No. 18-280

IN THE

Supreme Court of the United States

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

Petitioners,

v.

THE CITY OF NEW YORK; and THE NEW YORK CITY POLICE DEPARTMENT-LICENSE DIVISION,

Respondents.

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

BRIEF OF SECOND AMENDMENT LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICI CURIAE[1]

Amici curiae are scholars who have devoted a substantial part of their research and writing to the history of firearms regulation in the United States and the legal standards governing application of the Second Amendment. Their scholarship has been published by a major university press and in leading law journals, and has been cited by members of this Court and the courts of appeals. *Amici*'s interest in this case is in explaining the state of Second Amendment doctrine in the lower courts. *Amici* seek to correct the misconception that the lower courts are applying a unique, second-class doctrinal framework in Second Amendment cases. *Amici* further seek to explain why Second Amendment doctrine must provide lower courts with the tools to determine the constitutionality of a wide diversity of gun regulations among the several States. *Amici*'s expertise renders them particularly well-suited to assist the Court in this respect.

Joseph Blocher is the Lanty L. Smith '67 Professor of Law at Duke University School of Law. His scholarship on gun rights and regulation has been published in the Harvard Law Review Forum, the Yale Law Journal, the Stanford Law Review, and other leading academic journals. *See, e.g.*, *Good Cause Requirements for Carrying Guns in Public*, 127 Harv. L. Rev. Forum 218 (2014);

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[1] All parties have filed a notice of blanket consent with the Clerk. In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or their counsel, made such a monetary contribution.

Firearm Localism, 123 Yale L.J. 82 (2013); *The Right Not to Keep or Bear Arms*, 64 Stan. L. Rev. 1 (2012). His work has been cited by federal courts of appeal. *E.g. Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011) ("*Heller II*"). Recently, Professor Blocher co-authored a book with *amicus* Professor Darrell Miller, *The Positive Second Amendment: Rights, Regulation, and the Future of* Heller (Cambridge U. P. 2018) (with Darrell Miller), which includes a comprehensive account of the history, theory, and law of the right to keep and bear arms.

Darrell Miller is the Melvin G. Shimm Professor of Law at Duke University School of Law. His Second Amendment scholarship has been published in the University of Chicago Law Review, the Harvard Law Review Forum, the Yale Law Journal, the Columbia Law Review, and other leading journals. *See, e.g.*, *What is Gun Control? Direct Burdens, Incidental Burdens, and the Boundaries of the Second Amendment*, 83 U. Chi. L. Rev. 295 (2016) (with Joseph Blocher); Peruta*, the Home-Bound Second Amendment, and Fractal Originalism*, 127 Harv. L. Rev. Forum 238 (2014); *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 Yale L.J. 852 (2013).

Eric Ruben is a fellow at the Brennan Center for Justice at NYU School of Law. His scholarship on the Second Amendment has been published or is forthcoming in the California Law Review, Duke Law Journal, Yale Law Journal Forum, and Journal of Law and Contemporary Problems. *See, e.g.*, *An Unstable Core: Self-Defense and the Second Amendment*, 108 Calif. L. Rev. __ (forthcoming 2020); *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear*

Arms After Heller, 67 Duke L.J. 1433 (2018) (with Joseph Blocher); *Firearm Regionalism and Public Carry: Placing Southern Antebellum Caselaw in Context*, 125 Yale L.J. F. 121 (2015) (with Saul Cornell). His work has been cited in opinions of federal district and appellate courts addressing Second Amendment issues.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Amici urge the Court to hold that the two-part framework that the courts of appeals are using to adjudicate Second Amendment claims is the proper doctrinal analysis. They take no position on how that framework should apply to New York's policy at issue.

In *Heller*, "this Court's first in-depth examination of the Second Amendment," the Court explicitly disclaimed any attempt "to clarify the entire field," leaving the Amendment's precise contours to future cases. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008). Ten years on, the Second Amendment is no longer "terra incognita." *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011). Since *Heller*, federal and state courts have issued more than 1,000 decisions in cases asserting that laws violate the Second Amendment. Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After* Heller, 67 Duke L.J. 1433, 1435 (2018).

To analyze those claims, the courts of appeals have uniformly adopted a two-part framework. They first "ask if the restricted activity is protected by the Second Amendment in the first place; and then, if necessary, [they] apply the appropriate level of scrutiny." *United States v. Focia*, 869 F.3d 1269, 1285 (11th Cir. 2017), *cert. denied*, 139 S. Ct. 846 (2019) (internal quotation marks omitted). Courts apply intermediate scrutiny "if a challenged law does not implicate a core Second Amendment right, or does not place a substantial burden on the Second Amendment right." *United States v.*

Torres, 911 F.3d 1253, 1262 (9th Cir. 2019) (internal quotation marks omitted).

This Court should affirm that the courts of appeals' two-part framework properly protects the right to bear arms.

First, the two-part framework recognizes a right to bear arms resembling other enumerated constitutional rights: fundamental, but not unlimited. *McDonald v. City of Chi.*, 561 U.S. 742, 791 (2010). Petitioners urged the Court to take the case on the basis that many lower courts treat the Second Amendment as "a second-class right." Pet. 21. But in fact, the lower courts' application of the two-part framework has harmonized Second Amendment law with other constitutional doctrines and provided a meaningful limit on the government's ability to restrict the right to bear arms.

The courts of appeals are applying well-established principles that this Court applies to the First Amendment and other constitutional rights, not the "freestanding 'interest-balancing' approach" rejected in *Heller*, 554 U.S. at 634. Just as this Court does not apply strict scrutiny to every law burdening any kind of speech in any context, so too it should not apply strict scrutiny to every law regulating firearms. Rather, the lower courts have scrutinized laws burdening the "core" of the right to bear arms more strictly just as this Court has done for "core" political speech. No Circuit has adopted categorical strict scrutiny for firearms laws; to do so would make the right to bear arms *primus inter pares* among constitutional rights. Indeed, an invariable requirement to apply strict scrutiny in every case would require courts to give the people's representatives more leeway to discriminate against women than, for example, to

limit minors' access to guns. *See United States v. Virginia*, 518 U.S. 515, 568, 576–79 (1996) (Scalia, J., dissenting) (intermediate scrutiny applies to gender classifications); *cf.* Pet. Br. 31 (applying a different standard of scrutiny to the Second Amendment than "other fundamental rights would be tantamount to imposing 'a hierarchy of constitutional values' by judicial fiat") (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982)).

The evidence does not suggest that lower courts are systematically misapplying heightened scrutiny. Even if they were, the solution would be to make clear that intermediate scrutiny truly requires a law to be "substantially related to the achievement of . . . important governmental objectives," *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 70 (2001) (internal quotation marks omitted), not to supercharge the Second Amendment with a test that this Court does not apply to any other individual right. *Cf.* Pet. Br. 15 ("this Court must make clear that courts may not apply heightened scrutiny in name only").

Second, the two-step framework is faithful to this Court's emphasis in *Heller* that history and tradition play an important role in delineating the right to bear arms. Following this Court's guidance, lower courts hold that longstanding restrictions—*e.g.*, possession by felons or in schools—are "presumptively lawful," 554 U.S. at 627 n.26 (citations omitted), and that the Second Amendment does not apply to "dangerous and unusual weapons," *id.* at 627 (internal quotation marks omitted). Conversely, courts categorically invalidate extreme laws that are flatly inconsistent with the right to keep and bear arms as historically understood. *Id.* at 628–

29. Even in the many cases lying between these two *Heller* guideposts, courts still consult the historical record in determining whether a law burdens the "core" of the right and thus warrants strict scrutiny.

History shows that firearms regulations in this country have taken a variety of forms, reflecting the diversity of our communities and safety concerns regarding firearms. Thus, in many cases, historical analogies are far from decisive and might not even be illuminating, except at an unhelpfully high level of abstraction. In those cases, limiting Second Amendment doctrine to text, history, and tradition would mire courts in the kinds of strained analogies that have plagued Fourth Amendment jurisprudence with unpredictable and inconsistent results.

More importantly, a test in which the "absence of any historical (or even modern-day) analog suffice[s] to resolve th[e] case," Pet. Br. 29, will invade local communities' "ability to devise solutions to social problems that suit local needs and values," which this Court preserved in *McDonald*, 561 U.S. at 785. It is one thing to uphold "longstanding prohibitions," *Heller*, 554 U.S. at 626, on the theory that "the Bill of Rights codified venerable, widely understood liberties," *id.* at 605, and thus cannot be read to condemn widely adopted laws. But it is quite another thing to strike down any regulation that is not longstanding. In theory, one virtue of adopting "the original understanding of the Second Amendment," *id.* at 625, is that it maximizes the people's "freedom to govern themselves" at future times. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2627 (2015) (Scalia, J., dissenting). But interpreting the Second Amendment to permit only those firearms laws that many jurisdictions have tried for many years will freeze in time the people's options

for addressing today's horrific epidemic of gun violence, not to mention raise immense challenges of judicial administration. *See infra* II.B.2.

The two-part framework protects the people's fundamental right to defend themselves with firearms while ensuring that the people have a "variety of tools" to protect themselves from gun violence through legislation as well. *Heller*, 554 U.S. at 636. This Court should adopt that framework as the correct approach to evaluating claims that government has infringed the Second Amendment.

ARGUMENT

I. THE COURTS OF APPEALS HAVE UNIFORMLY ADOPTED A TWO-PART FRAMEWORK FOR APPLYING THE SECOND AMENDMENT.

This Court in *Heller* "declin[ed] to establish a level of scrutiny for evaluating Second Amendment restrictions." 554 U.S. at 634. The courts of appeals have since reached broad consensus on "a workable *framework*, consistent with *Heller*, for evaluating whether a challenged law infringes Second Amendment rights." *Gould v. Morgan*, 907 F.3d 659, 669 (1st Cir. 2018) (emphasis added).

The First, Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and District of Columbia Circuits have explicitly adopted this two-part framework. *See Gould*, 907 F.3d at 669; *N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 254 (2d Cir. 2015); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010); *United States v. Chester*, 628 F.3d 673, 680 (4th

Cir. 2010); *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194, 206 (5th Cir. 2012) ("*NRA*"); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Ezell v. City of Chi.*, 651 F.3d 684, 701–04 (7th Cir. 2011), *aff'd*, 846 F.3d 888 (7th Cir. 2017), *mandamus denied*, 678 F. App'x 430 (7th Cir. 2017); *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013); *United States v. Reese*, 627 F.3d 792, 800–01 (10th Cir. 2010); *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1260 n.34 (11th Cir. 2012); *Heller v. District of Columbia*, 670 F.3d 1244, 1252 (D.C. Cir. 2011), *aff'd*, 801 F.3d 264 (D.C. Cir. 2015) ("*Heller II*"). The Eighth Circuit, too, has acknowledged the framework (although that court has not yet specifically adopted it). *See United States v. Adams*, 914 F.3d 602 (8th Cir. 2019); *United States v. Hughley*, 691 F. App'x 278, 279 n.3 (8th Cir. 2017).[2]

The first step involves a "threshold question [of] whether the regulated activity falls within the scope of the Second Amendment." *Ezell v. City of Chi.*, 846 F.3d 888, 892 (7th Cir. 2017). "A law does not burden Second Amendment rights, if it either falls within one of the 'presumptively lawful regulatory measures' identified in *Heller* or regulates conduct that historically has fallen outside the scope of the Second Amendment." *Torres*, 911 F.3d at 1258 (quoting *Heller*, 554 U.S. at 627 n.26).

"[I]f the historical evidence is inconclusive or suggests that the regulated activity is not categorically unprotected[,] then there must be a second inquiry into the strength of the government's justification for restricting or regulating the exercise of Second Amendment

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[2] Given the Federal Circuit's subject-limited jurisdiction, it is unsurprising that it has not addressed the issue.

rights." *Kanter v. Barr*, 919 F.3d 437, 441 (7th Cir. 2019) (internal quotation marks omitted). In such cases, courts "evaluate the regulatory means the government has chosen and the public-benefits end it seeks to achieve." *Ibid.* (internal quotation marks omitted).

To determine the appropriate level of scrutiny, courts evaluate "how close the law comes to the core of the Second Amendment right and the severity of the law's burden on that right." *Ibid.* (internal quotation marks omitted). "If the core Second Amendment right is burdened, then strict scrutiny applies; otherwise, intermediate scrutiny applies." *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J.*, 910 F.3d 106, 117 (3d Cir. 2018). At all events, "rational-basis review does not apply." *Kanter*, 919 F.3d at 442 (internal quotation marks omitted).

Strict Scrutiny. The "weight of circuit court authority" has "identified the core of the Second Amendment," *Gould*, 907 F.3d at 671 (citing cases), as "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635. *E.g.*, *Ass'n of N.J. Rifle & Pistol Clubs*, 910 F.3d at 117 ("If the core Second Amendment right is burdened, then strict scrutiny applies . . . ."); *Gould*, 907 F.3d at 671 ("the core Second Amendment right is limited to self-defense in the home"); *NRA*, 700 F.3d at 195 ("A regulation that threatens a right at the core of the Second Amendment—for example, the right of a law-abiding, responsible adult to possess and use a handgun to defend his or her home and family—triggers strict scrutiny.") (citation omitted); *Masciandaro*, 638 F.3d at 470 ("[A]ny law that would burden the 'fundamental,' core right of self-defense in the home by a law-abiding citizen would be subject to strict scrutiny."). *But see Wrenn v. District of Columbia*, 864 F.3d 650, 661 (D.C. Cir. 2017).

Under the two-part framework, as with other constitutional doctrines, "strict scrutiny 'requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Mance v. Sessions*, 896 F.3d 699, 705 (5th Cir. 2018) (quoting *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010)).

Intermediate Scrutiny. Beyond cases substantially limiting the core right of self-defense as historically understood, there "has been near unanimity in the post-*Heller* case law that, when considering regulations that fall within the scope of the Second Amendment, intermediate scrutiny is appropriate." *Torres*, 911 F.3d at 1262 (internal quotation marks omitted).

For instance, courts have applied intermediate scrutiny for basic registration requirements. *E.g.*, *Heller II*, 670 F.3d 1244. Courts also have applied intermediate scrutiny in considering restrictions on possession by certain classes of individuals. *E.g.*, *Chester*, 628 F.3d at 681–82 (prohibition on possession by any person convicted of a misdemeanor crime of domestic violence); *United States v. Chapman*, 666 F.3d 220, 226 (4th Cir. 2012) (prohibition on possession for a "narrow class[ ] of persons who, based on their past behavior, are more likely to engage in domestic violence") (quoting *Reese*, 627 F.3d at 802); *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678 (6th Cir. 2016) (prohibition on possession for those who have been involuntarily committed); *NRA*, 700 F.3d at 206 (age restriction for sales); *Nat'l Rifle Ass'n of Am., Inc. v. McCraw*, 719 F.3d 338, 348 (5th Cir. 2013) (age-based restriction on public carry); *Marzzarella*, 614 F.3d at 97 (prohibition on possession of a firearm with a removed serial number); *Ass'n of N.J. Rifle & Pistol Clubs*, 910 F.3d at 118 (prohibition on large-

capacity magazines); *Masciandaro*, 638 F.3d at 473 (prohibition on possession of a loaded weapon in a motor vehicle in a national park).

As with laws burdening other constitutional freedoms, intermediate scrutiny of a law restricting possession of firearms requires the government to show that the challenged law "is reasonably adapted to a substantial governmental interest." *Masciandaro*, 638 F.3d at 471; *e.g.*, *Chovan*, 735 F.3d at 1139 ("[C]ourts have used various terminology to describe the intermediate scrutiny standard [but] all forms . . . require (1) the government's stated objective to be significant, substantial, or important; and (2) a reasonable fit between the challenged regulation and the asserted objective.").

II. THIS COURT SHOULD ADOPT THE TWO-PART FRAMEWORK FOR APPLYING THE SECOND AMENDMENT.

A. The Two-Part Framework Aligns the Second Amendment with Other Constitutional Rights.

The prevailing two-part framework for applying the right to bear arms employs modes of analysis well-known to this Court. The lower courts are not treating "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*, 561 U.S. at 780 (plurality opinion). That the courts of appeals have frequently applied intermediate rather than strict scrutiny hardly reflects a half-baked approach to the Second Amendment. To the contrary, applying strict scrutiny to all laws implicating the right to bear arms (as no Circuit has done) would render *all other rights* second-class.

1. This Court Should Not Apply Strict Scrutiny to Every Law Regulating Firearms.

The two-part framework is not a "convoluted analysis" that "bears no resemblance to the heightened scrutiny applied to laws infringing other fundamental rights." Pet. Br. 38–39. This Court "has not said . . . and it does not logically follow, that strict scrutiny is called for whenever a fundamental right is at stake." *Heller II*, 670 F.3d at 1256. *See also Gould*, 907 F.3d at 670 ("Strict scrutiny does not automatically attach to every right enumerated in the Constitution."); *Chester*, 628 F.3d at 682 ("We do not apply strict scrutiny whenever a law impinges upon a right specifically enumerated in the Bill of Rights.").

"In many areas of constitutional law, regulations that impose on rights are subject to one of three tests that are more or less stringent depending on the right and the burden at stake." *Wrenn*, 864 F.3d at 656; *see also Marzzarella*, 614 F.3d at 96 ("Strict scrutiny does not apply automatically any time an enumerated right is involved. We do not treat First Amendment challenges that way.").

"*Heller* itself repeatedly invokes the First Amendment in establishing principles governing the Second Amendment." *Marzzarella*, 614 F.3d at 89 n.4. The courts of appeals have thus adopted the two-step framework "because First Amendment doctrine informs it." *NRA*, 700 F.3d at 197. *See also Marzzarella*, 614 F.3d at 89 n.4 ("the structure of First Amendment doctrine should inform our analysis of the Second Amendment"). Indeed, both steps of the two-part framework subject firearm regulations to scrutiny consistent with that

which courts apply to laws burdening other fundamental, individual rights, such as speech.

As noted, at the first step, courts ask "whether the law regulates conduct that falls within the scope of the Second Amendment's guarantee." *NRA*, 700 F.3d at 194. Such "[c]ategorical limits on the possession of firearms would not be a constitutional anomaly. Think of the First Amendment, which has long had categorical limits: obscenity, defamation, incitement to crime, and others." *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (citing *United States v. Stevens,* 130 S. Ct. 1577, 1584 (2010)). As this Court explained in *Heller,* "[o]f course the right [to bear arms] was not unlimited, just as the First Amendment's right of free speech was not. Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for any sort of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for any purpose." 554 U.S. at 595 (internal citation omitted). *Cf. New York v. Ferber,* 458 U.S. 747, 764 (1982) ("[C]hild pornography . . ., like obscenity, is unprotected by the First Amendment"); *Garcetti v. Ceballos,* 547 U.S. 410 (2006).

The two-part framework's gradations of means-end scrutiny do not make the Second Amendment an outlier, either. This Court has not held that all fundamental rights require strict scrutiny no matter where or how they are exercised. Rather, "First Amendment doctrine demonstrates that, even with respect to a fundamental constitutional right, we can and should adjust the level of scrutiny according to the severity of the challenged regulation." *NRA*, 700 F.3d at 198.

In fact, this Court's precedents belie "the notion [that] 'core' rights is just an artificial construct designed to dilute Second Amendment rights." Pet. Br. 41. This Court repeatedly has emphasized that "[p]olitical speech, of course, is at the *core* of what the First Amendment is designed to protect." *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (internal quotation marks omitted) (emphasis added). *Cf. Citizens United,* 558 U.S. at 393 (Scalia, J., concurring) ("A documentary film critical of a potential Presidential candidate is core political speech."). "When a law burdens *core* political speech, we apply exacting scrutiny." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) (emphasis added). By contrast, "commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, and is subject to modes of regulation that might be impermissible in the realm of noncommercial expression." *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989) (internal quotation marks omitted). Similarly, "the First Amendment protects public employee speech only when it falls within the *core* of First Amendment protection—speech on matters of public concern." *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 600 (2008) (emphasis added).[3]

This Court also has calibrated First Amendment doctrine to the specific context in which fundamental speech rights are exercised—just as in many cases the

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[3] *Cf. R.A.V. v. City of St. Paul,* 505 U.S. 377, 422 (1992) (Stevens, J., concurring in judgment) ("Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech [in which] [c]ore political speech occupies the highest, most protected position . . . .").

courts of appeals have determined "[i]ntermediate scrutiny makes sense in the Second Amendment context" because "[t]he right to carry weapons in public for self-defense poses inherent risks to others," *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015).

Thus, "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings," and "must be applied in light of the special characteristics of the school environment." *Morse*, 551 U.S. at 396–97 (quotation marks and citations omitted). Further, "the extent to which the Government can control access" to a place for exercising fundamental speech rights "depends on the nature of the relevant forum." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985). "In a traditional public forum—parks, streets, sidewalks, and the like—the government may impose reasonable time, place, and manner restrictions on private speech, but restrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited." *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018).

In short, "[t]he right to free speech, an undeniably enumerated fundamental right, is susceptible to several standards of scrutiny, depending upon the type of law challenged and the type of speech at issue." *Marzzarella*, 614 F.3d at 96–97 (citation omitted). There is "no reason why the Second Amendment would be any different." *Id.* *See also Heller II*, 670 F.3d at 1257 ("As with the First Amendment, the level of scrutiny applicable under the Second Amendment surely depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right.") (internal quotation marks omitted).

Gradations of scrutiny characterize other fundamental rights as well. "In no quarter does the Fourth Amendment apply with greater force than in our homes, our most private space which, for centuries, has been regarded as entitled to special protection." *Kentucky v. King*, 563 U.S. 452, 474 (2011) (internal quotation marks omitted); *see also Silverman v. United States*, 365 U.S. 505, 511 (1961) ("At [the Fourth Amendment's] very *core* stands the right of a man to retreat to his own home and there be free from unreasonable governmental intrusion.") (emphasis added).

Under the Taking Clause of the Fifth Amendment, courts similarly apply different standards depending on the nature of the government's intrusion—i.e., physical occupation or regulation—on constitutionally protected property interests. *See, e.g.*, *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2425–28 (2015) (noting the distinction between a *per se* requirement of just compensation for a physical appropriation, *e.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), a regulatory taking under *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978), and a regulatory taking that amounts to a complete deprivation under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)). The Seventh "Amendment was designed to preserve the basic institution of jury trial in only its *most fundamental elements*." *Galloway v. United States*, 319 U.S. 372, 392 (1943) (emphasis added). And the level of scrutiny that the Equal Protection Clause requires depends on the nature of the government classification. *Compare Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235 (1995) (strict scrutiny for racial classifications); *with Craig v. Boren*, 429 U.S. 190, 197 (1976) (intermediate scrutiny for gender

classifications); *with City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (rational basis review for intellectual disability classifications). *Cf. Johnson v. California*, 543 U.S. 499, 524 (2005) (Thomas, J., dissenting) (arguing against strict scrutiny for prison regulations because "even when faced with constitutional rights no less 'fundamental' than the right to be free from state-sponsored racial discrimination, we have deferred to the reasonable judgments of officials").

The two-part framework plainly reflects common features of constitutional doctrine. Requiring strict scrutiny of every law regulating firearms would not give the right to bear arms its constitutional due, but instead would make that right "subject to an entirely different body of rules than the other Bill of Rights." *McDonald*, 561 U.S. at 780 (plurality opinion). Uniquely privileging the right to bear arms by always requiring strict scrutiny is no more proper than "denying a fundamental individual right by applying a version of heightened scrutiny unrecognizable in any other constitutional context." Pet. 11.

2. The Two-Part Framework Is Not the Freestanding Interest Balancing That *Heller* Ruled Out.

Heller poses no obstacle to the means-end scrutiny the Circuits have uniformly applied to laws regulating firearms. The lower courts "do not understand the Court to have rejected all heightened scrutiny analysis." *NRA*, 700 F.3d at 197. No Circuit has read *Heller* to hold 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*,

670 F.3d at 1271 (Kavanaugh, J., dissenting). And the lower courts' "heightened scrutiny is clearly not the interest-balancing inquiry' proposed by Justice Breyer and rejected by the Court in *Heller*." *Id.* at 1265.

"[T]he Court did not definitively resolve the 'level-of-scrutiny' debate." Pet. 25. Rather, "*Heller* explicitly leaves many questions unresolved and says nothing to cast doubt upon the propriety of the lower courts applying some level of heightened scrutiny in a Second Amendment challenge to a law significantly less restrictive than the outright ban on all handguns invalidated in that case." *Heller II*, 670 F.3d at 1267. In rejecting a "freestanding 'interest-balancing' approach," this Court noted that this did not reflect any "of the traditionally expressed levels" of scrutiny—"strict scrutiny, intermediate scrutiny, rational basis." 554 U.S. at 634.

These "familiar scrutiny tests are not equivalent to interest balancing." *NRA*, 700 F.3d at 197. Indeed, under the two-part framework, "[t]here is no balancing at either step." *Ass'n of N.J. Rifle & Pistol Clubs*, 910 F.3d at 119 n.22. The framework "require[s] an assessment of whether a particular law will serve an important or compelling governmental interest," which "is not a comparative judgment." *Heller II*, 670 F.3d at 1265. This Court makes the same judgment in testing burdens on activity implicating other constitutional rights. Nothing in *Heller* foreclosed applying to laws burdening the right to bear arms the strict or intermediate scrutiny that this Court has used so frequently to test other constitutional rights. Doing so now would "ben[d] the rules for favored rights." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2321 (2016), *as revised* (June 27, 2016) (Thomas, J., dissenting).

3. The Two-Part Framework Meaningfully Protects the Right to Bear Arms.

The Circuits' two-part framework not only is congruent with other constitutional doctrines in theory, it also meaningfully protects the right to bear arms in practice and provides a *bona fide* check on the government's ability to prevent citizens from keeping or bearing firearms.

The fact that courts uphold some firearms restrictions even under heightened scrutiny hardly proves that the two-part framework is "tailor-made to dilute Second Amendment protections at every step." Pet. Br. 39. Such cases "do arise" even under the First Amendment. *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1666 (2015). And this Court has sought "to dispel the notion that strict scrutiny is strict in theory, but fatal in fact." *Adarand Constructors, Inc.,* 515 U.S. at 237 (internal quotation marks omitted). Moreover, data suggesting that courts widely uphold firearms regulations reflects in part that many Second Amendment cases are brought in jurisdictions where gun rights (like concealed carry) already extend beyond the bounds of what *Heller* squarely protects, leaving only the most inapt parties challenging the most conventional kinds of firearm regulations. Ruben & Blocher, *supra*, at 1474–77 (showing that Second Amendment claims succeed almost exclusively in states and federal circuits associated with more gun regulation).[4]

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[4] This study involved a comprehensive review of every available Second Amendment challenge from the day *Heller* was decided until February 1, 2016. Each opinion was coded for roughly 100 variables regarding the content of the challenge and judicial

Moreover, courts have not hesitated to strike down laws that amount to the "total ban on handgun possession in the home" that *Heller* identified as "the archetype of an unconstitutional firearm regulation." *United States v. Cox*, 906 F.3d 1170, 1184 (10th Cir. 2018). *E.g.*, *Moore v. Madigan*, 702 F.3d 933, 940 (7th Cir. 2012) (striking down "[a] blanket prohibition on carrying [a] gun in public"); *People v. Aguilar*, 2 N.E.3d 321, 328 (2013) (same); *Palmer v. District of Columbia*, 59 F. Supp. 3d 173, 182 (D.D.C. 2014) (same).

Even when applying intermediate scrutiny, courts still frequently strike down laws regulating firearms. *E.g.*, *Binderup v. Att'y Gen.*, 836 F.3d 336 (3d Cir. 2016), *cert. denied*, 137 S. Ct. 2323 (2017) (holding a prohibition on possession by individuals convicted of a crime punishable by imprisonment for more than one year to be unconstitutional as-applied); *Heller III*, 801 F.3d 264 (D.C. Cir. 2015) (invalidating police inspection requirement, requirement to re-register every three years, limitation on registering more than one gun per month, and requirement that registrant pass a test); *N.Y. State Rifle & Pistol Ass'n*, 804 F.3d 242 (invalidating prohibition on possessing magazines loaded with more than seven rounds of ammunition). Indeed, empirical analysis shows that Second Amendment challenges subject to intermediate scrutiny are more likely to succeed than the average Second Amendment claim. *See generally* Ruben & Blocher, *supra*, at 1496.

More generally, as courts have implemented the two-part framework, the overall success rate for Second Amendment claims has steadily increased. Ruben &

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reasoning. *See* Ruben & Blocher, *supra*, at 1454–71 (explaining methodology in more detail).

Blocher, *supra*, at 1486. Some 30 percent of all civil plaintiffs asserting Second Amendment claims prevail in the federal courts of appeals; the success rate is 40 percent for civil plaintiffs represented by counsel. *Id.* at 1478–79, tbls. 4-5. Civil litigants challenging restrictions on certain categories of regulations such as public carry restrictions prevail at rates approaching 50 percent. *Id.* Appendix C: Summary Results at xxviii.[5]

Those rates are well within the range of success rates for other constitutional claims, suggesting that courts take the right to bear arms as seriously as other constitutional rights—including property rights, religious liberty rights and rights against unreasonable searches and seizures. *Compare* James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 Wm. & Mary L. Rev. 35, 64 (2016) ("In takings claims based on regulatory activity, aggrieved landowners prevail in fewer than 10 percent of the cases in our survey, and even that may overstate the success rate because the table aggregates the results in all of the cases studied and does not account for subsequent reversals."); Nancy Leong, *Making Rights*, 92 B.U. L. Rev. 405, 428 (2012)

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[5] https://perma.cc/9PQG-7WY6. Litigants have seen an overall success rate in Second Amendment challenges of around 9 percent. Ruben & Blocher, *supra*, at 1473. That figure, however, reflects the fact that roughly one quarter of Second Amendment challenges are claims by individuals with a felony conviction. *Id.* at 1447 n.68. Those cases are highly unlikely to succeed given *Heller*'s presumption in favor of "prohibitions on the possession of firearms by felons," 554 U.S. at 626, thus bringing down the aggregate success rate. More generally, almost two-thirds of post-*Heller* challenges were made by criminal defendants who have incentives to raise weak Second Amendment defenses that civil litigants would face costs to litigate. Ruben & Blocher, *supra*, at 1478, 1481.

(finding that "the plaintiff prevailed on 48% of all Fourth Amendment claims raised in the civil context: 52% of excessive force claims and 39% of all other claims excluding excessive force claims litigated in civil proceedings"); John P. Forren, *Revisiting Four Popular Myths About the Peyote Case*, 8 U. Pa. J. Const. L. 209, 222 n.52 (2006) (collecting sources and noting studies finding that claims under the Free Exercise clause prevail at rates of 12.4, 12.1, and 16 percent).

The Second Amendment is not "be[ing] singled out for special—and specially unfavorable—treatment." *McDonald*, 561 U.S. at 778–79.

B. The Two-Part Framework Properly Incorporates History and Tradition.

"*Heller* commands that, in passing on a Second Amendment claim, courts must read the challenged statute in light of the historical background of the Second Amendment." *GeorgiaCarry.Org*, 687 F.3d at 1261. The courts of appeals' two-part framework follows that command, ensuring that "historical meaning enjoys a privileged interpretive role in the Second Amendment context." *Masciandaro,* 638 F.3d at 470.

1. History and Tradition Are Integral to the Two-Part Framework.

The two-part framework's first step emanates directly from *Heller*, where this Court "acknowledged that the scope of the Second Amendment is subject to historical limitations." *Chester*, 628 F.3d at 679.

This Court stated that "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." *Id.* at 626–27. In other words, *Heller* "catalogued a non-exhaustive list of presumptively lawful regulatory measures that have historically constrained the scope of the right" and that "comport with the Second Amendment because they affect individuals or conduct unprotected by the right to keep and bear arms." *Binderup*, 836 F.3d at 343 (internal quotation marks omitted). This Court further endorsed the "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons,'" and "recognize[d] another important limitation on the right to keep and carry arms," *viz.*, that the right applies only to those "sorts of weapons . . . in common use at the time." *Heller*, 554 U.S. at 627 (internal quotation marks omitted).

Following this guidance, "[t]o determine whether a law impinges on the Second Amendment right, [courts] look to whether the law harmonizes with the historical traditions associated with the Second Amendment guarantee." *NRA*, 700 F.3d at 194; *see also Kanter*, 919 F.3d at 441 (step one involves "a textual and historical inquiry") (internal quotation marks omitted); *Torres*, 911 F.3d at 1258 ("the first step of our analysis requires us to explore the amendment's reach 'based on a historical understanding of the scope of the [Second Amendment] right."); *Medina v. Whitaker*, 913 F.3d 152, 158 (D.C. Cir. 2019) (courts at step one "look to tradition and history"); *Heller II*, 670 F.3d at 1253 (step one involves determining whether a regulation "has long been accepted by the public").

Following *Heller*, "a longstanding, presumptively lawful regulatory measure—whether or not it is specified on *Heller*'s illustrative list—would likely fall outside the ambit of the Second Amendment; that is, such a measure would likely be upheld at step one of [the prevailing] framework." *NRA*, 700 F.3d at 196; *see also Hamilton v. Pallozzi*, 848 F.3d 614, 624 (4th Cir.), *cert. denied*, 138 S. Ct. 500 (2017) ("for a presumptively lawful regulation [identified in *Heller*], at the first step of the Second Amendment inquiry, we need not undertake an extensive historical inquiry"); *Heller II*, 670 F.3d at 1253 ("the activities covered by a longstanding regulation are presumptively not protected from regulation by the Second Amendment").[6]

Such "exclusions need not mirror limits that were on the books in 1791." *Skoien*, 614 F.3d at 641. "[A] regulation can be deemed 'longstanding,'" and thus presumptively lawful, "even if it cannot boast a precise founding-era analogue." *NRA*, 700 F.3d at 196. "After all, *Heller* considered firearm possession bans on felons and the mentally ill to be longstanding, yet the current versions of these bans are of mid–20th century vintage." *Id.*

Step two of the prevailing framework likewise effectuates *Heller*'s historical analysis. This Court held that "banning from the home the most preferred firearm in the nation to 'keep' and use for protection of one's home and family, would fail constitutional muster" under any test. 554 U.S. at 628–29. The District of Columbia's

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[6] *But see Tyler*, 837 F.3d at 690 (concluding that "the regulations presumptively satisfy some form of heightened means-end scrutiny" rather than that "they do not burden persons within the ambit of the Second Amendment as historically understood").

handgun ban "ma[de] it impossible for citizens to use them for the core lawful purpose of self-defense and [wa]s hence unconstitutional." *Id.* at 630. Thus, as noted, the "weight of circuit court authority" has "identified the core of the Second Amendment," *Gould*, 907 F.3d at 671 (citing cases), as "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635. Accordingly, in evaluating whether laws that implicate the Second Amendment, in fact, infringe it, the courts of appeals have asked "whether the challenged regulation burdens the core Second Amendment right." *Ass'n of N.J. Rifle & Pistol Clubs, Inc.*, 910 F.3d at 117.

This, too, incorporates historical analysis, for "a longstanding measure that harmonizes with the history and tradition of arms regulation in this country would not threaten the core of the Second Amendment guarantee." *NRA*, 700 F.3d at 196. Indeed, the "longstanding out-of-the-home/in-the-home distinction bears directly on the level of scrutiny applicable." *Masciandaro,* 638 F.3d at 470.

That distinction reflects the venerable principle that "every man's house is looked upon by the law to be his castle." 3 William Blackstone, Commentaries on the Laws of England 288 (1803). More than 300 years ago, the common law recognized that "[i]n case a man 'is assailed in his own house, he need not flee as far as he can, *as in other cases of se defendendo*, for he hath the protection of his house to excuse him from flying." *People v. Tomlins*, 213 N.Y. 240, 243 (1914) (Cardozo, J.) (emphasis added). *See also* Restatement (Second) of Torts § 65, cmt. g (1965) ("the interest of society in the life and efficiency of its members and in the prevention of the serious breaches of the peace involved in bloody affrays

requires one attacked with a deadly weapon, *except within his own dwelling place*, to retreat") (emphasis added).

Thus, there is no tension between a framework that scrutinizes regulating firearms in the home more strictly than regulations applicable to public places and the notion that "the Second Amendment protects a right to keep and bear arms for self-defense—full stop." Pet. Br. 42. If the law of self-defense applies differently inside the home than out, then it is unsurprising that courts have recognized that the right to bear arms for self-defense has different dimensions at home than in public. That is far from a holding that "this individual right may be exercised only in the home." *Ibid.*

2. Means-End Scrutiny Is Better Suited Than a Purely Historical Approach.

The prevailing two-part framework is superior to a purely historical approach because it provides guidance in cases where courts face "institutional challenges in conducting a definitive review of the relevant historical record." *NRA*, 700 F.3d at 204. Many cases are likely to defy easy historical answers for at least two reasons.

First, "conditions and problems differ from locality to locality" and "citizens in different jurisdictions have divergent views on the issue of gun control." *McDonald*, 561 U.S. at 783. Firearms are and always have been subject to regulation throughout the United States. *See, e.g.*, Joseph Blocher & Darrell A.H. Miller, The Positive Second Amendment: Rights, Regulation, and the Future of *Heller* 19–21 (2018) (describing historical gun laws); Robert Spitzer, Guns Across America: Reconcil-

ing Gun Rules and Rights 5 (2015) ("[W]hile gun possession is as old as America, so too are gun laws."); Adam Winkler, Gunfight: The Battle Over the Right to Bear Arms in America 115 (2011) ("Gun safety regulation was commonplace in the American colonies from their earliest days.").

Historically, such laws "were not only ubiquitous, numbering in the thousands; they spanned every conceivable category of regulation, from gun acquisition, sale, possession, transport, and use, including deprivation of use through outright confiscation, to hunting and recreational regulations, to registration and express gun bans." Spitzer, *supra*, at 5. From the very beginning, those laws also varied across communities and regions, especially among urban and rural areas. *See generally* Joseph Blocher, *Firearm Localism*, 123 Yale L.J. 82 (2013); Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 Yale L.J. Forum 121 (2015).

Contemporary gun regulations likewise run the gamut, from restrictions on weapon possession by certain categories of people (such as those with a felony conviction, the mentally ill, and minors), to restrictions on specific weapons (like machine guns), to restrictions on possession in particular places (like court houses, polling place, police stations, and schools) to restrictions on possession at particular times (like pending trial or during a crime) to laws requiring permits for public carry. *See, e.g.*, Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. 1443, 1475–545 (2009) (discussing and categorizing a broad range of gun laws). Indeed, post-*Heller* litigation

has involved some 60 distinct forms of policies or government action subject to Second Amendment challenges. *See* Ruben & Blocher, *supra*, Appendix B.[7]

This legal diversity makes it unlikely that, for individual cases, courts will have access to the kind of historical record that enabled this Court to assert with "no doubt" "that the Second Amendment conferred an individual right to keep and bear arms." 554 U.S. at 595. *Heller* itself "d[id] not undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment." *Id.* at 626. And even proponents of a historical approach acknowledge that "analyzing the history and tradition of gun laws in the United States does not always yield easy answers." *Heller II*, 670 F.3d at 1275 (Kavanaugh, J., dissenting).

Thus, lower courts deciding individual cases have found that "[h]istory and tradition do not speak with one voice." *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 91 (2d Cir. 2012). As a result, courts reading the same sliver of the historical record don't speak with one voice, either. For example, the District of Columbia Circuit relied on historical analysis to invalidate a law requiring a permit for carrying firearms in public. *Wrenn*, 864 F.3d at 666–67. The First Circuit, however, upheld similar Massachusetts licensing requirements after finding that "the national historical inquiry does not dictate an answer to the question of whether the [challenged] policies burden conduct falling within the scope of the Second Amendment." *Gould*, 907 F.3d at 670. Indeed, history can even conflict over time within a single jurisdiction. *Compare* An Act for the Better Security of the Inhabitants, by Obliging the Male White Persons to Carry

[7] https://perma.cc/FCN2-GQYA.

Fire Arms to Places of Public Worship, 1770, § 1, in A DIGEST OF THE LAWS OF THE STATE OF GEORGIA, at 157 (Phila., Pa., R. Aitken 1800) (requiring the carrying of guns to church) *with* An Act to Preserve the Peace and Harmony of the People of this State, and for Other Purposes, 1870, § 1, in PUBLIC LAWS, PASSED BY THE GENERAL ASSEMBLY OF THE STATE OF GEORGIA, AT THE SESSION OF 1870, at 42 (Atlanta, New Era Printing Establishment 1870) (banning the carrying of guns to church).

Second, "[j]ust as the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search, the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Heller*, 554 U.S. at 582 (citations omitted). Yet "when legislatures seek to address new weapons that have not traditionally existed or to impose new gun regulations because of conditions that have not traditionally existed, there obviously will not be a history or tradition of banning such weapons or imposing such regulations." *Heller II*, 670 F.3d at 1275 (Kavanaugh, J., dissenting).

Measuring a firearm regulation's constitutionality based on its longevity therefore would jeopardize a number of important public policies. For example, it is clear that airplanes are the kind of "sensitive places" where legislatures should be able to prohibit firearms. *E.g.*, *United States v. Davis*, 304 F. App'x 473, 474 (9th Cir. 2008). But it is unclear how such a sensible regulation would fare under a historical test given that Congress did not regulate firearms in airplanes until the 1960s. *See* Act of Sept. 5, 1961, Pub. L. No. 87-197, 75 Stat. 466; *see also* Ariz. Rev. Stat. § 13-3102(A)(13) (forbidding "en-

tering a nuclear or hydroelectric generating station carrying a deadly weapon" unless permitted by law). Nor is there strong historical precedent for today's mass spectator events. MetLife Stadium at New Jersey's Meadowlands, home of the New York Jets and Giants, site of Super Bowl XLVIII and putative site of the 2026 FIFA World Cup Final holds 82,500 people[8]—nearly three times the 33,000 people who lived in New York, America's largest city and the home of the First Congress, in 1791.[9] Los Angeles will host the 2028 Summer Olympic games—which since ancient times have signaled a period of peace—at numerous venues owned by the State of California and/or the City of Los Angeles, including the Los Angeles Coliseum and the University of California-Los Angeles. More people will attend the Olympics than lived in the United States in 1791 (3 million). The fact that colonial America did not host such events should not prevent New Jersey, California and Los Angeles from taking measures to prevent the kind of terrorist violence that horrified the world in Munich in 1972 and Atlanta in 1996.

Thus, while longevity may be sufficient, there is no necessary correlation between how long a law regulating firearms has been on the books and whether that law passes constitutional muster. There are no clear historical reference points for "ghost guns" designed to stonewall criminal investigations or technology that enables individuals to "print" working firearms in their homes and evade restrictions on firearms sales. *United States v. McSwain*, No. CR 19-80 (CKK), 2019 WL

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[8] https://www.metlifestadium.com/stadium/about-us.

[9] https://www.census.gov/history/www/through_the_decades/fast_facts/1790_fast_facts.html.

1598033, at *3 (D.D.C. Apr. 15, 2019) (describing a "ghost gun" as "a weapon that lacks a serial number" and "is therefore untraceable by law enforcement"); *Def. Distributed v. U.S. Dep't of State*, 838 F.3d 451, 454–55 (5th Cir. 2016) (noting that "[t]hree-dimensional ('3D') printing technology allows a computer to 'print' a physical object" including, for example, with the right files, a "single-shot plastic pistol" or "a fully functional plastic AR–15"); *Washington v. U.S. Dep't of State*, 318 F. Supp. 3d 1247, 1255 (W.D. Wash. 2018) ("3D [printed] guns" are "virtually undetectable in metal detectors and other security equipment."). At best, a test requiring historical precedent to uphold any firearm regulation would severely confine legislatures' ability to address these policy issues; more likely, such a test would provide no guidance at all.

The Second Amendment is not the only constitutional right that must grapple with technological change, but a rigid historical test would make it uniquely ill-equipped to do so. If the people's representatives must point to some precedent for restricting firearms in order for their policies to pass constitutional muster, then gun policy in American will be confined to what has been done before. That would render empty this Court's assurances that the Second Amendment will not compromise communities' "ability to devise solutions to social problems that suit local needs and values," *McDonald*, 561 U.S. at 785, and that *Heller* leaves them "a variety of tools for combating" gun violence. 554 U.S. at 636.

Moreover, a singular directive requiring historical analogies will counterintuitively lead to the very free-standing balancing that this Court rejected in *Heller*.

The Court's Fourth Amendment case law shows the limits of historical analogies untethered to well-settled legal doctrines. *E.g.*, *Riley v. California*, 573 U.S. 373, 401 (2014) ("Is an e-mail equivalent to a letter? Is a voicemail equivalent to a phone message slip? It is not clear how officers could make these kinds of decisions before conducting a search, or how courts would apply the proposed rule after the fact."); *United States v. Jones*, 565 U.S. 400, 420 (2012) (Alito, J., concurring) (noting that "it is almost impossible to think of late-18th-century situations that are analogous to" GPS searches). *Cf. Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970) (noting that analogizing modern causes of action to those at common law "requir[es] extensive and possibly abstruse historical inquiry" and is "difficult to apply").

On a blank historical canvass, jurists are more likely to paint a self-portrait. Thus, a Fourth Amendment test that nominally searches for "encroachment of the sort the Framers, after consulting the lessons of history, drafted the Fourth Amendment to prevent," *Carpenter v. United States*, 138 S. Ct. 2206, 2223 (2018) (internal quotation marks omitted), has led the Court into "normative" policymaking that balances "the value of privacy in a particular setting and society's interest in combating crime." *Id.* at 2265 (Gorsuch, J., dissenting). *Cf. Wyoming v. Houghton*, 526 U.S. 295, 299–300 (1999) ("Where [historical] inquiry yields no answer, we must evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.").

So, too, grounding the right to bear arms on this Court's capacity to mine historical materials for appropriate historical analogues will lead to an "unpredictable—and sometimes unbelievable—jurisprudence," *Carpenter*, 138 S. Ct. at 2266 (Gorsuch, J.), that has little to do with whether legislatures are depriving Americans' ability to defend themselves under the guise of combating the ills of gun violence.

The better approach is the one that each court of appeals to have considered the question has adapted from other constitutional jurisprudence: absent a categorical ruling at the first step of the framework, "a law impinging upon the Second Amendment right must be reviewed under a properly tuned level of scrutiny—i.e., a level that is proportionate to the severity of the burden that the law imposes on the right." *NRA*, 700 F.3d at 198. *Cf.* Volokh, *supra*, 56 UCLA L. Rev. at 1549 (after *Heller*, courts should resolve Second Amendment cases by "looking closely at the scope of the right, at the burden the regulation imposes, [and] at evidence on whether the regulation will actually reduce danger of crime and injury").

CONCLUSION

This Court should hold that the courts of appeals have identified the correct two-part framework for adjudicating claims that the Second Amendment prohibits a law restricting the right to bear arms.

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