enumerated and reserved powers only in ways analogous to regulation

that existed in the eighteenth century. Legislatures should be free to make judgments based on imperfect and conflicting data—particularly when those judgments reflect attempts to solve life-or-death problems.

Accordingly, *amici* respectfully submit that, if this Court reaches the constitutional merits of this case, it should affirm that intermediate scrutiny is the proper standard of judicial review to apply to gun safety legislation that affects non-core Second Amendment rights and that strict scrutiny applies only to those regulations that burden the Second Amendment's core.

ARGUMENT

I. INTERMEDIATE SCRUTINY PROVIDES LEGISLATURES NEEDED FLEXIBILITY TO CRAFT POLICY JUDGMENTS AND SUFFICIENTLY PROTECTS INDIVIDUAL LIBERTIES.

The rights the Constitution entrenches have both *core* guarantees and peripheries. *See, e.g.*, *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989); *see also United States v. Virginia*, 518 U.S. 515, 533 (1996). The distinction between core and non-core rights reflects the fact that our Constitution's Framers were particularly concerned with certain paradigm cases of government malfeasance—for example, content-based restrictions on political speech or race-based state discrimination. Laws that raise the specter of these paradigm evils—evils that have no positive social utility—are appropriately held to the strictest scrutiny. *See* Jed Rubenfeld, *The Paradigm-Case Method,* 115 Yale L.J. 1977, 1982-88, 1993-96 (2006) (describing constitutional provisions as commitments the People make to prevent certain

"paradigm-case" evils); *see also* John Hart Ely, *Democracy and Distrust* 13 (1980) (describing the method of the faithful constitutional interpreter as identifying "the sorts of evils against which the provision was directed" and "mov[ing] against their contemporary counterparts"). But when regulations touch upon a constitutional right without significantly burdening its core guarantees, this Court has typically applied intermediate scrutiny. *See, e.g.*, *Turner Broad. Sys., Inc. v. FCC* (*Turner I*), 512 U.S. 622, 662 (1994) (content-neutral restrictions that incidentally burden speech); *Clark*, 486 U.S. at 461 (classifications of sex and illegitimacy).

The Courts of Appeals have properly applied this framework in the Second Amendment context, too, complying with *Heller*'s mandate that the Second Amendment be treated with the same respect afforded to other constitutional rights. *See Heller*, 554 U.S. at 603, 626. To assess a constitutional challenge to gun safety regulation, the test adopted by the lower courts looks first at whether a restriction "burdens conduct protected by the Second Amendment." *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 254 (2d Cir. 2015). If the restriction implicates the Second Amendment, courts then determine "how close the law comes to the core of the Second Amendment right and the severity of the law's burden on the right." *Ezell*, 651 F.3d at 703. Laws that significantly burden the core right receive strict scrutiny, while all others receive intermediate scrutiny. *See, e.g.*, *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J.*, 910 F.3d 106, 117 (3d Cir. 2018); *see also* Brief of Second Amendment Law Professors as *Amici Curiae* in Support of Neither Party at 8-9, *N.Y. State Rifle & Pistol Ass'n v. City of*

New York, No. 18-280 (May 14, 2019) (citing cases from each Circuit adopting the two-step framework).

Whether or not this Court ultimately concludes that New York City's now-abrogated Rule passes constitutional muster, it should expressly adopt the core/non-core framework suggested in *Heller* for evaluating Second Amendment challenges, and hold that the constitutionality of regulations touching upon non-core Second Amendment activities should be evaluated under intermediate scrutiny.

A. Intermediate Scrutiny Provides Legislatures Needed Flexibility To Adopt Reasonable Policy Judgments.

The application of intermediate scrutiny to gun safety regulations that do not substantially burden the core guarantee of the Second Amendment is consistent with the legislature's role to pass laws that promote public safety and welfare. That role is entrusted to the legislature, not the judiciary, for good reason. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2612 (2015) (Roberts, C.J., dissenting) ("[A]s this Court has been reminded throughout our history, the Constitution is made for people of fundamentally differing views. . . . Accordingly, courts are not concerned with the wisdom or policy of legislation." (internal quotation marks and citation omitted)); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in part and dissenting in part) (generally, "most important questions in our democracy" are to be resolved "by citizens trying to persuade one another and then voting."). Legislatures are "far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions." *Turner Broad. Sys., Inc. v. FCC*

(*Turner II*), 520 U.S. 180, 195-96 (1997) (internal quotation marks omitted); *accord Bd. of Educ. of the Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 251 (1990) (rejecting Establishment Clause challenge and noting that Court would not "lightly second-guess [] legislative judgments, particularly where the judgments are based in part on empirical determinations"); Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. Cin. L. Rev. 199, 209 (1971) (a legislature is a "better fact-finding body than an appellate court"). As this Court has acknowledged, legislatures "are better qualified to weigh and evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts." *McClesky v. Kemp*, 481 U.S. 279, 319 (1987) (internal quotation marks omitted); *accord Turner II*, 520 U.S. at 199 ("The Constitution gives to Congress the role of weighing conflicting evidence in the legislative process."); *Rostker v. Goldberg*, 453 U.S. 57, 68 (1981) (Courts "must be particularly careful not to substitute [their own] judgment of what is desirable for that of Congress, or [their] own evaluation of evidence for reasonable evaluation by the Legislative Branch.").

Regulation of firearms is one particular field where the legislature's ability to conduct fact-finding and make predictive judgments is crucial and entitled to judicial deference. Legislatures passing gun safety laws must make predictive judgments about the likely effects of different types of regulations; the evidence they can muster, while real, cannot approach the rigor of a controlled experiment. Gun safety laws thus involve legislative "judgments concerning regulatory schemes of inherent complexity" that are entitled to

"substantial deference," lest this Court "infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy." *Turner II*, 520 U.S. at 195-96; *see also Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 330 n.12 (1985) (noting that congressional findings "are of course entitled to a great deal of deference"). That flexibility is needed "in the context of gun safety," where "'the expense and other difficulties of individual determinations' may necessitate 'the inherent imprecision of a prophylactic rule.'" *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 698 (6th Cir. 2016) (en banc) (quoting *Weinberger v. Salfi*, 422 U.S. 749, 777 (1975)).

In assessing gun safety regulations, legislatures have to engage in multi-dimensional and often counterfactual analyses, and draw lines that inevitably may appear too fine or arbitrary to certain segments of the population. And legislators must draw these fine lines in the face of their own policy preferences and those of various constituencies. For example, how can legislatures reduce mass shooting fatalities by limiting the number of rounds of ammunition in a firearm magazine, while protecting the right to armed self-defense? What qualifications should applicants for permits to carry loaded firearms in public have? Should firearms be required to possess built-in safety devices (such as "smart handguns" that can be fired only by an authorized user) to prevent unintentional shootings and limit unreasonable risks to public safety; and if so, should the requirement be universal or apply only to a subset of either gun owners or firearms?

State and local legislatures are best positioned to make these judgments, balancing the needs of differently situated communities from our densely populated cities—like New York City in this case—to rural locales where police protection can be further away, *see* Kyle Hopkins, *Lawless*, ProPublica (May 16, 2019), https://features.propublica.org/local-reporting-network-alaska/alaska-sexual-violence-village-police (noting that in certain locations in Alaska, "emergency help is hours or even days away"), just as Congress is well positioned to determine when a national solution is appropriate. True to form, legislatures' judgments have been appropriately exercised in a wide variety of ways that promote safety. For example, the federal government and states have restricted the classes of people who can own firearms[3] and the locations where firearms can be possessed and carried.[4] As firearms have grown deadlier, legislatures

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[3] *See, e.g.*, 18 U.S.C. § 922(g) (convicted felons); Colo. Rev. Stat. § 18-1-1001(3)(c) (2018) (domestic abusers); Tenn. Code Ann. § 39-13-111(c)(6) (2018) (domestic abusers); Cal. Penal Code §§ 646.9, 29805 (stalkers); Cal. S.B. 1100 (2018) (sale to minors); Fla. S.B. 7026 (2018) (same); Vt. S.B. 55 (2019) (same); Wash. Initiative 1639 (2018) (same); *see also* Giffords Law Center to Prevent Gun Violence, *Categories of Prohibited People*, https://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/categories-of-prohibited-people.

[4] *See, e.g.*, 430 Ill. Comp. Stat. 66/65(a)(19) (2019) (areas under control of airports); 720 Ill. Comp. Stat. 5/24-1(c)(1.5) (2017) (public parks); Ky. Rev. Stat. Ann. § 237.110(16)(c) (2017) (courthouses); Mich. Comp. Laws §§ 28.425o(1)(d), 750.234d(1)(h) (2017) (bars and restaurants); S.C. Code Ann. § 16-23-420(A) (2019) (government-owned buildings); Wis. Stat. § 175.60(16)(a)(1) (2019) (law enforcement stations).

have restricted access to military-grade weaponry,[5] and have regulated how firearms are acquired to ensure that background check laws effectively protect the public.[6] While it is impossible to know exactly how many lives these restrictions have saved, intermediate scrutiny gives legislatures the breathing room they need to consider and pass gun safety legislation that is tailored to their respective communities' needs.

Intermediate scrutiny reflects the legislature's institutional competence to make those difficult judgments, and respects the role of legislatures across the country to conduct fact-finding and pass laws that best respond to contemporary threats in their respec-

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[5] *See, e.g.*, 18 U.S.C. § 925(d)(3) (automatic firearms); Bump-Stock-Type Devices, 83 Fed. Reg. 66,514 (Dec. 26, 2018) (bump stocks); *see also, e.g.*, Conn. H.B. 5542 (2018) (same); Del. H.B. 300 (2018) (same); Fla. S.B. 7026 (2018) (same); Haw. S.B. 2046 (2018) (same); Md. S.B. 707 (2018) (same); N.J. S.B. 3477 (2017) (same); R.I. S.B. 2292/H.B. 7075 (2018) (same); Wash. S.B. 5992 (2018) (same); N.J. A.B. 2761 (2018) (armor-piercing bullets); Vt. S.B. 55 (2019) (magazine capacity limitations). Additionally, certain states have regulated the purchase and possession of untraceable and undetectable firearms. *See, e.g.*, N.J. Stat. Ann. § 2C:39-9(k), (m).

[6] *See* Giffords Law Center to Prevent Gun Violence, *Background Check Procedures: State by State*, https://lawcenter.giffords.org/gun-laws/state-law/50-state-summaries/background-check-procedures-state-by-state; *see also* Conn. Gen. Stat. § 29-37g(c) (2019) (requiring dealers to report to law enforcement when a potential purchaser fails a background check); Or. Rev. Stat. § 166.435(1)(a)(F) (permitting guns to be temporarily transferred without a background check to prevent a death); Haw. H.B. 459 (2017) (requiring notice to law enforcement agencies if a permit applicant fails a background check); Wash. H.B. 1501 (2017) (same).

tive communities. *See generally* Blocher, *supra* (tracing the history of gun regulation and usage in rural versus urban communities); *see also McDonald v. City of Chicago*, 561 U.S. 742, 902 (2010) (Stevens, J., dissenting) ("Across the Nation, States and localities vary significantly in the patterns and problems of gun violence they face, as well as in the traditions and cultures of lawful gun use they claim. . . . Given that relevant background conditions diverge so much across jurisdictions, the Court ought to pay particular heed to state and local legislatures' 'right to experiment.'"); *id.* at 785 (majority opinion) (noting that "[s]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment" (internal quotation marks omitted)). Intermediate scrutiny gives democratically elected legislators the breathing room to make these difficult predictive judgments. This Court should preserve that essential balance here.

B. Intermediate Scrutiny Adequately Protects Second Amendment Rights.

Intermediate scrutiny is not toothless, as certain *amici* have suggested. *See, e.g.*, Brief of Amicus Curiae National Rifle Association of America, Inc. in Support of Petitioners at 26-29, *N.Y. State Rifle & Pistol Ass'n v. City of New York*, No. 18-280 (May 14, 2019) (suggesting that application of intermediate scrutiny would "make a mockery" of the Second Amendment). It can and does adequately protect and preserve individual liberty. Indeed, gun safety laws are often struck down under intermediate scrutiny when governments cannot demonstrate a reasonable fit between regulations and important government interests. *See, e.g.*, *Ezell*, 651 F.3d at 707-11 (finding

that a law banning firing ranges in Chicago would likely fail under intermediate scrutiny).

The laws that courts have invalidated or questioned under intermediate scrutiny are a diverse set, demonstrating that intermediate scrutiny—while providing legislatures with needed flexibility—is hardly a rubber stamp:

- Federal statute permanently prohibiting plaintiff previously committed to a mental institution from possessing a firearm violates the Second Amendment if the government fails to sufficiently justify the lifetime prohibition. *Tyler*, 837 F.3d 678 (reversing dismissal of as-applied challenge to 18 U.S.C. § 922(g)(4)).
- Federal statute prohibiting individuals convicted of certain state misdemeanors from possessing a firearm held unconstitutional as applied. *Binderup v. Att'y Gen. U.S.*, 836 F.3d 336, 353 (3d Cir. 2016), *cert. denied*, 137 S. Ct. 2323 (2017).
- Provision of New York statute imposing a seven-round magazine load limit invalidated. *Cuomo*, 804 F.3d 242.
- Several provisions of District of Columbia statute—including written examination, re-registration, and inspection requirements—invalidated. *Heller v. District of Columbia* (*Heller III*), 801 F.3d 264 (D.C. Cir. 2015).
- Federal statute criminalizing the possession of firearms by users of controlled substances not sufficiently justified by the government, but

remanding to give the government the opportunity to develop the record. *United States v. Carter*, 669 F.3d 411 (4th Cir. 2012).

- Federal statute criminalizing possession of firearms by individuals convicted of a domestic-violence misdemeanor not sufficiently justified by the government, but remanding to give the government the opportunity to develop the record. *United States v. Glisson*, 460 F. App'x 259 (4th Cir. 2012) (per curiam); *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010) (same).
- Preliminarily enjoining as unconstitutional city ordinance banning firing ranges within city limits. *Ezell*, 651 F.3d 684.[7]

Gun safety regulations are invalidated under intermediate scrutiny when the evidence presented by the government is insufficient to show the law fits reasonably with the law's purpose. Indeed, even under intermediate scrutiny, the government's evidence must be specific enough to justify the particular regulation in question. For example, the Third Circuit, in applying intermediate scrutiny to a prohibition on gun possession by individuals convicted of a crime

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[7] Intermediate scrutiny has also been applied in other contexts to invalidate a wide variety of laws, demonstrating that this test is hardly toothless. *See, e.g.*, *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690 (2017) (gender-based distinctions in derivation of United States citizenship); *Clark*, 486 U.S. at 465 (limitations for paternity actions by illegitimate children); *United States v. Grace*, 461 U.S. 171, 182-83 (1983) (content-neutral law prohibiting displays on Supreme Court grounds); *Craig v. Boren*, 429 U.S. 190, 204 (1976) (law prohibiting sale of beer to men under age 21 and women under age 18).

punishable by more than one year's imprisonment, rigorously evaluated the government's proffered evidence before invalidating the prohibition as applied to the appellants, who were convicted of nonviolent misdemeanors. *Binderup*, 836 F.3d at 353. Although the government's public safety interest was sufficiently important, the government's studies, which showed only a general correlation between past felonies and future violent crime, did not satisfy its burden as to individuals who committed misdemeanor crimes the court determined were not serious. *Id.* at 353-54. "[E]ven under intermediate scrutiny," the government's empirical evidence had to "demonstrate[] an appropriate fit between" the regulation and the promoted end. *Id.* at 353, 355.

Similarly, the D.C. Circuit invalidated parts of D.C.'s Firearms Registration Amendment Act, including those requirements for police inspections, re-registrations every three years, registrant testing about the District's gun laws, and limitations on registering more than one gun per month. *Heller III*, 801 F.3d 264. For each of the invalidated provisions, the court held that the District either "offered no evidence" or failed to justify its regulation with "substantial evidence." *Id.* at 277-80. And for the testing requirement in particular, the court distinguished the evidence that the District provided—that training in the safe use of firearms promotes public safety—from the evidence that would be required to meet the District's burden—for instance, that passing a test on local gun laws would do the same. *Id.* at 278-79.

Intermediate scrutiny requires legislatures to justify laws with evidence, not unsupported speculation.

In *Ezell*, the Seventh Circuit rejected Chicago's proffered explanation for the prohibition because, instead of providing directly relevant evidence or testimony based on experience, the city had provided mere "speculation about accidents and theft" that *might* occur at a firing range. 651 F.3d at 709. Even if the government can offer independently persuasive evidence, under intermediate scrutiny, it also faces the burden of rebutting the opposing party's evidence if that evidence is sufficient to "cast direct doubt" on the government's claims; the government cannot "get away with shoddy data or reasoning." *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438-39 (2002).

Unlike rational basis review, which gives "almost complete deference" to the legislature and almost always leads to a finding of constitutionality, Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 706-08 (5th ed. 2015), intermediate scrutiny provides real protection for Second Amendment rights—while still giving legislatures breathing room to make difficult life-or-death decisions.

C. The Second Circuit Properly Determined That The New York City Rule Burdened Only Non-Core Rights, Rendering It Subject To Intermediate Scrutiny.

The former New York City Rule restricting the transportation of firearms for holders of premises licenses is no longer in effect, and Respondents contend that this dispute is therefore moot. *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); Resp. Br. at Arg. Pt. I. If this Court nonetheless evaluates the now-abrogated New York City Rule, it should affirm

the Second Circuit's conclusion that the Rule burdened only non-core Second Amendment rights, to which the application of intermediate scrutiny is appropriate, and should uphold the Rule under that test.[8]

The Second Circuit properly determined that the challenged regulation, which limited the transportation of firearms outside of the home, did not significantly burden the core Second Amendment right to keep arms in one's home for self-defense. *See N.Y. State Rifle & Pistol Ass'n v. City of New York*, 883 F.3d 45, 60-61 (2d Cir. 2018). The former Rule did not prohibit New Yorkers from possessing firearms in their homes or from training adequately with those firearms. *Id.* The nature of the burden imposed by the former Rule was best analogized to a content-neutral time, place, or manner restriction on speech, to which courts commonly apply intermediate scrutiny, *see Hill v. Colorado*, 530 U.S. 703, 727-30 (2000); the restriction made it marginally more difficult to exercise the right, but the right remained intact nonetheless. *See Ezell*, 651 F.3d at 703 ("[b]orrowing from the Court's First Amendment doctrine" the principle that "the rigor of [] judicial review will depend on how close the law comes to the core of the Second Amendment Right and the severity of the law's burden on that right").

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[8] Petitioners only challenged provisions of New York City's premises-licensing scheme; they did not challenge, and the Second Circuit did not consider, New York's separate *carry*-licensing scheme. *See N.Y. State Rifle & Pistol Ass'n v. City of New York*, 883 F.3d 45, 52-53 (2d Cir. 2018). The constitutionality of the carry-licensing scheme is not at issue.

Given that the former Rule at most burdened only non-core Second Amendment rights, the Second Circuit was correct to apply intermediate scrutiny—for all of the reasons discussed herein—and correct in ultimately concluding that New York's Rule was "substantially related to the achievement of an important government interest." *City of New York*, 883 F.3d at 62 (quoting *Cuomo*, 804 F.3d at 261). The rationale for the former Rule—"protect[ing] public safety and prevent[ing] crime"—was clearly an important governmental interest. *Id.*; *accord, e.g.*, *Heller III*, 801 F.3d at 274. And the City proffered sufficient evidence to demonstrate that its regulation was "substantially related" to that interest, through testimony from the former Commander of the License Division, Andrew Lunetta, who discussed why the restriction was necessary to prevent "potential threat[s] to public safety." *City of New York*, 883 F.3d at 63. As he explained, the transport restrictions then in effect prevented licensees from continually traveling with their weapons and minimized "instances of unlicensed transport of firearms on city streets." *Id.* This testimony was sufficient: As the Second Circuit noted, intermediate scrutiny does not require a perfect, narrowly tailored or least restrictive fit between a law and the government's ends. *Id.* at 62. The evidence was non-speculative and "fairly supported" the City's rationale. *Id.* at 64 (internal quotations omitted). In accepting the City's proffered evidence as sufficient to establish a substantial relation between its former Rule and the important interest of public safety, the Second Circuit properly applied intermediate scrutiny. *Turner II*, 520 U.S. at 195-98 (deferring to Congress's judgment that cable operators had considerable market power over local video programming markets, based in part

on record evidence and testimony that cable market penetration was predicted to grow beyond 70 percent).

But regardless of how the Court ultimately rules on the unique facts of this case, if it reaches the merits it should expressly affirm the core/non-core distinction and hold that laws implicating only non-core Second Amendment activities be evaluated under intermediate scrutiny, consistent with this Court's treatment of other constitutional rights.

* * *

In sum, intermediate scrutiny allows our federal and state system to function exactly as it should, while still preserving individual Second Amendment liberties: Intermediate scrutiny lets the states serve as "laboratories for devising solutions to difficult legal problems," *see Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015) (quoting *Oregon v. Ice*, 555 U.S. 160, 171 (2009)), and lets Congress legislate where gun safety requires nationwide legislation. Under the intermediate-scrutiny regime, legislatures have been able to both experiment with gun safety policy and have a fighting chance to justify their legislative judgments while balancing public safety and individual liberty. Congress, and state and local legislatures should be free to continue to experiment for the public good. Applying intermediate scrutiny lets them do just that.

II. APPLICATION OF STRICT SCRUTINY OR PETITIONERS' PURELY HISTORICAL TEST WOULD UNDULY LIMIT THE ABILITY OF LEGISLATURES AROUND THE COUNTRY TO PRESERVE PUBLIC SAFETY AND LIMIT GUN VIOLENCE.

Petitioners and their *amici* propose two alternatives to intermediate scrutiny: strict scrutiny or an amorphous approach based on "text, history, and tradition." Neither alternative is the proper means of evaluating statutes and regulations that affect non-core Second Amendment rights. Neither alternative affords adequate deference to the collective wisdom of federal, state, and local legislatures, and both alternatives would curtail the efforts of elected representatives across the country to enact reasonable gun safety measures to prevent crime and promote public safety. This Court should decline Petitioners' invitation to radically revamp the framework that nearly all Courts of Appeals have applied to evaluate legislation that burdens non-core Second Amendment rights.

A. This Court Should Not Apply Strict Scrutiny To Laws And Regulations That Do Not Interfere With Core Second Amendment Rights.

Strict scrutiny, which requires the government to demonstrate that a challenged law "is *necessary* to accomplish a *compelling* governmental purpose," is one of the most stringent tests in constitutional law. Chemerinsky, *Constitutional Law, supra*, at 567 (emphasis added). To survive strict scrutiny, a law must be "narrowly tailored" and the "least restrictive" option. *United States v. Playboy Entm't Grp., Inc.*, 529

U.S. 803, 813 (2000); *Ezell*, 651 F.3d at 707. Commentators have described strict scrutiny as "virtually always fatal to the challenged law" or regulation. Chemerinsky, *Constitutional Law*, *supra*, at 699; *see, e.g.*, *Brown v. Entm't Merch. Ass'n*, 564 U.S. 786, 805 (2011) (content-based restrictions on speech failed strict scrutiny as both "seriously overinclusive" and "seriously underinclusive"); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 362 (2010) (restrictions on political speech failed strict scrutiny as "both underinclusive and overinclusive"); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 121 (1991) (content-based restrictions on speech failed strict scrutiny as "significantly overinclusive"); *see also United States v. Alvarez*, 567 U.S. 709, 731 (2012) (Breyer, J., concurring) (describing strict scrutiny as "near-automatic condemnation"); 2 Chester James Antieau & William J. Rich, *Modern Constitutional Law* § 25.02, at 8 (2d ed. 1997) (strict scrutiny "create[s] virtually insurmountable hurdles for the government seeking to defend its classifications"); Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 Yale L.J. 1141, 1160 (2002) (strict scrutiny, "as everyone knows, is almost always fatal").

Strict scrutiny's highly intensive judicial review is inappropriate in the context of non-core Second Amendment rights for at least three reasons. *First*, strict scrutiny would be incompatible with the unique text of the Second Amendment, which expressly contemplates regulation in this area. The first clause of the Second Amendment specifically recognizes that the militia must be "well regulated." U.S. Const.

amend. II. Unlike with other individual rights enshrined in the Constitution, the Founders thus baked into the Second Amendment the notion that the legislative branch *must* have a say in how arms are handled and used. *Compare* U.S. Const. amend. II (describing the "necess[ity]" of a "well regulated Militia"), *with* U.S. Const. amend. I ("Congress shall make *no law*" abridging the rights guaranteed by the First Amendment (emphasis added)). *See also* Adam Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683, 707 (2007) (observing that "[s]ome measure of regulatory authority . . . does seem to be called for by the text" of the Second Amendment); Saul Cornell & Justin Florence, *The Right to Bear Arms in the Era of the Fourteenth Amendment: Gun Rights or Gun Regulation?*, 50 Santa Clara L. Rev. 1043, 1054 (2010) ("[T]he necessity of having a well-regulated militia meant that the people had the right to have certain weapons, which they were entitled to use for self defense, under common law and *subject to reasonable state regulation*." (emphasis added)). Given the necessity of a "well-regulated militia," it cannot be the case that our nation's legislatures should be strictly scrutinized when they enact such regulations. *See Heller*, 554 U.S. at 627 & n.26 (providing non-exhaustive list of "presumptively lawful regulatory measures" relating to firearms).

Second, the adoption of strict scrutiny would drastically limit the ability of legislatures to enact sensible gun safety regulations appropriate to their particular locality. To satisfy the "demanding standard" of strict scrutiny, the government must not only "specifically identify an 'actual problem' in need of solving," but also build a robust record showing that the challenged

law is "actually necessary to the solution." *Brown*, 564 U.S. at 799-800. "[B]ecause [the government] bears the risk of uncertainty, ambiguous proof will not suffice." *Id.* (internal citation omitted) (striking down a content-based restriction because the State could not show "a *direct causal link* between violent video games and harm to minors" (emphasis added)); *see Abbott v. Perez*, 138 S. Ct. 2305, 2335 (2018) (legislature must make "a strong showing of a pre-enactment analysis with justifiable conclusions"). Legislatures—particularly those in smaller communities with fewer resources—will rarely be able to compile the necessary robust and unambiguous record in the firearm context, where "the empirical data [are] often conflicting." Winkler, *supra*, at 713; *see Peruta v. Cty. of San Diego*, 824 F.3d 919, 944 (9th Cir. 2016) (en banc) (Graber, J., concurring) (noting that "social scientists disagree" about the effect of even "modest restrictions on concealed carry of firearms"). Strict scrutiny could therefore doom legislative efforts from the start and prevent them from taking the diverse approaches needed to balance individual liberty and public safety. Where life and death are concerned, legislatures should have *more* flexibility to innovate, not less. *See Kolbe v. Hogan*, 849 F.3d 114, 150 (4th Cir. 2017) (Wilkinson, J., concurring) (application of strict scrutiny in non-core Second Amendment challenges would "[d]isenfranchis[e] the American people on this life and death subject" and "deliver a body blow to democracy as we have known it since the very founding of this nation").[9]

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[9] *See also Turner v. Safley*, 482 U.S. 78, 89 (1987) ("[I]nflexible strict scrutiny analysis" would "distort the decisionmaking process," for every decision "would be subject to the possibility that

Third, laws affecting the right to bear arms do not pose the kinds of dangers that strict scrutiny is designed to guard against. This Court and constitutional scholars have recognized that strict scrutiny "is appropriately reserved for areas of law, such as race discrimination and restrictions on political speech, where we would expect most, if not all, regulation to be invidious." Winkler, *supra*, at 702; *see City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 444 (1985) (declining to apply strict scrutiny to disability classifications because "in the vast majority of situations" such classifications are not invidious); Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 Harv. L. Rev. 4, 78 (1996) (strict scrutiny "ensure[s] that courts are most skeptical in cases in which it is highly predictable that illegitimate motives are at work"); *see also* Rubenfeld, *Paradigm-Case Method*, *supra* at 1993-96; Ely, *supra*, at 13. Unlike classifications based on race or viewpoint, which are almost never permissible, most laws regulating arms are passed to further the compelling governmental interests of public safety and crime prevention—a fact Petitioners do not dispute. *See Heller*, 554 U.S. at 689 (Breyer, J., dissenting) ("[A]lmost every gun-control regulation will seek to advance . . . a 'primary concern of every government—a concern for the safety and indeed the lives of its citizens.'").

In sum, strict scrutiny is the wrong way to assess gun safety regulation that affects non-core Second Amendment rights. Even with the current level of

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some court somewhere would conclude that it had a less restrictive way of solving the problem at hand").

flexibility made possible by the appellate courts' adoption of intermediate scrutiny, the rates of gun violence and crime remain unacceptably and tragically high. Placing federal, state, and local safety measures under a strict-scrutiny microscope would drastically reduce legislative innovation in this area at a time when citizens need more, not less, to be done to protect police, students, and other bystanders from senseless gun violence. *See Obergefell*, 135 S. Ct. at 2612 (Roberts, C.J., dissenting) (noting that the Court should not "seize[] for itself a question the Constitution leaves to the people, at a time when the people are engaged in a vibrant debate on that question"); *McDonald*, 561 U.S. at 784-85 (Although the Second Amendment applies to the States, "their ability to devise solutions to social problems that suit local needs and values" survives.); *Cleburne*, 473 U.S. at 445 ("[G]overnmental bodies must have a certain amount of flexibility and freedom from judicial oversight in shaping and limiting their remedial efforts.").

B. The Proposed "Historical" Approach Is Deeply Flawed.

Petitioners propose a second, even more inflexible test based on "text, history, and tradition." Pet. Br. at 26. Under Petitioners' proposed historical approach, a court must identify at least one "historical analog" to the challenged law or strike the law down as unconstitutional. *Id*. at 27-29. This test should be rejected as inconsistent with this Court's precedent and unduly restrictive of the constitutionally mandated prerogatives of the legislatures.

When describing the use of history as an analytical and interpretive tool, Petitioners have it exactly

backwards. Congress has the authority to pass appropriate legislation consistent with the Article I grant of the legislative power, without looking to whether there is historical precedent for such legislation. Otherwise, Congress would be unable to pass laws regulating any number of subject matters that did not exist and were not even contemplated at the time of the nation's Founding, such as the internet, space flight, cancer treatments, nuclear power, or methamphetamines. By contrast, this Court has consulted history in order to define the scope of *individual rights*, not the scope of permissible regulation touching upon those rights. *See Heller*, 554 U.S. at 634-35 (explaining that "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them," regardless of the action or inaction of "future legislatures"); Erwin Chemerinsky, *History, Tradition, the Supreme Court, and the First Amendment*, 44 Hastings L.J. 901, 901 (1993) ("Repeatedly, the Supreme Court has denied constitutional protection by holding that the claimed *right* was not historically protected." (emphasis added)); *id.* at 903 (observing the "Court's repeated statements and rulings," in virtually "every area of individual rights," that "the Constitution does not protect more than has been traditionally safeguarded"). Indeed, if a particular right was not constitutionalized at the time of the Founding, members of this Court have understood that legislatures are free to regulate in ways that may infringe upon it. *See, e.g.*, *Obergefell*, 135 S. Ct. at 2613-15 (Roberts, C.J., dissenting); *Brown*, 564 U.S. at 835 n.2 (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." (internal quotation marks, citation, and brackets

omitted)); *Lawrence v. Texas*, 539 U.S. 558, 593 (2003) (Scalia, J., dissenting) (noting that "*only* fundamental rights . . . deeply rooted in this Nation's history and tradition" call for heightened scrutiny, and that "[a]ll other liberty interests may be abridged or abrogated pursuant to a validly enacted state law if that law is rationally related to a legitimate state interest" (emphasis in original) (internal quotations omitted)).

Even if Petitioners accurately described this Court's use of history, the Court should reject the so-called historical test as fundamentally unworkable. Petitioners' historical test is possibly even less deferential to legislative expertise than strict scrutiny. Under the historical test, even laws narrowly tailored to support a compelling contemporary interest, *see supra* Part II.A, would not pass muster if they lack a "historical analog." Although modern innovations such as background checks and domestic violence restraining orders that prohibit gun possession might well survive strict scrutiny, their historical analogs may be sparse, potentially obliterating essential (and not unduly burdensome) public safety measures. This formula has no basis in the text of the Constitution or in this Court's jurisprudence. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 373 (1995) (Scalia, J., dissenting) ("Quite obviously, not every restriction upon expression that did not exist in 1791 or 1868 is *ipso facto* unconstitutional.").

Petitioners' historical test will also handcuff legislatures as they attempt to address novel problems and respond to rapidly developing technology. Justice Alito recognized this concern in *United States v. Jones*, 565 U.S. 400 (2012), where he rejected the ap-

plication of a historical test when the Court considered whether the application of GPS trackers constituted a "search" under the Fourth Amendment. A historical test to that inquiry made no sense, Justice Alito explained, because, short of imagining a "very tiny constable" who "secreted himself somewhere in a coach," it was "almost impossible to think of late-18th-century situations that are analogous to" GPS tracking of automobiles. *Id.* at 420 & n.3 (Alito, J., concurring); *see also id.* at 429 ("In circumstances involving dramatic technological change, the best solution . . . may be legislative.").[10] This concern is particularly salient in the context of gun safety legislation, much of which aims to address modern technological advancements that would have been inconceivable at the time of the Founding. For example, the 3D Printed Gun Safety Act, recently introduced in the House of Representatives, would prohibit "the distribution of 3D printer plans for the printing of firearms." H.R. 3265, 116th Cong. (2019). Similarly, states have been experimenting with "microstamping" technology, which would imprint a serial number on shell casings when a bullet is fired, enabling police to reduce the number of unsolved gun homicides and prevent the retaliatory violence that sometimes follows an unsolved crime.

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[10] Justice Alito's critique of the historical text in the Fourth Amendment context is particularly apt given that the language of the Second Amendment (which, again, expressly contemplates "well regulated" activity, U.S. Const. amend. II) aligns closely with that of the Fourth Amendment. Both Amendments enshrine not only a liberty but also a government power: the Second Amendment recognizes the need for "regulat[ion]" while the Fourth reflects the authority of the government to conduct reasonable searches and seizures. U.S. Const. amend. IV.

See Cal. Penal Code § 12126(b)(7) (requiring new semiautomatic handgun models to imprint cartridges with at least two identifying microstamps that are transferred onto the cartridge casing when the firearm is fired). Petitioners' proposed historical test would effectively kneecap legislatures around the country and prevent their adoption of innovative efforts to address modern firearm dangers. The Court should reject this approach.

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In short, although the degree and scope of firearm regulation varies, the federal government and all fifty states have exercised their discretion to enact gun safety legislation of some kind, drawing upon local context and the needs of local constituents as well as insights from other states, in accordance with the federalist design. *Amici* as legislators and representatives of these communities across the country have a vested interest in protecting these laws and ensuring that legislatures in the future have the discretion and receive the judicial deference to continue to craft innovative solutions to gun safety challenges.

Petitioners ask this Court to restrict significantly that discretion, to curtail the ability of legislators—acting on behalf of the People—to provide for the safety of their communities. This the Court should reject. Legislatures, from the municipal to the national, should be free to adopt common-sense solutions to our nation's gun violence epidemic that do not infringe core Second Amendment rights, without limiting those solutions only to the "least restrictive" means or the most historically analogous method. This Court

should make clear that such legislative deference is permitted and required.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that this Court affirm the judgment below and affirm the two-step analytical framework that the Courts of Appeals have universally applied.

Respectfully submitted.

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