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, *et al.*,

Respondents.

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

AMICI CURIAE BRIEF OF ACADEMICS FOR THE SECOND AMENDMENT IN SUPPORT OF THE PETITIONERS

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TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Cited Authorities

Page

Page

Page

Statutes

Page

Articles

INTEREST OF THE AMICUS[1]

Amicus Academics for the Second Amendment ("A2A"), is a §501(c)(3) tax-exempt organization. Formed in 1992 by law school teachers, A2A's goal is to secure the right to keep and bear arms as a meaningful, individual right. A2A has filed *amicus* briefs in this Court in *McDonald v. City of Chicago, District of Columbia v. Heller,* and in *United States. v. Lopez*. It has also published a series of "*Open Letters*" signed by college and university professors in the New York Times, the National Review, the New Republic, and other print media.

SUMMARY OF ARGUMENT

The Second Circuit erred in applying a dual standard of review, under which a very few Second Amendment challenges are reviewed under strict scrutiny, and all others reviewed under a lax form of intermediate review. The dual standard originates in First Amendment ballot-access cases, and is necessitated by the unique setting such challenges pose.

The case now before the Court also offers an opportunity for the Court to clarify its *Heller dicta*, which have given rise to circuit splits and have been misread by the lower courts as creating bright-line rules.

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1. No counsel for a party authored this brief in whole or in part, and no person other than amicus and its members made a monetary contribution to the preparation and submission of this brief. Counsel for Petitioners and Counsel for Respondents consented to this filing in accordance with this Court's rules.

ARGUMENT

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), this Court recognized that the Second Amendment guaranteed an individual right to keep and bear arms. In *McDonald v. Chicago*, 561 U.S. 742 (2010), it recognized this right was fundamental and binding upon the states. In *Caetano v. Massachusetts*, 577 U.S. __, 136 S. Ct. 1027 (2016) (*per curiam*), it turned back a state court's attempt to evade its earlier teachings. The case now under consideration offers the opportunity to correct the Second Circuit's similar attempt. It also offers the opportunity to clarify descriptive language, *dicta*, in *Heller* which the lower courts have seized upon as a means to avoid giving serious consideration to the Second Amendment.

I. THE SECOND CIRCUIT ERRED IN APPLYING A DUAL STANDARD OF REVIEW, WITH STRICT SCRUTINY LIMITED TO FEW IF ANY INFRINGEMENTS, AND A LOOSE FORM OF INTERMEDIATE REVIEW APPLIED TO ALL OTHERS.

The Second Circuit employed a dual standard of review, under which certain firearm restrictions (very few, in practice none) would be evaluated under strict scrutiny, while all others are assessed under intermediate review. *New York State Rifle & Pistol Ass'n v. City of New York*, 883 F.3d 45, 56-57 (2nd Cir. 2018). This approach has been employed by other circuits. These have ruled that strict scrutiny is limited to infringements that (1) severely burden (2) the right of armed self-defense (3) in the home. *See, e.g, United States v. Masciandaro,* 638 F.3d 458, 470 (4th Cir. 2011); *Nordyke v. King*, 644 F.3d 776, 783 (9th Cir.

2011). Since *Heller* ten years ago struck down those laws that severely burden possession for self-defense in the home, the dual standard of review reduces to: all existing restrictions on firearm possession and use will receive intermediate scrutiny.

In the past, the Second Circuit has gone farther, suggesting that any but substantial burdens on the core right should receive no form of heightened scrutiny at all. *See United States v. Decastro*, 682 F.3d 160, 164-65 (2d Cir. 2012) ("We hold that heightened scrutiny is appropriate only as to those regulations that substantially burden the Second Amendment. Because § 922(a)(3) only minimally affects the ability to acquire a firearm, it is not subject to any form of heightened scrutiny."); *New York State Rifle and Pistol Ass'n v. Cuomo*, 804 F.3d 242, 258 (2nd Cir. 2015) ("Laws that neither implicate the core protections of the Second Amendment nor substantially burden their exercise do not receive heightened scrutiny.").

A. The Dual Standard Is Properly Confined to the Unique Setting of Election-Law Challenges, Where Extensive Regulation Is Necessary to Exercise of a First Amendment Right.

The use of multiple standards of review to evaluate the same statute is an import from First Amendment challenges to election laws, specifically ballot-access laws. *See, e.g.*, *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Timmons v. Twin Cities New Party*, 520 U.S. 351 358 (1997); *Norman* v. *Reed,* 502 U. S. 279, 288-89 (1992).

It is important to note that these election law cases address an unusual, indeed unique, constitutional problem.

On the one hand, elections involve the very core of First Amendment rights. "Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S, 1, 17 (1964). "[V]oting is of the most fundamental significance under our constitutional structure." *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979). Thus, the ordinary application of the First Amendment would use strict scrutiny to evaluate virtually all regulation of elections.

On the other hand, extensive government regulation is necessary merely to make elections possible, let alone fair. "[A]s a practical matter, there must be substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974). "To achieve these necessary objectives, States have enacted comprehensive and sometimes complex elections codes," each part of which "inevitably affects – at least to some degree – the individual's right to vote…." *Anderson v. Celebreeze*, 460 U.S. 780, 788 (1983).

It is hard to envision another First Amendment right that can only be exercised on a day and at a place dictated by the government,[2] with expression restricted to making government-designated choices by checking boxes on a government-provided form.[3]

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2. And in a place where many other First Amendment activities, such as handing out leaflets and display of political messages, can be forbidden. *See Burson v. Freeman*, 304 U.S. 191 (1992).

3. A state may refuse to allow voting for "write-in" candidates. *See Burdick v. Takushi,* 504 U.S. 428 (1992).

This Court's ballot-access jurisprudence reflects this unique reality. To apply strict scrutiny to all election regulations would simply be impossible. Instead, this Court has evolved a dual standard, recognizing that the harm to be avoided is that those in power might be tempted to manipulate the system to perpetuate that power. Accordingly, "reasonable, nondiscriminatory restrictions," *Anderson*, 460 U.S. at 788, or "generally applicable and evenhanded restrictions," *id.*, n. 9, are exempted from strict scrutiny. Measures which do discriminate, or are unreasonable, are still subject to it. *Williams v. Rhodes*, 393 U.S. 23, 31 (1968) (discrimination against third parties); *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) (unreasonable requirements for third-party candidates). As Justice O'Connor explained,

> Where the State imposes only reasonable and genuinely neutral restrictions on associational rights, there is no threat to the integrity of the electoral process and no apparent need for judicial intervention. As such restrictions become more severe, however, and particularly where they have discriminatory effects, there is increasing cause for concern that those in power may be using electoral rules to erect barriers to electoral competition. In such cases, applying heightened scrutiny helps to ensure that such limitations are truly justified and that the State's asserted interests are not merely a pretext for exclusionary or anti-competitive restrictions.

Clingman v. Beaver, 544 U.S. 581, 603 (2005) (O'Connor, J., concurring). *See also Anderson*, 460 U.S. at 793.

The dual standard of review thus was evolved to deal with a unique and narrow aspect of First Amendment law, where the very exercise of the right must depend upon "comprehensive and sometimes complex elections codes." Moreover, it is a field where a single likely source of abuse can be identified: the risk that those in power will discriminate against their challengers. Even-handed, nondiscriminatory measures are self-limiting: supporters of those in power will equally be subject to their restrictions.

Neither factor is present in the Second Amendment context. The right to arms may, like rights to speech in general and to religion and assembly, be exercised absent government regulation. Further, the firearms restrictions are rarely imposed in a "reasonable and generally neutral" manner. Those in power commonly exempt themselves from the arms restrictions they impose upon others.[4]

4. *See, e.g.,* 18 U.S.C. §925(a)(1) (exempting federal and state agencies from most Gun Control Act requirements); N.J. Statutes 2:39-6 (extensive exemptions for guards, law enforcement, and other government employees); D.C. Code §7-2531 (imposing strict liability for illegal firearm transfers, but exempting any firearm "originally distributed for a law enforcement agency or a law enforcement officer"); D.C. Code §7-2551 (strict liability for sale of an "assault weapon," with same exemption). The most obvious case of discrimination is found in California, which requires extensive, and expensive, safety testing of each model of handgun being sold at retail, requirements so expensive that many manufacturers have refused to meet them and thus are barred from the state. Firearms not so tested are legally classified as "unsafe." Cal. Penal Code §32000.

B. The Dual Standard of Review Improperly Allows Lower Courts to Avoid Meaningful Review of Firearm Laws, to the Point of Directly Contradicting *Heller*'s Holding.

The practical effect of the dual standard of review is to allow lower courts to avoid any real application of the Second Amendment. They need only find that strict scrutiny is limited to "serious" invasions (bans on possession) of the "core right" (possession in the home) – that is, the laws struck down in *Heller* and *McDonald* – and apply intermediate review to every other restriction. They are then free to treat the broad standard of intermediate review as rational basis under another name. *Jackson v. City and County of San Francisco*, 746 F.3d 953 (9th Cir. 2014), is an archetype of this approach.

By way of background, in addition to striking down the District of Columbia's ban on handgun possession, *Heller* also struck down the District's requirement that all firearms kept in the home must be locked in a container, or disassembled, or given a trigger-lock.

> We must also address the District's requirement (as applied to respondent's handgun) that firearms in the home be rendered and kept inoperable at all times. This makes it impossible for citizens to use them for the core lawful purpose of self-defense and hence is unconstitutional.

California, however, permits prosecutors, employees of prosecutors' offices, and law enforcement officials to freely buy these supposedly "unsafe" guns. Cal. Penal Code §32000(b)(4).

Heller, 554 U.S. at 630. In *Jackson v. City and County of San Francisco*, however, the Ninth Circuit managed to use the dual standard of review to uphold a statute that it conceded was in practice identical to that stricken in *Heller*.

The San Francisco ordinance prohibited keeping a handgun within the home unless it was stored in locked container, disabled by a trigger lock, or carried on the person. The last was the only distinction between the San Francisco ordinance and the D.C. ordinance invalidated in *Heller*, and the Ninth Circuit conceded that "there are times when carrying a weapon on the person is extremely impractical, such as when sleeping or bathing. Therefore, as a practical matter, section 4512 sometimes requires that handguns be kept in locked storage or disabled with a trigger lock." 746 F.3d at 963-64.

The Ninth Circuit nonetheless upheld the ordinance by finding that, while the ordinance restricted the "core" of the right to arms, possession for self-defense in the home, it did not impose a "substantial burden" on it. 746 F.3d at 964, 965. The Ninth Circuit then used intermediate scrutiny to *uphold an ordinance it had recognized was essentially identical to the one this Court had stricken in Heller. Jackson* illustrates how the dual standard of review not only can be, but actually has been, used by lower courts to entirely vitiate this Court's holdings.

Silvester v. Harris, 843 F.3d 816 (9th Cir. 2016), *cert. denied* 138 S.Ct. 945 (2018), is another illustration of how lower courts have used intermediate scrutiny to apply what is in fact rational basis. Under intermediate scrutiny the government bears the burden of justifying

the challenged regulation. *State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989). This "justification must be genuine, not hypothesized or invented post hoc in response to litigation." *United States* v. *Virginia*, 518 U.S. 515, 533 (1996). *See also 44 Liquormart v. Rhode Island*, 517 U.S. 484, 531 (1996).

Silvester challenged California's ten-day waiting period for firearms purchase, as applied to purchasers who already owned firearms. The alleged justification for the waiting period was that a homicidally-enraged person would have ten days in which to "cool off" before he could obtain a firearm;[5] the challenger asked how could this be effective as applied to a person who *already* owned firearms.

The Ninth Circuit dealt with this by speculating that such a person might decide that his already-owned firearms were less suited to a contemplated homicide than another type of firearm would be, and so desire to obtain a new and different arm. 843 F.3d at 828. There was no evidence such a hypothetical purchaser had ever existed. This was, however, was no barrier to the Ninth Circuit concluding that the requirement had a "reasonable fit" to the proffered objective of reducing gun violence.

The dual standard of review used by the Second Circuit, and other courts, is thus taken from the unique

5. At that, it seems unlikely that a person would go into an uncontrolled homicidal rage, dispassionately judge that his odds of success would improve with a firearm, locate a licensed dealer, travel to the dealer's premises, execute the paperwork and obtain a firearm and ammunition, then return to the scene to act out his rage.

setting of ballot-access laws. It is inappropriately applied to the Second Amendment, a setting where the considerations that underlie ballot access regulations are inapplicable. The lower courts have employed the dual standard to evade giving serious consideration to the principles this Court enunciated in *Heller* and *McDonald*. They have, indeed, employed the dual standard to uphold a law identical to one stricken in *Heller*.

II. THIS COURT SHOULD CLARIFY DESCRIPTIVE *DICTA* EMPLOYED IN *HELLER* WHICH THE LOWER COURTS HAVE MISCONSTRUED AS CREATING BRIGHT-LINE RULES.

In *Heller*, this Court sought to provide reassurance that its recognition of an individual right to arms did not mean that all arms-related regulations must be found unconstitutional. The sole issue before the Court was a ban on possession of handguns in the home, which failed under any standard of heightened review; other possible restrictions were a matter for another day when they might be properly posed, briefed, and assessed.

Unfortunately, lower courts have too often seized upon these dicta and interpreted them as creating categorical exceptions. This categorical approach enables them to uphold broad classes of restrictions regardless of the significance of their burdens and the lack of any social benefit.

A. "Presumptively Lawful"

No passage in *Heller* has created as much conflict in the lower courts as:

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Heller, 554 U.S. at 626-27. The Court added a footnote describing these as "presumptively lawful regulatory measures." *Id.* at 627, n. 26.

Among the conflicts generated by this paragraph has been the question of whether as-applied Second Amendment challenges are permissible. *See generally* C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?,* 32 Harv. J. L. & Pub. Pol'y 695 (2009). Four Circuits have treated the listed restrictions as exceptions to the Second Amendment, much as obscenity, fraud, and facilitation of crime are exceptions to the First Amendment. These Circuits thus see as-applied challenges as barred. *See United States v. Scroggins*, 599 F.3d 433, 451 (5th Cir. 2010); *United States v. Vongxay*, 594 F.3d 1111, 1114 (9th Cir. 2010) *(en banc)*; *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009); *United States v. Rozier*, 598 F.3d 768, 771 (11th Cir.), *cert. denied* 560 U.S. 958 (2010).

Five other Circuits focus upon "presumptively," and hold that this Court's language does not bar as-applied challenges. *See Binderup v. Attorney Gen.,* 836 F.3d 336 (3d Cir. 2016) (*en banc*), *cert. denied*, 137 S. Ct. 2323 (2017);

United States v. Woolsey, 759 F.3d 905, 909 (8th Cir. 2014)*; Schrader v. Holder,* 704 F.3d 980, 990–91 (D.C. Cir. 2013); *United States v. Moore,* 666 F.3d 313, 320 (4th Cir. 2012); *United States v. Williams*, 616 F.3d 685, 692 (7th Cir.), *cert. denied* 563 U.S. 1092 (2010). *See generally Kanter v. Barr*, 919 F.3d 437 (7th Cir. 2019).

In weighing the meaning of the disputed paragraph from *Heller*, it must be recognized that the *Heller* Court granted certiorari on a very narrow issue. As the Court phrased the issue presented, it was whether the District's ordinances "violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?" *District of Columbia v. Heller*, Order of November 20, 2007.

That, by this Court's direction, was the sole issue before it. As to all other issues, the Court kept all options open for future cases in which those issues might be properly posed, briefed, and considered. The *Heller* paragraph on longstanding laws was thus purest *dictum*.[6]

Even considering it as *dictum*, this Court has universally used the term "presumptively," not to describe bright-line rules, but to describe generalities subject to exceptions. Thus it has used the term in First Amendment cases involving viewpoint discrimination, *see Nat'l Inst. Of Family & Life Advocates v. Becerra*, __ U.S. __, 138 S.Ct.

6. As *Heller* itself noted, with regard to *Lewis v. United States,* 445 U.S. 55 (1980), "It is inconceivable that we would rest our interpretation of the basic meaning of any guarantee of the Bill of Rights upon such a footnoted *dictum* in a case where the point was not at issue and was not argued." 554 U.S. at 625, n. 25.

2361, 2371 (2018) (such discrimination is "presumptively unconstitutional"); *Matal v. Tam*, 582 U.S. ___, 137 S.Ct. 1744, 1766 (2017) (same); *Reed v, Town of Gilbert*, 576 U.S. ___, 135 S.Ct. 2218, 2226 (2015) (same); *Rosenberger v. Rectors and Visitors of the Univ. of Va.,* 515 U.S. 819, 830 (1995) (same). It has likewise used it in the Fourth Amendment context to describe warrantless searches, *see Dow Chemical Co.* v. *United States*, 476 U. S. 227, 245 (1986) ("presumptively unreasonable"); *Kyllo v. United States*, 533 U.S. 27, 32 (2001) (same).

"Presumptively lawful" is thus purest *dictum*, referring to issues not posed by the narrow grant of certiorari, nor briefed by the parties. At that, it expresses a generality, not a bright-line rule. Since the lower courts have frequently misconstrued the passage at issue, with significant effect on the scope of the Second Amendment, it is appropriate that the Court provide guidance in this area.

B. "Longstanding"

Heller mentions the adjective "longstanding" in passing, but some lower courts have looked upon this as creating a manner of test. *See, e.g., NRA v. BATFE*, 700 F.3d 185, 196-97 (5th Cir. 2012) (ban on sales to juveniles); *United States v. Rene E.*, 583 F.3d 8, 12 (1st Cir. 2009) (same, tracing age restrictions to the 1870s); *United States v. Skoien,* 614 F.3d 638, 640-44 (7th Cir. 2010) (*en banc*) (acknowledging logical problems with this approach, but reasoning by analogy).

It is apparent that the reference to "longstanding" was not meant to have constitutional significance; it simply

described some laws that were not before the Court, and as to which the Court did not wish to tie its hands. It did not create a criterion, or even a consideration, for constitutionality. Relatively old laws are not *per se* constitutional, any more than relatively new ones are *per se* unconstitutional.

The age of the other restrictions cited was not such as to be relevant to the understandings of the Framing generations of 1789-91 or of 1866-68. Even in the major urban states, commercial restrictions date only to the early twentieth century. *See, e.g.,* 1911 NY Laws ch. 195, §2 (recordkeeping by retail handgun sellers); 1923 Calif. Laws ch. 339 §§ 9, 11 (licensing of same). Federal law did not prohibit possession by violent felons until 1938, *see* Federal Firearms Act, Pub. L. No. 75-785. 52 Stat. 1250 §2(d), (e), (f), and nonviolent felons and the mentally ill until 1968. 18 U.S.C.§922(d), (g). The Court was not creating a hard-and-fast rule based on (very limited) antiquity, a principle unknown to any other field of constitutional law.[7] Rather, it was simply *describing* some laws that were not before it, and which its holding did not inevitably bar. "Longstanding" was an adjective used in passing, not a constitutional test.

This is reinforced by reflection upon why obscenity, fraud, facilitation of crime, "fighting words" and other such are exceptions to the First Amendment. The Framing

7. *Roe v. Wade*, 410 U.S. 113 (1973), struck down a statute dating to the 1850s. 410 U.S. at 119. *Loving v. Virginia*, 388 U.S. 1 (1967) struck down a 1924 re-enactment of laws dating to the colonial period. 388 U.S. at 6. *Lawrence v. Texas*, 549 U.S. 558 (2003), struck down statutes that (depending upon the definition) dated to the 16th century or to the 1970s. 549 U.S. at 568-70.

generations knew of these categories and did not consider them protected by "freedom of speech." The same cannot be said of the "longstanding" restrictions listed in *Heller*.

Accordingly, *Heller*'s reference to these "longstanding," presumptively constitutional, laws cannot be taken to carve out exceptions to the right to arms, but simply to briefly describe what restrictions were not before the Court and thus not foreclosed by its ruling.

CONCLUSION

This Court should reverse the ruling below, reject its use of a dual standard of review, and use the opportunity presented to clarify the *dicta* referenced in *Heller*.

Respectfully submitted,

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