No. 18-280

In The
Supreme Court of the United States

NEW YORK STATE RIFLE &
PISTOL ASSOCIATION, INC., et al.,

Petitioners,

v.

THE CITY OF NEW YORK, et al.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Second Circuit**

BRIEF OF COMMONWEALTH SECOND AMENDMENT, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Commonwealth Second Amendment, Inc. ("Comm2A") is a Massachusetts non-profit corporation dedicated to preserving Second Amendment rights. Comm2A engages in public advocacy to promote a better understanding of the Second Amendment, and supports litigation to

[1] Rule 37 statement: All parties have consented in writing to the filing of this brief. No counsel for any party authored this brief, in whole or in part, and no person or entity other than *amicus*, its members, and its counsel funded its preparation or submission.

improve access to the fundamental right to keep and bear arms. This case's outcome will directly impact Comm2A's interests and those of its members and supporters, who are affected by laws that interfere with their peaceful exercise of Second Amendment rights.

SUMMARY OF ARGUMENT

Courts have largely failed to absorb the news that Americans enjoy a fundamental right to keep and bear arms. In the absence of this Court's oversight, "the passage of time has seen *Heller*'s legacy shrink to the point that it may soon be regarded as mostly symbolic . . . *Heller* has been narrowed from below." Richard Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L. J. 921, 962-63 (2016) (citing *District of Columbia* v. *Heller*, 554 U.S. 570 (2008)).

The problem does not lie with *Heller*. Courts dedicated to resisting *Heller*'s implementation would find ambiguity in any opinion securing Second Amendment rights. The only decision this Court could reach that would make the right to keep and bear arms truly operational would be the decision to review, reverse, and rebuke each act of defiance—as regularly as the lower courts resist *Heller*, and for as long as it takes to set things right. While no one in 2008 predicted the lower courts' near-complete revolt against *Heller*, that decision acknowledged that Second Amendment doctrine would develop organically over time on a case-by-case

basis, as is the experience under other rights-securing provisions. *Heller*, 554 U.S. at 635.

In launching this essential process here, the Court should start by emphasizing *Heller*'s example of dispensing with threshold tests and means-ends scrutiny. If a law interferes with Second Amendment rights, a court's failure to appreciate the value of what is lost is unimportant. And whatever role the familiar standards of review might play in the Second Amendment space, *Heller* confirmed that these are not always required. *Heller*'s nonreliance on means-ends scrutiny was no oversight.

To the extent that it would preserve a role for means-ends scrutiny in Second Amendment cases, this Court should be under no illusion that mandating "strict" scrutiny will make much difference. The lower courts' widespread failure to apply strict scrutiny is a symptom, not a cause, of the underlying results-oriented problem. If allowed at all, applying a standard of review (strict scrutiny, for what it may be worth) should be the last methodological resort, not as is often the case, the only option. *Heller* already demonstrated that levels of scrutiny are inappropriate to adjudicate the constitutionality of categorical arms bans or other effective destructions of Second Amendment rights.

And if, as the last methodological resort, courts employ strict scrutiny in Second Amendment cases, this Court should make clear that "scrutiny" requires rigorous examination of the right at stake—not the

assumption of a paperweight cipher to be balanced away at the next step. Means-ends scrutiny balances a right, a real right, against regulatory interests. It does not balance competing interests as to whether the right is a good idea.

Heller requires no "expansion." And the time has come for it to be enforced.

ARGUMENT

I. This Court Should Directly Address the Lower Courts' Bias Against Second Amendment Rights.

1. "[T]here is no . . . distinction between, or hierarchy among, constitutional rights." *Caplin & Drysdale* v. *United States*, 491 U.S. 617, 628 (1989). This Court has rejected the notion that some constitutional provisions "are in some way less 'fundamental' than" another. *Valley Forge Christian College* v. *Americans United for Separation of Church & State*, 454 U.S. 464, 484 (1982). "Each [provision] establishes a norm of conduct which the Federal Government is bound to honor—to no greater or lesser extent than any other inscribed in the Constitution." *Id.* "[W]e know of no principled basis on which to create a hierarchy of constitutional values. . . ." *Id.*

Yet Chicago should not have been faulted for asking this Court "to treat the right recognized in *Heller* as a second-class right, subject to an entirely different

body of rules than the other Bill of Rights guarantees." *McDonald* v. *City of Chicago*, 561 U.S. 742, 780 (2010) (plurality op.). After all, courts nearly always oblige such requests.

2. Notwithstanding the fact that the federal, state, and local governments comprehensively regulate every aspect of the possession and use of arms, decisions holding such regulations unconstitutional are vanishingly rare. If the lower courts' post-*Heller* body of work is to be credited, the Second Amendment is unnecessary. Perhaps nothing the government might do, short of enacting Washington, D.C.'s late prohibitions verbatim, violates the right to keep and bear arms. As far as the relevant circuits are concerned, the Second Amendment has never been violated in Massachusetts, New York, California, and other states where hostility to the private ownership of firearms is intense and pervasive.

Not for nothing have constitutional scholars "dubbed the Second Amendment 'the Rodney Dangerfield of the Bill of Rights.'" *Mance* v. *Sessions*, 896 F.3d 390, 396 (5th Cir. 2018) (Willett, J., dissenting from denial of rehearing en banc) (footnote omitted). In over a decade of post-*Heller* litigation, only six surviving published appellate decisions have restrained interference with Second Amendment rights. *See Ezell* v. *City of Chicago*, 846 F.3d 888 (7th Cir. 2017) ("*Ezell II*"); *Wrenn* v. *District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017); *Binderup* v. *Att'y Gen.*, 836 F.3d 336 (3d Cir. 2016) (en banc); *Heller* v. *District of Columbia*, 801 F.3d 264 (D.C. Cir. 2015); *Moore* v. *Madigan*, 702 F.3d 933

(7th Cir. 2012); *Ezell* v. *City of Chicago*, 651 F.3d 684 (7th Cir. 2011) ("*Ezell I*").[2]

Of these six decisions, five came from just two circuits, two from the same panel. None of the victories came easily. All emanated from divided courts. All but two (*Ezell I* and *II*) overcame meaningful en banc litigation. And all but two (*Ezell II* and *Binderup*) were bitterly opposed not just by the various units of federal, state, and local government, but by the usual *amici*, many of whom will doubtless shortly appear to proclaim that awarding Petitioners any relief would risk widespread death and destruction.

It is not only "the lower courts [that] seem to have gotten the message" about the Second Amendment's subterranean status. *Silvester* v. *Becerra*, 138 S. Ct. 945, 952 (2018) (Thomas, J., dissenting from denial of certiorari). The Second Amendment's political opponents are hardly concerned with constitutional impediments to their ever-proliferating regulatory schemes. And the largely quixotic nature of Second Amendment

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[2] A number of divided Ninth Circuit panels have expressed openness to Second Amendment rights, but these were all quickly vacated en banc. *See* Reply Br., *Pena* v. *Horan*, No. 18-843, at 3-4 (collecting cases).

The Sixth Circuit preserved an as-applied challenge to 18 U.S.C. § 922(g)(4), which bans firearms possession by people who had been involuntarily committed. *Tyler* v. *Hillsdale Cnty. Sheriff's Dep't*, 837 F.3d 678 (6th Cir. 2016) (en banc). But poor physical health eventually forced the challenger to abandon his claim. Stipulation to Dismiss, *Tyler* v. *Hillsdale Cnty. Sheriff's Dep't*, No. 1:12-CV-523-GJQ, Dkt. 59 (W.D. Mich. Aug. 7, 2017).

litigation is not lost on those who would organize, support, and participate in efforts to preserve the right.

3. Bias against Second Amendment rights is not merely apparent in the rarity of decisions vindicating the right, or the dubious character of many decisions that refuse to acknowledge it. Courts sometimes express such disdain openly. For example, in declining to acknowledge the Second Amendment's protection of the right to carry arms for self defense, *Heller*, 554 U.S. at 584, the Fourth Circuit offered that:

> This is serious business. We do not wish to be even minutely responsible for some unspeakably tragic act of mayhem because in the peace of our judicial chambers we miscalculated as to Second Amendment rights.

United States v. *Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011).

Missing from this analysis is any acknowledgment that Second Amendment rights might have even minimal value. The *Masciandaro* court never paused to consider that by "miscalculating as to Second Amendment rights" (in "the peace of judicial chambers" enjoying armed protection), it *enabled* "tragic acts of mayhem" that arms in the hands of responsible, law-abiding people might prevent. Second Amendment rights come with benefits, not just costs.

Upholding New Jersey's rationing of the right to bear arms to a select few individuals, one district judge opened his opinion this way:

> At the outset, it is noted to any reader of this Opinion that this Court shall be careful—most careful—to ascertain the reach of the Second Amendment right that the plaintiffs advance. That privilege is unique among all other constitutional rights to the individual because it permits the user of a firearm to cause serious personal injury—including the ultimate injury, death—to other individuals, rightly or wrongly.

Piszczatoski v. *Filko*, 840 F. Supp. 2d 813, 816 (D.N.J. 2012), *aff'd sub nom. Drake* v. *Filko*, 724 F.3d 426 (3d Cir. 2013). When the judge declares that a constitutional right "permits" people to kill "wrongly," the right's enforcement is not forthcoming.

Even where courts do not explicitly adopt an anti-gun bias, they often defer to such bias in affirming restrictions of Second Amendment rights. Upholding a ban on commonly-used rifles and magazines, the Seventh Circuit offered that "[i]f it has no other effect, [the] ordinance may increase the public's sense of safety." *Friedman* v. *City of Highland Park*, 784 F.3d 406, 412 (7th Cir. 2015). The risk may be "overestimate[d]," but if a prohibition "reduces the *perceived* risk from a mass shooting, and makes the public feel safer as a result, that's a substantial benefit." *Id.* (citation omitted) (emphasis added). Who needs text, history, tradition, or even empirical evidence, if violating a right makes political majorities feel better.

4. The lower courts' Second Amendment methodologies require correction, as described below. But

hostility to the right itself—the persistent belief that the Second Amendment is a social evil—is the problem's root cause.

When facing such resistance, this Court's words must be backed up with action—with a regular practice of policing compliance—to be truly effective. *Heller* is lucid enough, but willing courts have overcome it. So too will courts resist the next unwelcome Second Amendment opinion. In the meantime, this Court should instruct the lower courts to credit the People's determination that the right to keep and bear arms has significant social utility worthy of constitutional protection.

II. This Case Is Best Resolved Using *Heller*'s Categorical Approach—Not Under Means-Ends Scrutiny.

Heller's failure to apply any threshold test or means-ends scrutiny was intentional. This Court should resolve this case in the same manner, and insist that lower courts consider *Heller*'s categorical approach first, if not exclusively, in any Second Amendment dispute.

1. Arguing against Washington, D.C.'s handgun ban, Heller offered that "[t]o determine whether a particular weapon falls within the Second Amendment's protection, the Court need not apply any particular standard of review." Respondent's Br., *District of Columbia* v. *Heller*, No. 07-290, at 41. And once the right's individual nature was established, the only dispute

between the *Heller* parties with respect to Washington's functional firearms ban was whether that law effected "functional disarmament." *Id.* at 52-53 (quoting Petitioners' Br., *District of Columbia* v. *Heller*, No. 07-290, at 43-44) (footnote omitted).

> [T]his case does not require the application of any standard of review, because it involves a ban on a class of weapons protected under *Miller*, and a statutory interpretation dispute concerning whether a particular provision enacts a functional firearms ban.

Id. at 55 (citing *United States* v. *Miller*, 307 U.S. 174 (1939)). Heller argued for strict scrutiny only "should the Court venture to comment on the standard of review governing the regulation of Second Amendment rights." *Id.*; *see also id.* at 4 ("this case does not call upon the Court to determine the standard of review applicable to regulations of Second Amendment rights").

Observing that the Constitution contains no standards of review, the Chief Justice "wonder[ed] why in this case we have to articulate an all-encompassing standard." Tr. of Oral Arg., *District of Columbia* v. *Heller*, No. 07-290, at 44.

> Isn't it enough to determine the scope of the existing right that the amendment refers to, look at the various regulations that were available at the time [and compare these to a challenged provision]? I'm not sure why we have to articulate some very intricate standard.

Id.

In the end, this Court adopted Heller's approach. Although it did not explicitly foreclose tiered scrutiny, *Heller* demonstrated that standards of review are not the first methodological option in resolving Second Amendment cases.

Heller's categorical approach is well-grounded in logic and precedent. Not everything is always up for grabs. Sometimes, the Constitution simply forbids the government from taking action, or mandates unbendable rules for particular situations.

While courts at times struggle to decide whether the government has established religion, effected a search, or taken property, determining that the government has done these things typically suffices to vindicate First, Fourth, and Fifth Amendment rights. A religious imposition is unconstitutional even if it "seems relatively insignificant" compared to more pervasive religious mandates. *Engel* v. *Vitale*, 370 U.S. 421, 436 (1962). The warrantless search of a home is presumptively unconstitutional regardless of what it reveals. "In the home . . . *all* details are intimate details, because the entire area is held safe from prying government eyes." *Kyllo* v. *United States*, 533 U.S. 27, 37 (2001). And when the government effects "a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982).

The right to keep and bear arms has always functioned this way. Long before the advent of scrutiny tiers and threshold burden tests, courts struck down arms restrictions merely for conflicting with a constitutional guarantee. *See, e.g.*, *State* v. *Rosenthal*, 55 A. 610 (Vt. 1903)*; Andrews* v. *State*, 50 Tenn. 165 (1871); *Nunn* v. *State*, 1 Ga. 243 (1846). *Heller* followed this course, steering clear of needless methodological complications that risk weakening a fundamental right. This case should be decided in the same manner.

2. "[C]ertain unarticulated rights are implicit in enumerated guarantees . . . fundamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined." *Richmond Newspapers* v. *Virginia*, 448 U.S. 555, 579-80 (1980). The Second Amendment secures the right to possess handguns. Because there is a right to possess handguns, there is, necessarily, a right to move them between all the various places throughout the United States where their possession is lawful. A country whose constitution secures the right to keep handguns cannot see its people required to purchase a separate handgun in each of the innumerable places where handguns might be possessed.

The right to keep an article of portable, personal property implies the right to move it so that it may be used as ordinarily expected. Overlooked here, Heller also challenged Washington's requirement that he have an unobtainable permit to move his handgun *within* his home. Neither this Court, nor the D.C.

Circuit, struggled with the concept that if there is a right to have a handgun, there is a right to move the handgun to where it might be needed. "[J]ust as the District may not flatly ban the keeping of a handgun in the home, obviously it may not prevent it from being moved throughout one's house. Such a restriction would negate the lawful use upon which the right was premised—i.e[.], self-defense." *Parker* v. *District of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007), *aff'd sub nom. Heller*. "[T]he District must permit [Heller] to register his handgun and *must issue him a license to carry it in the home*." *Heller*, 554 U.S. at 635 (emphasis added). Just as New York cannot bar individuals from moving a handgun from their bedroom to their kitchen, it cannot bar individuals from relocating a handgun from Queens to Brooklyn, or from Manhattan to New Jersey.

A one paragraph order with citations to *Heller* and *McDonald*, by the district court or, if needed, by the Second Circuit, would have sufficed to dispense with New York's unconstitutional ordinance. Commitment to following *Heller*'s categorical example would have spared the tremendous waste of litigation and judicial resources poured into this case over the years.

3. *Heller*'s categorical approach would best resolve other needlessly-protracted cases. Legislatures have grown accustomed to restricting the right to arms while being unaware of its existence, or at least, while under the protection of courts unwilling to enforce the right. Washington, D.C.'s gun prohibitions were not the only laws ever enacted in this country that are flatly

incompatible with a right to keep and bear arms. *Heller*'s categorical approach is well-suited to resolving these cases as well.

Some may argue that a mandate to apply "strict scrutiny" in Second Amendment cases would suffice to break the lower courts' resistance to this right. *Amicus* is skeptical. To be sure, if a standard of review is to be used in evaluating Second Amendment claims, that standard should be as strict as any applied to substantive attacks on fundamental rights. But this Court should at least minimize resort to the scrutiny mechanism.

As Chief Justice Roberts observed, tiered scrutiny "just kind of developed over the years as sort of baggage." *Heller* Tr. of Oral Arg. 44; *see* G. Edward White, *Historicizing Judicial Scrutiny*, 57 S. C. L. REV. 1 (2005). Unraveling tiered scrutiny across the constitutional landscape may yet prove optimal. R. George Wright, *What If All the Levels of Constitutional Scrutiny Were Completely Abandoned?*, 45 U. MEM. L. REV. 165 (2014). For example, it may well be that strict scrutiny "has no real or legitimate place when the Court considers the straightforward question [of] whether the State may enact a burdensome [content-based speech] restriction." *Simon & Schuster, Inc.* v. *Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 124 (1991) (Kennedy, J., concurring in the judgment).

But leaving that project for another day, *Heller*'s lost first decade confirms the wisdom of the Chief Justice's wariness before extending tiered scrutiny "when

we are starting afresh" with a newly acknowledged right. *Heller* Tr. of Oral Arg. 44. No adjective preceding "scrutiny" immunizes courts from the "tendency to relax purportedly higher standards of review for less-preferred rights." *Whole Woman's Health* v. *Hellerstedt*, 136 S. Ct. 2292, 2328 (2016) (Thomas, J., dissenting) (citations omitted).

Quite apart from the Second Amendment, strict scrutiny is context-sensitive and is "far from the inevitably deadly test imagined by the Gunther myth." Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 795 (2006). One survey argues "strict scrutiny" actually embodies three distinct tests of varying strengths, one of which "is not terribly strict at all and amounts to little more than weighted balancing, with the scales tipped slightly to favor the protected right." Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1271 (2007). Under this view, "individual Justices tend to vary their applications of strict scrutiny based on their personal assessments of the importance of the right in question." *Id.*

The limited Second Amendment experience with allegedly "strict" scrutiny has borne out this view. Seven years before *Heller*, the Fifth Circuit announced a form of strict scrutiny to evaluate Second Amendment claims, permitting regulations that are "limited, narrowly tailored specific exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right of Americans generally to

individually keep and bear their private arms as historically understood in this country." *United States* v. *Emerson*, 270 F.3d 203, 261 (5th Cir. 2001).

Eleven years after *Heller*, the Fifth Circuit has yet to strike down anything under this test. Its version of "strict scrutiny" in the Second Amendment space is no less illusory than anything emanating from New York or San Francisco. It purportedly applied strict scrutiny to uphold the complete ban on interstate handgun sales, on the theory that federal firearms licensees are capable of following only those gun laws that pertain to bigger guns. And the complete prohibition of interstate handgun sales was declared to be narrowly tailored, notwithstanding the facts that many states allow such sales, and that the police stood ready to specifically authorize the sales at issue. *Mance* v. *Sessions*, 896 F.3d 699 (5th Cir. 2018), *cert. petition pending*, No. 18-663 (filed Nov. 19, 2018).

The *Mance* panel worked hard to reach its decision reversing the district court. Before hearing argument, it explored a standing theory that even the government disavowed, as it threatened to enforce the challenged law against the plaintiffs. After the argument, the panel took over two years to issue its first fractured opinion, rewriting it on rehearing in the face of an 8-7 en banc vote. But just as labeling its analysis "strict" rather than "intermediate" did not break the court of its inclination, raising the alleged standard of review to some new form of yet-stricter, extra-strict scrutiny would not improve the outcome. This Court could ask the Fifth Circuit to scrutinize better, but the best

option would stress that Americans in 1791 would have been shocked had the federal government barred them from purchasing firearms outside their home states.

In any event, the lower courts are magnetically drawn to a two-step, means-ends scrutiny mechanism. *See Gould* v. *Morgan*, 907 F.3d 659, 668-69 (1st Cir. 2018), *cert. petition pending*, No. 18-1272 (filed Apr. 1, 2019) (collecting cases). Of the very few surviving appellate decisions that enforced Second Amendment rights, only one veered from the default two-step approach to strike down an ordinance for effecting a "destruction" of Second Amendment rights. *Wrenn*, 864 F.3d at 666. If non-categorical Second Amendment analysis is to continue, it should be the exception to *Heller*'s rule, and not the other way around. And it requires significant reform.

III. If Retained, the Lower Courts' Non-Categorical Approaches to Second Amendment Claims Must Be Reformed.

A. The Second Amendment Tolerates No Threshold "Substantial Burden" Test.

Notwithstanding *Heller*'s admonition that the Third Branch of government has no say as to whether rights are worthy of enforcement, *Heller*, 554 U.S. at 634-35, the Second and Ninth Circuits have adopted a threshold "substantial burden" test for Second Amendment claims. The threshold test spares courts the effort

of inking the "heightened scrutiny" rubber stamp. But it also excuses the government from carrying burdens it cannot meet.

The threshold test limits *Heller* to its facts. Assuming that this Court used means-ends scrutiny in *Heller* and that means-ends scrutiny is the only method by which laws might be held unconstitutional, the Second Circuit offered that "we do not read [*Heller*] to mandate that any marginal, incremental or even appreciable restraint on the right to keep and bear arms be subject to heightened scrutiny." *United States* v. *Decastro*, 682 F.3d 160, 166 (2d Cir. 2012).

What is a "marginal, incremental or even appreciable restraint" on the right to arms? Anything short of the laws *Heller* enjoined. "[H]eightened scrutiny is triggered *only* by those restrictions that (like the complete prohibition on handguns struck down in *Heller*) operate as a *substantial* burden on [Second Amendment rights]." *Id.* (emphasis added).

The Ninth Circuit recently adopted this approach, holding that a Second Amendment claim is not stated unless people are "*meaningfully* constrained" or "inhibit[ed]" from accessing the right, or "that [an] ordinance *actually or really* burdens" Second Amendment rights. *Teixeira* v. *Cnty. of Alameda*, 873 F.3d 670, 680 & n.14 (9th Cir. 2017) (en banc) (emphasis added).

In other words, if a judge feels a restriction is no big deal, the government need not justify it. For example, the Second Circuit suggested that charging over $100 a year to possess a handgun merited *no*

constitutional scrutiny because the tax was no more than a "marginal, incremental or even appreciable restraint" on Second Amendment rights, especially where it was not specifically attacked as "*prohibitively* expensive." *Kwong* v. *Bloomberg*, 723 F.3d 160, 167 (2d Cir. 2013) (citation and footnote omitted) (emphasis added). It remains to be seen whether the Second Circuit would employ such reasoning to excuse the government from justifying a $100 abortion tax, or a $100 fee to obtain or maintain voter identification.

Teixeira demonstrates how the substantial burden test can save governments from unwinnable situations. The case concerned a Second Amendment challenge by aspiring gun dealers to the summary revocation of their store's conditional use permit and variance. That revocation overruled the considered judgment of the county's planning department, reached after extensive study, that the store would be perfectly safe and compatible with neighboring land uses. The county could not have carried any burden of showing that the store's prohibition advanced a valid regulatory interest, so the en banc Ninth Circuit moved the goal posts. Nevermind what the county could or could not show, the store would not be missed by people seeking to access Second Amendment rights (aside, perhaps, from the dissenting judges). The county burdened Second Amendment rights, but not substantially as far as the majority were concerned.

Heller was unambiguous on the subject of letting judges decide whether Second Amendment rights are

"*really worth* insisting upon." *Heller*, 554 U.S. at 634. But the lower courts require a more specific reminder.

B. Means-Ends Scrutiny Cannot Excuse the Lower Courts from Developing Second Amendment Doctrine.

There is no Second Amendment exception to Article III jurisdiction. "The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. . . . All we can do is, to exercise our best judgment, and conscientiously to perform our duty." *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). Moreover, this Court depends on the lower courts to develop constitutional doctrine. It is a court "of review, not of first view." *Byrd* v. *United States*, 138 S. Ct. 1518, 1527 (2018) (internal quotation marks omitted).

Yet courts have complained, since *Heller*'s earliest days, that the Second Amendment is simply too dangerous for them to handle. *See, e.g.*, *Masciandaro*, *supra*; *Williams* v. *State*, 417 Md. 479, 496, 10 A.3d 1167, 1177 (2011) ("[i]f the Supreme Court . . . meant its holding [in *Heller* and *McDonald*] to extend beyond home possession, it will need to say so more plainly"). Every time courts decline to interpret the Second Amendment, the government wins by default.

Reticence to examine the Second Amendment's requirements, and the government's consequent automatic victory, has now been fully absorbed into the two-step, means-ends scrutiny process. Unwilling to

examine the Second Amendment's text, history, and tradition, courts readily assume-without-deciding that a challenged law implicates the right to arms. This path is "well-trodden." *Pena* v. *Lindley*, 898 F.3d 969, 976 (9th Cir. 2018), *cert. petition pending*, No. 18-843 (filed Dec. 31, 2018) (citing *Woollard* v. *Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013)); *Gould*, 907 F.3d at 670 ("we decline [to analyze *Heller*] and proceed on [an] assumption").

Invariably, the assumed, unexamined right is a strawman. Courts readily admit that they assume a challenge passes step one, because they already know that it cannot pass "scrutiny" at step two:

> We assume without deciding that the challenged [ ] provisions burden conduct protected by the Second Amendment because we conclude that the statute is constitutional irrespective of that determination. By making this assumption, we bypass the constitutional obstacle course of defining the parameters of the Second Amendment's individual right. . . .

Pena, 898 F.3d at 976.

> [W]e merely assume that the *Heller* right exists . . . and that such right of Appellee Woollard has been infringed. We are free to make that assumption because the [challenged statute] passes constitutional muster under what we have deemed to be the applicable standard—intermediate scrutiny.

Woollard, 712 F.3d at 876. Once the court knows how the case will turn out, it can assume any and all priors that would suggest a contrary result:

> We assume, without deciding, that the proscribed weapons have some degree of protection under the Second Amendment. We further assume, again without deciding, that the Act implicates the core Second Amendment right of self-defense in the home by law-abiding, responsible individuals.

Worman v. *Healey*, 2019 U.S. App. LEXIS 12588, at *4-*5, 2019 WL 1872902 (1st Cir. Apr. 26, 2019). "For present purposes, we simply assume, albeit without deciding, that the Act burdens conduct that falls somewhere within the compass of the Second Amendment." *Id.* at *17. Here, the court below took this approach, reducing the first step analysis to the perfunctory recitation that no analysis is required because the city is destined to win. Pet.App.10.

Judge O'Scannlain explained the folly of assuming-without-deciding. "[W]e must fully understand the historical scope of the right before we can determine whether and to what extent the [challenged law] burdens the right or whether it goes even further and 'amounts to a destruction of the right' altogether." *Peruta* v. *Cnty. of San Diego*, 742 F.3d 1144, 1166 (9th Cir. 2014), *reh'g granted*, 781 F.3d 1106 (9th Cir. 2015) (en banc) (internal quotation marks omitted). "Tracing the scope of the right is a necessary first step in the constitutionality analysis—and sometimes it is the dispositive one. . . . Understanding the scope of the right is

not just necessary, it is key to our analysis." *Id.* at 1167 (citation omitted).

Often enough, reflecting on *why* a law trenches upon Second Amendment rights should alert the court that there ought not be a second step. If the People have a right to carry a gun outside the home for self-defense, *see Heller*, 554 U.S. at 584, the government cannot decree that the right must be severely rationed on the theory that the right is inherently harmful, *Wrenn*, 864 F.3d at 667. If the Second Amendment protects possession of an arm, there can be no second step by which a court might subordinate that right to concerns that other arms are preferable. *Heller*, 554 U.S. at 629. And if, in an as-applied challenge to a dispossession law, the challenger can prove that he has become a "law-abiding, responsible citizen," *Heller*, 554 U.S. at 635, there can be no second step, because the government lacks an interest in disarming such people, *Binderup*, 836 F.3d at 363 (Hardiman, J., concurring).

Even if the initial text-and-history analysis is not categorically dispositive, it would invariably guide the application of means-ends scrutiny, or at least, afford reviewing courts—including this Court—the benefit of the lower courts' initial take.

But where the right is only assumed in an abstract sense, it falls in the face of critical government interests. "In point of fact, few interests are more central to a state government than protecting the safety and well-being of its citizens." *Gould*, 907 F.3d at 673

(citations omitted). Also in point of fact—the Second Amendment protects people's safety and well-being. But courts that are disinterested in examining the Second Amendment's meaning are not going to elevate that right over *anything* the government claims to be essential to public safety.

Examples of this phenomenon abound, of which the opinion below is just one. The First Circuit's formulation of the error is particularly clarifying. The government's arguments may only be "plausible, but not infallible," and understating the matter, "open to legitimate debate." *Gould*, 907 F.3d at 675. But Second Amendment claims apparently require "metaphysical certainty." *Id.* at 676. "[C]ourts *must* defer to a legislature's choices among reasonable alternatives." *Id.* (emphasis added). Such obsequiousness is what passes for heightened scrutiny.

It may well be "the legislature's prerogative—not ours—to weigh the evidence, choose among conflicting inferences, and make the necessary policy judgments." *Id.* But it is the courts' job to make *constitutional* judgments. Not everything that is socially optimal, per legislative wisdom, is therefore constitutional. Courts cannot abdicate their function by allowing legislatures to adjudicate the constitutionality of their acts. And courts cannot know what is constitutional if their vision of heightened scrutiny extends no further than the governments' claims as to what is best, overlooking the Constitution itself.

It is not too much to ask that the lower courts pause to consider the Second Amendment's content when the subject comes before them.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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