No. 18-280

IN THE

Supreme Court of the United States

NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC., *ET AL.*, *Petitioners*,

v.

CITY OF NEW YORK, NEW YORK, *ET AL.*, *Respondents*.

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

Brief *Amicus Curiae* of Gun Owners of America, Gun Owners Foundation, The Heller Foundation, Conservative Legal Defense and Education Fund, Downsize DC Foundation, DownsizeDC.org, and Restoring Liberty Action Committee in Support of Petitioners

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INTEREST OF THE *AMICI CURIAE*[1]

Gun Owners of America, Inc. and DownsizeDC.org are nonprofit social welfare organizations, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). Gun Owners Foundation, The Heller Foundation, Conservative Legal Defense and Education Fund, and Downsize DC Foundation are nonprofit educational and legal organizations, exempt from federal income tax under IRC section 501(c)(3). Restoring Liberty Action Committee is an educational organization. *Amici* organizations were established, *inter alia*, for the purpose of participating in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law. Many of these *amici* have filed *amicus* briefs in dozens of cases involving the Second Amendment, including both:

- District of Columbia v. Heller, Brief Amicus Curiae of Gun Owners of America, Inc., et al. (Feb. 11, 2008); and
- McDonald v. Chicago, (July 6, 2009), Brief Amicus Curiae of Gun Owners of America, Inc. (July 6, 2009).

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to its filing; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

New York City's understanding of Second Amendment rights is radically different from that recognized in Heller. There, the right to keep arms is limited to certain Americans[2] who meet eligibility requirements,[3] submit to invasive government screening (Petition for Certiorari ("Pet. Cert.") at 4), wait a lengthy period of time,[4] and pay substantial fees.[5] Even then, the few who qualify may not "bear" arms as Heller envisioned. Rather, they may only "keep" them at home, or perhaps at a place of business. True "bearing" of arms within the City is limited to government agents, along with a select few "politician[s], celebrit[ies] or [the] very, very wealthy...."[6] For those without wealth, influence, or connections, the only "bearing" arms they may do

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[2] "[P]ossession of a handgun or rifle/shotgun in New York City requires a license (for handguns) or a permit (for rifles/shotguns) issued by the NYPD License Division." Firearms Licensing, New York City Police Department (Jan. 1, 2018).

[3] *See* "Apply for a Firearms License," New York State.

[4] "You should expect it to take a minimum of four months from the time of application until a license is either granted or denied." *See* Firearms Licensing.

[5] "The application fee for a handgun license and for renewal is $340... The application fee for a Rifle/Shotgun permit is $140... The fingerprint fee is $87...." New Application Instructions, New York City Police Department License Division (Jan. 1, 2018).

[6] D. H. King, "License to Carry: New York's Gun Permit Laws," *Gotham Gazette* (June 23, 2015).

(even with a permit or license) is directly between their home or business and a few government-authorized locations. *See* 38 R.C.N.Y. Section 5-23. Even then, the firearms must be rendered nonfunctional and useless — unloaded and locked away. Pet. Cert. at 5.

No reasonable person could possibly conclude that residents of New York City are able to freely and fully exercise the rights protected by the Second Amendment, but that is what federal judges have ruled. Limiting the Second Amendment to the bare facts of the Heller decision, the Second Circuit imported modern, atextual First Amendment balancing into the Second Amendment, concluding that the "core" of the Amendment protects only the right to keep a handgun in the home for self-defense. *See* New York State Rifle & Pistol Ass'n v. New York City, 883 F.3d 45, 57 (2d Cir. 2018) (hereinafter "NYSRP 2018"). Although admitting that restrictions on "firearms training and ... firearm practice" could burden "the core right to keep and use firearms in self-defense in the home," the court used another First Amendment doctrine, and rationalized that "the restriction leaves law-abiding citizens with reasonable alternative means" to exercise their rights. *Id.* at 58, 60. The lower court then employed even another First Amendment doctrine — precisely the type of "judge-empowering 'interest balancing'" test that Heller forbade, applying "intermediate scrutiny" to uphold the City's firearms regime. *Id.* at 64. Justifying what are perhaps the most oppressive and restrictive gun laws in the country, the lower court blithely concluded

that they "impose at most trivial limitations on" Second Amendment rights. *Id.* at 57.

This Court's disturbing trend of denying petitions in Second Amendment decisions has left the lower federal courts free to disregard this Court's holdings in Heller and McDonald, leaving the American public at the mercy of states, cities, and local governments who have grown increasingly bold in their attacks on a right that — according to the Second Amendment text — "shall not be infringed."

ARGUMENT

I. THE SECOND CIRCUIT REJECTED THE CATEGORICAL APPROACH TO THE SECOND AMENDMENT, IN CONFLICT WITH HELLER, NECESSITATING REVIEW BY THIS COURT.

A. Balancing Interests, the Second Circuit Elevated Its Own Opinion over the Constitutional Text and the Categorical Heller Holding.

For just over a decade, since this Court issued its landmark decision in District of Columbia v. Heller, 554 U.S. 570 (2008), most of the lower courts have labored to devise judicial tests under which a wide range of firearms restrictions would be approved, lest the American people be allowed to exercise the individual right to keep and bear arms recognized by this Court. The opinion issued by the Second Circuit in NYSRP 2018 is among the most unfaithful in this

ignoble line of Second Amendment lower court decisions.

Completely unlike Heller's textual and categorical analysis, but similar to the approach taken by many other circuits, the Second Circuit decision below was based on application of judicial interest balancing tests pursuant to a "two-step inquiry."

> **First**, we "determine whether the challenged legislation impinges upon conduct protected by the Second Amendment," and **second**, if we "conclude[] that the statute[] impinge[s] upon Second Amendment rights, we must next determine and apply the appropriate level of scrutiny." [NYSRP 2018 at 55 (citations omitted) (emphasis added).]

As authority for its "two-step" test, the Court cited its own earlier decision in New York State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242 (2d. Cir. 2015) (hereinafter "NYSRP 2015"). However, it is simply impossible to tease a "two-step" test out of the text of the Second Amendment:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Second, it is impossible to find support for a "two-step" test in either the Heller or McDonald[7] decisions. The Supreme Court pedigree undergirding this "two-step inquiry," if it has any at all, will not be found in either of those decisions, but rather in the dissent in Heller, and in balancing tests used primarily in the context of the First Amendment which were rejected by the Heller majority.[8]

Nevertheless, with only a few notable exceptions, judges in the lower courts have rejected the approach taken by the Heller majority. For example, in dissent in Heller v. District of Columbia, 670 F.3d 1244 (D.C. Cir. 2011) ("Heller II"), then-Judge Kavanaugh explained:

> Heller and McDonald leave little doubt that courts are to assess gun bans and regulations based on **text, history, and tradition**, not by a balancing test such as strict or intermediate scrutiny....

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[7] McDonald v. Chicago, 561 U.S. 742 (2010).

[8] Some of the blame for perpetuating the "two-step inquiry" belongs on the lawyers litigating these cases, who argue based on the most recent precedents. It has been a mistake to place primary reliance on pragmatic balancing arguments, rather than Justice Scalia's principled "text, history, and tradition" approach. A similar failure of advocacy has also occurred with respect to the Fourth Amendment, where this Court's watershed property-based decision in United States v. Jones, 565 U.S. 400 (2012), has been ignored, as lawyers fall back on the familiar "reasonable expectation of privacy" test. *See* Carpenter v. United States, 138 S.Ct. 2206 (2018) (Gorsuch, J., dissenting).

> The Court responded to Justice Breyer by rejecting his "judge-empowering 'interest-balancing inquiry' that 'asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests.'" [*Id*. at 1271, 1277 (Kavanaugh, J., dissenting) (emphasis added).]

Apparently believing that it was permissible to rely either on the Heller majority opinion or on the Heller dissent, the Second Circuit chose the dissent, employing judicial balancing through its "two-step" around the Second Amendment.

The first prong of the "two-step" test allows courts to find that the legislation restricting "the right ... to keep and bear Arms" does not "impinge[] upon conduct protected by the Second Amendment...." This verbal legerdemain allows the Court to determine that certain infringements on "the right ... to keep and bear Arms" are not even subject to the Second Amendment. In the case below, the Second Circuit chose to skip the first step, assuming that the law infringed on conduct protected by the Second Amendment, so that it could move on to select a standard of review and balance the interests.

The second prong of the "two-step" requires the court to "determine and apply the appropriate level of scrutiny." The Second Circuit chose "intermediate" scrutiny, where "'the key question is whether the statute[] at issue [is] substantially related to the achievement of an important governmental interest.'"

NYSRP 2018 at 62 (citing NYSRP 2015). The type of analysis that the Second Circuit employs has become familiar as a result of this Court's use in First Amendment jurisprudence for nearly eight decades.[9] Accordingly, all lawyers currently in practice and judges in office were trained in this dance. First, one is to select the appropriate level of scrutiny — generally described as rational basis, intermediate scrutiny, exacting scrutiny, strict scrutiny, heightened scrutiny, or some gradient or mixture thereof.[10] And, since each type of scrutiny comes with its own tests and standards — which have evolved over the decades in regular, if not constant, flux — one needs to then apply that standard to the competing interests in the case. In the case of the First and Second Amendments, which textually limit the federal

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[9] The use of balancing tests in the First Amendment area can be traced back to Schneider v. New Jersey, 308 U.S. 147 (1939).

[10] When balancing tests are used, no matter what test is employed, the basis for the decision is transferred away from the Framers' text to the personal preferences of judges. In its first use of "rigid scrutiny" in balancing, this Court upheld President Roosevelt's Executive Order 9066, the Japanese-American internment order, that high standard having been met by one of the most egregious acts of any American president. *See* Korematsu v. United States, 323 U.S. 214, 216 n.1 (1944). If EO 9066 can survive "rigid scrutiny," then one can see how several circuits have upheld firearms restrictions, even while applying strict scrutiny. *See, e.g.,* United States v. Chovan, 735 F.3d 1127, 1136-42 (9th Cir. 2013) (applying strict scrutiny and upholding 18 U.S.C. § 922(g)(9)). Just as Korematsu has been discredited, so also should be the use of all such essentially meaningless and unworkable standards of review used in balancing.

government and judicially limit state governments as well, the balancing is always between governmental interests and an individual's interests.

Imagine a person of reasonable intellect and common sense, who never had training by law professors in the intricacies of judicial balancing, who was attempting to ascertain the constitutionality of a law challenged under the Second Amendment. His approach would likely be to read the text and seek to understand it the same way he would any work of nonfiction. He would seek the author's intent, here meaning the Framers and those who ratified the Constitution. To do that, he would ensure that the definitions of the words then had not changed with the passage of time. And he would seek out any common law or colonial antecedent to the text to ensure words that had technical meaning were understood to have that meaning. *See generally* E.D. Hirsch, Validity in Interpretation.

Contrast that common sense approach with these excerpts from the "reasoning" employed by the Second Circuit:

- "In Second Amendment cases, our Circuit has recognized **at least two forms** of heightened scrutiny — strict and intermediate." NYSRP 2018 at 55 (emphasis added).

- "*See* Kachalsky, 701 F.3d at 93 (holding that although '**some form** of heightened scrutiny would be appropriate,' strict scrutiny was **not**

necessary, and instead applying intermediate scrutiny.)" *Id.* (emphasis added).

- "[A] form of **non-heightened scrutiny may** be applied in some Second Amendment cases." *Id.* (emphasis added).

- "[H]eightened scrutiny is **not appropriate** where the regulation does not impose a '**substantial burden** on the ability of [plaintiffs] to possess and use a firearm for **self-defense**." *Id.* (emphasis added).

- "[W]e **need not determine** here which types of regulations may be subject only to **rational basis review**, or whether some form of **non-heightened scrutiny** exists that is more exacting than **rational basis review**.... [W]e find that the Rule does **not trigger** strict scrutiny and that it **survives** intermediate scrutiny." *Id.* at 55-56 (emphasis added).

- "In determining whether **some form** of heightened scrutiny applies, we consider **two factors**: '(1) "**how close** the law comes to the **core** of the Second Amendment right" and (2) "the **severity of the law's burden** on the right."'" *Id.* at 56 (emphasis added).

Obscured by this avalanche of balancing jargon, the Second Circuit completely ignores the constitutional text, effectively reducing the holding in Heller to its facts, namely: (i) a complete ban; (ii) on handguns; (iii) in the home; and (iv) kept for self-

defense and possibly some other ancillary rights to be named later. Any other restriction on the right to keep and bear arms is not subject to the "shall not be infringed," but rather "shall not be UNREASONABLY infringed," or under step one sometimes, does not implicate the Second Amendment at all. Thus, the Second Circuit has empowered itself to disregard the Second Amendment, except in the narrow area of a statute on all fours with the facts in Heller. If for no other reason, certiorari should be granted in this case to restore order in the circuits.

The Second Circuit sought to rationalize its opinion with the notion that all rights are limited, and thus, the Second Amendment could not possibly mean what it says. NYSRP 2018 at 55-64. But this view ignores the fact that each amendment has a common law or colonial context, and the words employed had an established meaning in 1787-89.[11]

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[11] The Heller case can be seen as a parallel to the historic dispute over the text of the First Amendment between Justice Hugo Black and Judge Felix Frankfurter. Justice Black wrote: "The First Amendment's language leaves no room for inference that abridgments of speech and press can be made just because they are slight. That Amendment provides, in simple words, that 'Congress shall make no law ... abridging the freedom of speech, or of the press.' I read 'no law ... abridging' to mean *no law abridging*." Smith v. California, 361 U.S. 147, 157 (1959) (Black, J., concurring). On the other hand, Justice Frankfurter preferred to reserve to the serving judges the authority to sanction abridgments of the freedom of speech.

B. The Heller Decision Rejected Judicial Interest Balancing.

The Heller case truly was a landmark case, and Justice Scalia's brilliant opinion clearly set out both the Court's approach to reach its decision and the rules by which future Second Amendment cases should be decided. When certiorari was granted, the question presented was whether D.C. law, which banned private possession of handguns while allowing possession of rifles and shotguns "violate[d] the Second Amendment right of individuals who are not affiliated with any state-regulated militia...." Deciding that issue in the affirmative, this Court rejected what was called the "collective right" theory in favor of the Amendment's protection of the right of each "individual." The Heller decision affirmed Judge Lawrence Silberman's opinion for the D.C. Circuit, that the Second Amendment "protects an individual right to keep and bear arms." Parker v. District of Columbia, 478 F.3d 370, 395 (D.C. Cir. 2007). And it affirmed the D.C. Circuit's view that the right was not bestowed by government on the people, but rather was a right which "existed prior to the formation of the new government under the Constitution." *Id.* And, Heller approved the view of the court below that one of the central purposes of the Second Amendment was to empower the people, not just in acts of self-defense against "private lawlessness," but also from "the depredations of a tyrannical government (or a threat from abroad)." *Id.*

Heller thus provides a classic illustration of how constitutions should be interpreted by judges, with

fidelity to the text and deference to the original public meaning of the people's Constitution. To ensure that public meaning would control, even at oral argument, the Chief Justice warned the Solicitor General that there is no room for interest balancing regarding the Second Amendment:

> Well, these various phrases under the different standards that are proposed, "compelling interest," "significant interest," "narrowly tailored," **none of them appear in the Constitution**; and I wonder why in this case we have to articulate an all-encompassing standard. Isn't it enough to **determine the scope of the existing right** that the amendment refers to...?
>
> [T]hese standards that apply in the First Amendment just kind of developed over the years as sort of **baggage that the First Amendment picked up**. [Heller Transcript Oral Argument at 44 (March 18, 2008) (emphasis added).]

Similarly, Justice Scalia's opinion employed a dismissive term for interest balancing approaches, calling them "judge-empowering" balancing tests. Heller at 634. Never once did the Second Circuit below quote that portion of Justice Scalia's opinion, which rejected the use of balancing tests in no uncertain terms. Perhaps the reason that language was ignored is that judges love to be empowered. Judges do not seem to be able to resist the power to usurp the role of the Framers of the Second Amendment, to decide, as Justice Scalia put it,

"whether the right is *really worth* insisting upon." Heller at 634.

C. The McDonald Decision Rejected Judicial Interest Balancing.

The Heller decision does not stand alone. The McDonald decision was cited below only once, as authority for the incorporation of the Second Amendment into the Due Process Clause of the Fourteenth Amendment. NYSRP 2018 at 55. As then-Judge Kavanaugh explained in Heller II:

> [t]he Court's later decision in *McDonald* underscores that text, history, and tradition guide analysis of gun laws and regulations. There, the Court again **precluded the use of balancing tests**; furthermore, it expressly rejected judicial assessment of 'the costs and benefits of firearms restrictions' and stated that courts applying the Second Amendment thus would not have to make 'difficult empirical judgments' about the efficacy of particular gun regulations.
>
> That language from McDonald is critically important because strict and intermediate scrutiny obviously require assessment of the "costs and benefits" of government regulations and entail "difficult empirical judgments" about their efficacy — **precisely what McDonald barred**. [Heller II at 1278-79 (emphasis added).]

In contrast, the Second Circuit explained that its approach:

> will often involve **difficult balancing** of the individual's constitutional right to keep and bear arms against the states' obligation to 'prevent armed mayhem in public places.' This is **not such a case**. The City has a clear **interest** in protecting **public safety**.... [NYSRP 2018 at 33 (emphasis added) (citations omitted).]

Remarkably, under the Second Circuit's balancing regime, once New York postulated some risk to "public safety," the constitutional challenge was doomed and not even requiring interest balancing. Thus, the same arguments made by the District of Columbia and rejected in Heller, and made by Chicago and rejected in McDonald, were reasserted by New York and adopted by the Second Circuit in NYSRP 2018 as the basis for its decision.

II. THE U.S. SUPREME COURT SHOULD NOT ALLOW LOWER COURTS TO TREAT THE SECOND AMENDMENT AS A SECOND-CLASS RIGHT.

In McDonald, this Court refused to treat the Second Amendment "as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees...." McDonald at 780. Yet this is what it has occurred at the hands of the lower federal courts. Petitioners correctly claim that "the Second Circuit's decision [is an] extreme outlier[] even among

Second Amendment decisions." Pet. Cert. at 11. However, the Second Circuit applied the same flawed tests used by many other lower courts. Since McDonald was decided in 2010, this Court has had multiple opportunities to correct the course of the lower courts, but has declined to do so.

In 2015, the Ninth Circuit upheld San Francisco's highly restrictive requirement that a handgun in a home must be stored in a gun safe when it is not physically on the person. Justices Thomas and Scalia dissented from this Court's denial of certiorari, explaining that "Second Amendment rights are no less protected by our Constitution than other rights enumerated in that document," and that "[d]espite the clarity with which we described the Second Amendment's core protection for the right of self-defense, lower courts ... have failed to protect it." Jackson v. City & Cnty. of San Francisco, 135 S.Ct. 2799-2800 (2015). Disagreeing with the Ninth Circuit's "tiers-of-scrutiny analysis," the dissent noted that the Court should have granted the petition "to reiterate that courts may not engage in this sort of judicial assessment as to the severity of a burden imposed on core Second Amendment rights." *Id*. at 2801-02.

Later in 2015, Justices Thomas and Scalia once again dissented from a denial of certiorari from a Seventh Circuit decision upholding an Illinois city's ban on so-called "assault weapons." Justice Thomas criticized the Seventh Circuit's "crabbed reading of *Heller*," which left the Circuit "free to adopt a test for assessing firearm bans that eviscerates many of the

protections recognized in *Heller* and *McDonald*." Friedman v. City of Highland Park, 136 S.Ct. 447, 448 (2015). The dissent reiterated that "*Heller* ... forbids subjecting the Second Amendment's 'core protection ... to a freestanding "interest-balancing" approach.'" *Id.* at 449 (quoting Heller at 634). And the dissent pointed out the disparity of treatment that the Second Amendment has received: "The Court's refusal to review a decision that flouts two of our Second Amendment precedents stands in marked contrast to the Court's willingness to summarily reverse courts that disregard our other constitutional decisions." *Id.* (citing several summary reversals).

In 2017, Justices Thomas and Gorsuch dissented from denial of certiorari of a Ninth Circuit *en banc* decision. The Ninth Circuit had *sua sponte* granted rehearing *en banc* after a panel of that court faithfully applied the text, history, and tradition of the Second Amendment to find California's "good cause" requirement for concealed carry permits to be unconstitutional. Peruta v. California, 137 S.Ct. 1995, 1996-97 (2017). The *en banc* court reversed, finding that the Second Amendment does not protect carrying firearms concealed in public. *Id.* Justice Thomas' dissent addressed "a distressing trend: the treatment of the Second Amendment as a disfavored right." *Id.* at 1999. Justice Thomas observed that from the McDonald decision to the denial of certiorari in Peruta, this Court had granted review in about 35 cases involving the First Amendment and 25 cases involving the Fourth Amendment, but none on the Second Amendment. *Id.*

Earlier this year, Justice Thomas once again dissented from a denial of certiorari of another Ninth Circuit decision. *See* Silvester v. Becerra, 138 S.Ct. 945 (2018). The dissent found the Ninth Circuit's decision upholding a 10-day waiting period for firearm purchases to be "symptomatic of the lower courts' general failure to afford the Second Amendment the respect due an enumerated constitutional right," and that "[i]f a lower court treated another right so cavalierly, I have little doubt that this Court would intervene." *Id*. at 945. The dissent again stressed that "the lower courts are resisting this Court's decisions in *Heller* and *McDonald* and are failing to protect the Second Amendment to the same extent that they protect other constitutional rights," and added that the Court's "continued refusal to hear Second Amendment cases only enables this kind of defiance." *Id*. at 950-51. Justice Thomas noted the curiosity that "rights that have no basis in the Constitution receive greater protection than the Second Amendment, which is enumerated in the text." *Id*. at 951. "The right to keep and bear arms is apparently this Court's constitutional orphan. And the lower courts seem to have gotten the message." *Id*. at 952.

Criticism of judicial balancing has come from the lower federal courts as well. In the year after McDonald, the D.C. Circuit upheld D.C.'s modified gun regulation scheme, but then-Judge Kavanaugh dissented and would have held that "*Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny." Heller II at 1271.

Last year, the Ninth Circuit upheld the ban on firearms possession by an individual who has been convicted of a misdemeanor crime of domestic violence[12] in Fisher v. Kealoha, 855 F.3d 1067 (9th Cir. 2017). Judge Kozinski concurred in the *per curiam* decision, but issued a separate "ruminating" opinion to encourage equal treatment of the Second Amendment among the Bill of Rights:

> In other contexts, we don't let constitutional rights hinge on unbounded discretion [of a governor's pardon]; the Supreme Court has told us, for example, that "[t]he First Amendment prohibits the vesting of such unbridled discretion in a government official." Despite what some may continue to hope, the Supreme Court seems unlikely to reconsider *Heller*. **The time has come to treat the Second Amendment as a real constitutional right. It's here to stay**. [Fisher at 1072 (Kozinski, J., ruminating) (emphasis added).]

Although the Fifth Circuit joined the Second Amendment two-step, many judges on that court disagree with interest balancing in the Second Amendment context. *See* Houston v. City of New Orleans, 675 F.3d 441, 448 (5th Cir. 2012) (Elrod, J., dissenting), opinion withdrawn and superseded on reh'g, 682 F.3d 361 (5th Cir. 2012) (*per curiam*); NRA v. BATFE, 714 F.3d 334 (5th Cir. 2013) (six judges

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[12] *See* 18 U.S.C. § 922(g)(9).

dissenting from a denial of rehearing *en banc*). Just three months ago, the Fifth Circuit once again denied rehearing *en banc* in a Second Amendment case involving a challenge to the residency requirement for firearms purchases from federally licensed firearms dealers.[13] *See* Mance v. Sessions, 896 F.3d 390 (5th Cir. 2018). There, seven judges vigorously dissented from the denial of rehearing, explaining, "Simply put, unless the Supreme Court instructs us otherwise, we should apply a test rooted in the Second Amendment's text and history — as required under *Heller* and *McDonald* — rather than a balancing test like strict or intermediate scrutiny." *Id*. at 394 (Elrod, J., dissenting). Judge Willett explained:

> Constitutional scholars have dubbed the Second Amendment "the Rodney Dangerfield of the Bill of Rights...."
>
> The Second Amendment is neither second class, nor second rate, nor second tier. The "right of the people to keep and bear Arms" has no need of penumbras or emanations. It's right there, 27 words enshrined for 227 years. [*Id*. at 396 (Willett, J., dissenting).]

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[13] *See* 18 U.S.C. §§ 922(a)(3) and 922(b)(3).

III. WHETHER THE NEW YORK CITY BAN UNCONSTITUTIONALLY ABRIDGES PLAINTIFFS' RIGHT TO TRAVEL IS A QUESTION OF GREAT IMPORT THAT SHOULD BE DECIDED BY THIS COURT.

With only a ritualistic quotation of the Second Amendment text, and without so much as a glance at the relevant constitutional and historical context and purpose, the Second Circuit dismissed Plaintiffs' contention that the New York City ban violates their constitutional right to travel, glibly asserting that "[t]he Constitution protects the right to travel, not the right to travel armed." NYSRP 2018 at 67. Yet, the two rights have been historically exercised in tandem, playing an essential role in the unfolding of events leading up to, and immediately following the Civil War.

In his careful study of the application of the Second Amendment to the States under the Fourteenth Amendment's "privileges or immunities" text, Justice Thomas documents the role that firearms played in the self-defense of black communities, both before slavery and after emancipation. *See* McDonald at 843-50, 855-58 (Thomas, J., concurring). And, as black people traveled far and wide — many leaving the southern States to settle up north and out west — they carried their firearms with them, prepared to defend their families if threatened by hostile communities seeking to deny them ingress and egress. *See generally* N. Johnson, Negroes and the Gun: The Black Tradition of Arms (Prometheus Books: 2014).

Before emancipation and the ratification of the Fourteenth Amendment, blacks did not enjoy any constitutional right either to travel or to keep and bear arms. But, with the Amendment's ratification, "our system of government" was "significantly altered" by the very first sentence of the Amendment's first section, which provides that "'[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.'" McDonald at 807 (Thomas, J. concurring). As Justice Thomas explained, this single sentence:

> unambiguously overruled this Court's contrary holding in *Dred Scott* ... that the Constitution did not recognize black Americans as citizens of the United States or their own State. [*Id.* at 807-08.]

Yet, as Justice Thomas has acknowledged, the text's promise that — "'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States'" — has not lived up to its promise — except to affirm that the "Clause prevents state abridgment of ... the right to travel." *Id.* at 809. NYSRP 2018 at 66.

While Justice Thomas has expressed reservations on whether the right to travel is "essential to liberty" (McDonald at 809), this Court has extolled the right's virtues on numerous occasions, even predating the Fourteenth Amendment. In Crandall v. Nevada, 6 Wall. 35 (1867), this Court held that a Nevada tax upon every person leaving the State by common carrier

violated "the right to move freely throughout the nation ... as a right of *national* citizenship." *See* Edwards v. California, 314 U.S. 160, 178 (1941) (Douglas, J., concurring). Even though there was no evidence in Crandall that any of the persons there involved were on a mission that would require the payment of the tax — it was enough that "damage and havoc ... would ensue if the States had the power to prevent the free movement of citizens from one State to another." *Id.*

In sum, the right to travel and the right to keep and bear arms fit like hand-in-glove. As both are privileges and immunities of United States citizenship, both are unconstitutionally abridged by New York City, whose actions cannot be saved by the Second Circuit's opinion dismissing the city ordinance as an inconsequential "regulation [that] concerns only [the citizens'] ability to remove the specific handgun licensed to their residences from the premises for which they hold the license." NYSRP 2018 at 67.

IV. THIS COURT SHOULD GRANT THE PETITION TO DECIDE WHETHER A PERSON MAY BE FORCED TO FORFEIT HIS SECOND AMENDMENT RIGHTS IN EXCHANGE FOR OTHER CONSTITUTIONAL PROTECTIONS.

Petitioner notes that "the ban violates the fundamental right to travel by conditioning such travel on the forfeiture of a separate, but equally important, constitutional right." Pet. Cert. at 3. The Petition argues that "the decision below forces petitioners to

choose which constitutional right they would rather exercise: their right to travel or their right to keep and bear arms."[14] Pet. Cert. at 20. Indeed, the circuit court below applauded this result, claiming that "[t]he Constitution protects the right to travel, not the right to travel armed."[15] NYSRP 2018 at 67. Unfortunately, this is not the first time that governments (and courts) have conditioned the exercise of constitutional rights on a person's forfeiture of his Second Amendment rights.

In 2013, a Texas appellate court held that the police can transform a search warrant for drugs into a no-knock warrant simply because there may be a firearm in the home. Quinn v. State, 2013 Tex. App. LEXIS 6167 (Ct. App. Tx. 5th Dist. Dallas, 2013) (*cert. denied* at Quinn v. Texas, 571 U.S. 1202 (2014)). In the case, the police knew that John Quinn's son Brian, the target of their drug raid, was not at home. The police knew that John Quinn was a law-abiding person, as he held a Texas concealed handgun license. And, of course, from that license, they knew he likely was armed. From those facts, the Texas court concluded that, if an American would like to preserve

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[14] In reality, the city's ban puts petitioners to an even more nefarious Hobson's choice: in order to receive permission from the government to exercise their "core" Second Amendment right to "keep" a handgun in their home for self-defense, they must promise that they will not "bear" that firearm in public. As Petitioner notes, "[t]he Constitution does not allow the government to put citizens to that choice." Pet. Cert. at 20.

[15] Of course, the Second Amendment unambiguously protects the right to "bear arms" — *i.e.*, the right to travel armed.

his Fourth Amendment right to have the police "knock and announce" their presence while serving a warrant, he must forego his "core" Second Amendment right to keep a firearm in his home for self-defense.

Then, in 2017, and over a vigorous dissent, the Fourth Circuit sitting *en banc* reversed a panel decision and concluded that "a law enforcement officer is justified in frisking a person whom the officer has lawfully stopped and whom the officer reasonably believes to be armed, regardless of whether the person may legally be entitled to carry the firearm." United States v. Robinson, 846 F.3d 694, 695 (4th Cir. 2017). Although the panel decision had found that "today in West Virginia ... there is no reason to think that public gun possession is unusual, or that a person carrying or concealing a weapon during a traffic stop is anything but a law-abiding citizen who poses no danger to the authorities,"[16] the *en banc* court concluded that the police may treat all gun owners the way they would dangerous armed criminals. In doing so, the court collapsed this Court's "armed and dangerous" test from Terry v. Ohio into a single element — "armed." In other words, any law-abiding American who exercises his right to "bear" arms in the Fourth Circuit must forgo his Fourth Amendment right to be secure in his person when stopped by the police.

These cases violate the principle set out in Simmons v. United States, 390 U.S. 377 (1968), where this Court held that the government requiring a

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[16] 814 F.3d 201, 208 (4th Cir. 2016).

person to forfeit one Constitutional right in order to exercise is a "condition of a kind to which this Court has always been peculiarly sensitive." Simmons at 393. The Court continued that "we find it intolerable that one constitutional right should have to be surrendered in order to assert another." *Id.* at 394. However, many lower courts' "tolerance" is far greater in the Second Amendment context. Or, as Orwell put it, "all animals are equal, but some animals are more equal than others." G. Orwell, Animal Farm (1945). The Second Amendment is no second-class right, and government may not require its forfeiture in exchange for other fundamental rights.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be granted.

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