No. 19-404

In the Supreme Court of the United States

DAVID SETH WORMAN, ET AL., PETITIONERS

v.

MAURA T. HEALEY, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, ET AL.

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

BRIEF OF THE NATIONAL SHOOTING SPORTS FOUNDATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The National Shooting Sports Foundation (NSSF) is a non-profit trade association that works to promote, protect and preserve hunting and the shooting sports. Its members include manufacturers, distributors, endemic media, firearms retailers, shooting ranges, and sports-

1. All parties were timely notified and consented to the filing of this brief. No counsel for a party authored any part of this brief. And no one other than the amicus curiae, its members, or its counsel financed the preparation or submission of this brief.

men's organizations throughout the United States. NSSF seeks to protect the constitutional right to keep and bear arms and the lawful commerce that makes the exercise of those rights possible. NSSF leads the way in advocating for the firearms industry and its businesses and jobs, keeping guns out of the wrong hands, encouraging enjoyment of recreational shooting and hunting, and helping people better understand the industry's lawful products.

SUMMARY OF ARGUMENT

The Court should grant certiorari for three reasons. First, the courts of appeals are divided on the standard of review to be applied to laws that prohibit semiautomatic firearms or standard-capacity[2] magazines. The First, Second, Fourth, Ninth, and D.C. Circuits have all ruled that "intermediate scrutiny" should apply to laws of this sort.[3] The Seventh Circuit, by contrast, has eschewed intermediate scrutiny and applies a very different test:

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2. Many courts and litigants tendentiously describe these prohibited magazines as "large capacity," but that nomenclature is misleading. The magazines that Massachusetts (and other jurisdictions) have outlawed are the standard size produced by the manufacturer in response to consumer demand; they are not excess-capacity magazines. Indeed, NSSF has estimated, based on its own survey research, that *133 million* magazines containing 11 rounds or more are possessed throughout the United States. *See* https://www.nssf.org/research/top-industry-research-reports/ (last visited on October 23, 2019).

3. *See* Pet. App. 6a, 22a–28a; *New York State Rifle and Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 259–61 (2d Cir. 2015); *Kolbe v. Hogan*, 849 F.3d 114, 138–39 (4th Cir. 2017) (en banc); *Fyock v. Sunnyvale*, 779 F.3d 991, 998–99 (9th Cir. 2015); *Heller v. District of Columbia*, 670 F.3d 1244, 1261–62 (D.C. Cir. 2011) (*Heller II*).

> [I]nstead of trying to decide what 'level' of scrutiny applies, and how it works, . . . we think it better to ask whether a regulation bans weapons that were common at the time of ratification or those that have 'some reasonable relationship to the preservation or efficiency of a well regulated militia,' and whether law-abiding citizens retain adequate means of self-defense.

Friedman v. City of Highland Park, 784 F.3d 406 (7th Cir. 2015) (citations omitted). The Court should grant certiorari to resolve this conflict among the circuits and announce the proper standard that courts should apply to bans on semiautomatic firearms or standard-capacity magazines.

Second, the Court should grant certiorari to repudiate the loose and malleable "intermediate scrutiny" standard, which has no grounding in the language of the Second Amendment and gives judges unlimited discretion to approve or disapprove firearms regulations. The command of the Second Amendment is simple and straightforward: "the right of the people to keep and bear arms shall not be infringed." U.S. Const. amend. II. This is not an invitation for courts to balance Second Amendment rights against competing public-policy goals—and it does not allow courts to ask whether an infringement of the right to keep and bear arms is "substantially related" to a sufficiently "important" governmental interest.

When considering a ban on semiautomatic firearms or standard-capacity magazines, the appropriate test is whether the outlawed products qualify as "arms" within the meaning of the Second Amendment, and whether the

people's right to keep and bear arms is "infringed" by a categorical prohibition on this subset of firearms and magazines. Those are the *only* inquiries a court is authorized to undertake under the text of the Second Amendment; the jargon associated with "intermediate scrutiny" has no place in Second Amendment jurisprudence. The Court should grant certiorari and remand for the First Circuit to apply a textually grounded standard of review rather than a court-created "intermediate scrutiny" test.

Finally, the Court should grant certiorari because the lower courts' widespread use of "intermediate scrutiny" relegates the Second Amendment to second-class constitutional citizenship. For too long, the federal judiciary has downplayed or narrowly construed constitutional provisions that protect rights that are no longer fashionable among the illuminati—while simultaneously adopting expansive interpretations of rights that have no grounding whatsoever in constitutional language. And nowhere has the modern judiciary's selective disfavoring of constitutional provisions been more evident than with the Second Amendment. *See* Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637 (1989). Even after this Court's ruling in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the belief that Second Amendment rights are somehow less worthy of judicial protection seems to be hardwired into members of the federal judiciary. In *McDonald v. City of Chicago*, 561 U.S. 742 (2010), for example, four members of this Court endorsed a regime in which nearly every provision in the Bill of Rights *except* the Second Amendment would be incorporated against

the States. *See id.* at 858–912 (Stevens, J., dissenting); *id.* at 912–41 (Breyer, J., dissenting).

In this case, the First Circuit assumed that the challenged law burdens conduct protected by the Second Amendment,[4] but held that courts should apply "intermediate scrutiny" to any law that "fails to impose a substantial burden" on the "core Second Amendment right." Pet. App. 22. In no other area of constitutional law would a court apply a standard as lenient as intermediate scrutiny to a law that burdens a "core" constitutional guarantee—and the widespread embrace of the intermediate-scrutiny standard among lower courts is a symptom of the continued disfavor with which the Second Amendment is viewed relative to other constitutional protections.

The First Circuit should have instead resolved whether the prohibited semiautomatic firearms and standard-capacity magazines qualify as "arms" within the meaning of the Second Amendment—or whether a prohibition on this subset of firearms qualifies as an "infringement" of the people's constitutional right to keep and bear arms. The Court should grant certiorari and remand for application of the proper constitutional standard.

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4. Pet. App. 18 ("[W]e simply assume, albeit without deciding, that the Act burdens conduct that falls somewhere within the compass of the Second Amendment.").

ARGUMENT

I. THE COURTS OF APPEALS ARE DIVIDED ON THE STANDARD OF REVIEW TO BE APPLIED TO LAWS THAT PROHIBIT SEMIAUTOMATIC FIREARMS OR STANDARD-CAPACITY MAGAZINES

Six courts of appeals have weighed in on the constitutionality of laws that prohibit semiautomatic firearms or standard-capacity magazines. Five of these courts have held that "intermediate scrutiny" is the proper standard to apply—even on the assumption that the laws burden rights protected by the Second Amendment.[5] The Seventh Circuit, however, explicitly rejects the tiers-of-scrutiny framework and instead asks: (1) "whether a regulation bans weapons that were common at the time of ratification or those that have some reasonable relationship to the preservation or efficiency of a well regulated militia"; and (2) "whether law-abiding citizens retain adequate means of self-defense." *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015) (citations and internal quotation marks omitted). The Court should grant certiorari to resolve this disagreement and announce the proper standard of review that applies in cases of this sort.

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5. *See* Pet. App. 6a, 22a–28a; *New York State Rifle and Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 259–61 (2d Cir. 2015); *Kolbe v. Hogan*, 849 F.3d 114, 138–39 (4th Cir. 2017) (en banc); *Fyock v. Sunnyvale*, 779 F.3d 991, 998–99 (9th Cir. 2015); *Heller v. District of Columbia*, 670 F.3d 1244, 1261–62 (D.C. Cir. 2011) (*Heller II*).

A. The First, Second, Fourth, Ninth, and D.C. Circuits All Apply "Intermediate Scrutiny" To Laws That Ban Semiautomatic Firearms Or Standard-Capacity Magazines

The First Circuit's decision below assumed for the sake of argument that a ban on semiautomatic firearms and standard-capacity magazines burdens the constitutional right protected by the Second Amendment. Pet. App. 18 ("[W]e simply assume, albeit without deciding, that the Act burdens conduct that falls somewhere within the compass of the Second Amendment."). It even went so far as to assume that the law burdens "the core Second Amendment right to self-defense in the home." Pet. App. 22. But it ruled that "intermediate scrutiny" should apply—even to laws that burden "the core Second Amendment right to self-defense in the home"—so long as the challenged law "fails to impose a substantial burden on that right." Pet. App. 22.[6]

The framework that the First Circuit adopted is consistent with the approach taken by many—but not all—of the other courts of appeals. In *New York State Rifle and Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242 (2d Cir. 2015), for example, the Second Circuit "assume[d] for the sake of argument" that a prohibition on semiautomatic firearms and standard-capacity magazines "ban weapons

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6. *See also* Pet App. 22 ("In our view, intermediate scrutiny is appropriate as long as a challenged regulation either fails to implicate the core Second Amendment right or fails to impose a substantial burden on that right."); *id.* ("[I]ntermediate scrutiny is the appropriate level of scrutiny for evaluating a law—like the Act—that arguably implicates the core Second Amendment right to self-defense in the home but places only a modest burden on that right.").

protected by the Second Amendment." *Id.* at 257. But the court went on to hold that a law of this sort needs only to survive "intermediate scrutiny." *Id.* at 260. One would think that a law banning "weapons protected by the Second Amendment" should be unconstitutional *per se*, especially when the constitutional text provides that "the right of the people to keep and bear arms shall not be infringed." U.S. Const. amend. II. But the Second Circuit defended its approach by pointing to rulings from "other courts," and observing that "many of [them] have applied intermediate scrutiny to laws implicating the Second Amendment." *Id.* at 260–61.

The en banc Fourth Circuit has likewise held (over dissent) that "intermediate scrutiny" should apply to laws that ban semiautomatic firearms and standard-capacity magazines, even on the assumption that the outlawed firearms are entitled to Second Amendment protection. *See Kolbe v. Hogan*, 849 F.3d 114, 139 (4th Cir. 2017) (en banc) ("[A]ssuming the Second Amendment protects the FSA-banned assault weapons and large-capacity magazines, the FSA is subject to the intermediate scrutiny standard of review.").[7] And the Ninth Circuit and D.C. Circuit have followed this approach by applying "intermediate scrutiny" to prohibitions on semiautomatic firearms and standard-capacity magazines. *See Fyock v. Sunnyvale*,

7. The Fourth Circuit also held (in the alternative) that semiautomatic firearms and standard-capacity magazines fall outside the "arms" protected by the Second Amendment. *See Kolbe*, 849 F.3d at 135 ("Because the banned assault weapons and large-capacity magazines are 'like' 'M-16 rifles'—'weapons that are most useful in military service'—they are among those arms that the Second Amendment does not shield.").

779 F.3d 991, 999 (9th Cir. 2015) ("[T]he impact Measure C may have on the core Second Amendment right is not severe and . . . intermediate scrutiny is warranted."); *Heller v. District of Columbia*, 670 F.3d 1244, 1262 (D.C. Cir. 2011) (*Heller II*) ("[W]e believe intermediate rather than strict scrutiny is the appropriate standard of review.").

B. The Seventh Circuit Rejects "Intermediate Scrutiny" And Applies A Two-Part Test To Determine Whether A Law Banning Semiautomatic Firearms Or Standard-Capacity Magazines Regulates "Arms," Or Whether It "Infringes" The People's Constitutional Right To Keep And Bear Arms

The Seventh Circuit, by contrast, has rejected the intermediate-scrutiny standard when reviewing laws that ban semiautomatic firearms or standard-capacity magazines, and applies a different test derived from *Heller* and the text of the Second Amendment:

> [I]nstead of trying to decide what 'level' of scrutiny applies, and how it works, inquiries that do not resolve any concrete dispute, we think it better to ask whether a regulation bans weapons that were common at the time of ratification or those that have 'some reasonable relationship to the preservation or efficiency of a well regulated militia,' and whether law-abiding citizens retain adequate means of self-defense.

Friedman v. City of Highland Park, 784 F.3d 406 (7th Cir. 2015) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 622 (2008), and *United States v. Miller*, 307 U.S. 174, 178 (1939)).

Under the Seventh Circuit's test, a court first asks whether the prohibited firearms fall were "common at the time of ratification" or "have some reasonable relationship to the preservation or efficiency of a well regulated militia"—an inquiry designed to determine whether the weapons at issue qualify as "arms" protected by the Second Amendment. Then the court is to ask "whether law-abiding citizens retain adequate means of self-defense"—an inquiry designed to determine whether a ban on particular firearms rises to the level of an "infringement" on the constitutional right to keep and bear arms.

In the Seventh Circuit, there is no judicial inquiry into whether a ban on semiautomatic firearms or standard-capacity magazines serves "important" governmental interests, or whether it is "substantially related" to those supposed interests. Pet. App. 23a. Nor is a court to ask whether there is a "reasonable fit" between the law and its asserted objectives. *Id.* The Seventh Circuit establishes binary inquiries rather than balancing tests: A prohibited firearm is either protected by the Second Amendment or it isn't, and a prohibition on certain firearms either infringes the constitutional right to self-defense or it doesn't.

The First Circuit's opinion did not engage *Friedman* or discuss the Seventh Circuit's rejection of the intermediate-scrutiny standard. Instead, the First Circuit was content to observe that its decision to apply intermediate scrutiny "aligns us with a number of our sister circuits," Pet. App. 22a, without acknowledging that the Seventh Circuit has taken a different tack or attempting to refute the Seventh Circuit's approach. But legal questions must

be resolved with reasons, not by a show of hands. *See* Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 Harv. L. Rev. 148, 155 (2005). Many times this Court resolves circuit splits by endorsing what had been the minority viewpoint among the lower courts—and it will sometimes even reject the *unanimous* view of the courts of appeals that have weighed in on the matter. *See Rehaif v. United States*, 139 S. Ct. 2191, 2201 (2019) (Alito, J., dissenting) (criticizing the Court for adopting an interpretation of 18 U.S.C. § 922(g) that had been rejected "by every single Court of Appeals to address the question.").[8] Yet the First Circuit allowed the brute fact that other courts have embraced the intermediate-scrutiny standard to serve as evidence of legal correctness.

II. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE THIS DIVISION OF AUTHORITY AND REPUIDATE THE "INTERMEDIATE SCRUTINY" STANDARD THAT THE MAJORITY OF CIRCUITS HAVE ADOPTED

The disagreement among the circuits over the proper standard of review is alone sufficient to warrant certiorari. But the need for certiorari takes on added urgency because the majority of circuits have embraced an "intermediate scrutiny" standard that has no foundation is constitutional language and gives judges unacceptably broad discretion to approve or disapprove gun-control

8. *See also Buckhannon Board and Care Home, Inc., v. W. Va. Dep't of Health and Human Resources*, 532 U.S. 598, 601–02 & n.3 (2001) (resolving a 9-1 circuit split in favor of the Fourth Circuit, which had rejected the "catalyst theory," and rejecting the views of the nine other circuits that had endorsed it).

measures. The courts should instead apply the text of the Second Amendment and ask: (1) Whether semiautomatic firearms or standard-capacity magazines qualify as "arms" described in the Second Amendment; and (2) Whether a prohibition on this subset of weaponry qualifies as an "infringement" of the right to keep and bear arms. This Court should grant certiorari and remand for the lower courts to apply a textually grounded standard rather than a court-created "intermediate scrutiny" doctrine.

The text of the Second Amendment is straightforward and bears repeating:

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

U.S. Const. amend. II. A text of this sort leaves no room for courts to balance Second Amendment rights against competing governmental interests, or for legislators to subordinate the constitutionally protected right to policy goals that courts deem "important." The entire point of enshrining a constitutional right is to *prevent* it from being overridden when legislators and judges think there are "important" reasons for doing so.

If a ban on semiautomatic firearms or standard-capacity magazines is to be upheld, it must be because either: (1) the prohibited firearms fall outside the category of "arms" protected by the Second Amendment; or (2) a prohibition on semiautomatic firearms or standard-capacity magazines fails to "infringe" the constitutional right to keep and bear arms.

Heller acknowledges, for example, that the "arms" protected by the Second Amendment exclude "dangerous and unusual weapons," like the automatic M-16, although it did not purport to resolve whether commonly owned semiautomatic firearms or standard-capacity magazines fall within this category. *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008) (citing 4 William Blackstone, Commentaries on the Laws of England 148-49 (1769)). Yet the First Circuit did not even discuss whether the ban could be upheld on these grounds, even though an inquiry of this sort would resolve the case in a manner that is rooted in constitutional text and in this Court's pronouncement in *Heller*.

Instead, the First Circuit rushed to embrace the "intermediate scrutiny" standard that other courts of appeals have applied to laws that ban semiautomatic firearms or standard-capacity magazines—even going so far as to assume for the sake of argument that the prohibited weapons qualify as protected "arms" under the Second Amendment. Pet. App. 18a ("[W]e simply assume, albeit without deciding, that the Act burdens conduct that falls somewhere within the compass of the Second Amendment."). This Court should emphatically reject the notion that laws may infringe the constitutional right to keep and bear arms so long as they satisfy the "intermediate scrutiny" standard.

The "intermediate scrutiny" standard has no basis whatsoever in the language of the Constitution or the Second Amendment, and it cannot be used to limit the scope of a textually grounded constitutional right. The Second Amendment does not say that "the right of the people to

keep and bear Arms shall not be infringed, except by legislation that is substantially related to an important governmental objective." The right that the Second Amendment describes is absolute. That does not mean that every gun-control law is unconstitutional—far from it[9]—but it does mean that gun-control laws must be measured against the text of the Second Amendment rather than the court-created jargon of "intermediate scrutiny." A constitutionally permissible gun-control measure must either: (1) Regulate weaponry that falls outside the category of "arms" described in the Second Amendment; or (2) Fall short of an "infringement" of the people's right to keep and bear arms for their self-defense. *These* are the inquiries that judges should undertake if they claim to be enforcing the Constitution rather than court-created doctrines.

We recognize, of course, that courts have used the "intermediate scrutiny" standard in other areas of constitutional doctrine, such as sex equality and the regulation of adult bookstores. *See, e.g.*, *Craig v. Boren*, 429 U.S. 190, 197 (1976); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002). But neither of those court-protected rights can be found in the Constitution's language. The text of the equal protection clause does not require equal treatment of men and women. It requires only the "equal *protection* of the laws," and section 2 of the Fourteenth Amendment makes abundantly clear that the disenfranchisement of women would remain permissible after the

9. *See Heller*, 554 U.S. at 626–28 (acknowledging a litany of presumptively lawful gun-control measures).

amendment's ratification.[10] *See* David A. Strauss, *Foreword: Does The Constitution Mean What It Says?*, 129 Harv. L. Rev. 1, 38, 41–42 (2015). In like manner, the peddling of smut is conduct rather than "speech," and the judicial protections it receives are rooted in textually dubious precedents rather than constitutional language. *See City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 443–44 (2002) (Scalia, J., concurring) ("The Constitution does not prevent those communities that wish to do so from regulating, or indeed entirely suppressing, the business of pandering sex.").

There is little cause for concern when a court subjects rights of that sort to a standard as lenient as "intermediate scrutiny." When a right is derived from judicial precedent rather than constitutional text, the courts that created the right hold the prerogative to define the appropriate standard of review—or even to modify or overrule the right itself if the court sees fits to do so. *See, e.g.*, *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833

10. *See* U.S. Const. amend. XIV, § 2 ("Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.").

(1992) (replacing *Roe v. Wade*'s trimester framework with an "undue burden" test); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (overruling *Lochner*-era protections for liberty of contract).

It is another matter entirely when a court assumes that a challenged law burdens a textually guaranteed constitutional right—and then excuses the burden on the ground that it is "substantially related" to an "important governmental objective." Pet. App. 23a. When a court applies a standard such as "intermediate scrutiny" to a right that is explicitly protected by the Constitution's language, it is arrogating to itself the power to decide the policy goals that are sufficiently "important" to trump constitutional text. That is incompatible with the very notion of enumerated constitutional rights. As this Court explained in *Heller*:

> The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.

Heller, 554 U.S. at 634–35.

This leads into the second problem with the "intermediate scrutiny" standard: It is hopelessly indeterminate

and leads inevitably to result-oriented judging. Ponder for a moment the discretion that this standard provides to the courts that must apply it. In the words of the First Circuit, one is to ask whether a firearm prohibition is "*substantially* related (how substantial?) to an *important* (how important?) governmental objective." Pet. App. 23. Words such as "substantially" and "important" are quintessential weasel words. Any judge can assert that any gun-control measure is "substantially" related to the "important" governmental objective of public safety—or that it is not quite "substantially" related to this "important" objective—regardless of the data or evidence that the litigants produce. Consider the proceedings below. The State introduced evidence showing that semiautomatic firearms and standard-capacity magazines have been used in recent mass shootings and that these firearms inflict more serious and more lethal injuries than other weapons. Pet. App. 25a–27a. But is that enough to justify a complete and total prohibition on the disfavored firearms, with *no* exceptions for *any* law-abiding citizen who can pass an extensive background check? The First Circuit thought so, but a judge applying "intermediate scrutiny" could just as easily conclude that the challenged law is overinclusive, that it "burdens more conduct than is reasonably necessary," and that it fails the "reasonable fit" component of intermediate scrutiny. Pet. App. 23a–24a (quoting *Gould v. Morgan*, 907 F.3d 659, 672 (1st Cir. 2018)).

The point is not to take sides on whether the First Circuit correctly applied its "intermediate scrutiny" standard—at least not at this stage of the litigation. The point

is that the "intermediate scrutiny" standard is non-falsifiable. In the words of this Court, "it is always possible to disagree with such judgments and never to refute them." *Blakely v. Washington*, 542 U.S. 296, 308 (2004). This is not a standard that should be applied to a right that the Constitution is supposed to protect from the vagaries of political and judicial opinion.

III. THE LOWER COURTS' WIDESPREAD USE OF INTERMEDIATE SCRUTINY RELEGATES THE SECOND AMENDMENT TO SECOND-CLASS STATUS

There is a third and final reason why certiorari is so urgently needed. The use of "intermediate scrutiny" in Second Amendment litigation is spreading rapidly among the federal courts, and if left unchecked it will return the Second Amendment to its pre-*Heller* status as a disfavored and underenforced constitutional provision.[11]

It has become all too common for the modern judiciary to downplay or narrowly construe constitutional provisions that are perceived to have outlived their usefulness. The contract clause has been rendered a nullity by the judiciary's lack of enforcement and a toothless standard of review. *See Energy Reserves Group v. Kansas Power & Light*, 459 U.S. 400, 411–13 (1983). The takings clause (until recently) was largely unenforceable in federal court

11. *See, e.g.*, *Association of New Jersey Rifle and Pistol Clubs, Inc. v. Attorney General New Jersey*, 910 F.3d 106, 126 (3d Cir. 2018) (Bibas, J., dissenting) ("The Second Amendment is an equal part of the Bill of Rights. We must treat the right to keep and bear arms like other enumerated rights, as the Supreme Court insisted in *Heller*. We may not water it down and balance it away based on our own sense of wise policy.").

because of a court-imposed exhaustion-of-state-remedies doctrine that no other constitutional claims were subject to. *See Knick v. Township of Scott*, 139 S. Ct. 2162 (2019). And the constitutional right to keep and bear arms suffered a similar disfavored status in the decades before *Heller* and *McDonald*. The "collective right" interpretation had rendered the Second Amendment effectively non-justiciable, and it was one of few provisions in the Bill of Rights that had never been incorporated against the States.

The recent decisions of this Court in *Heller* and *McDonald* have taken large steps toward removing the second-class status of the Second Amendment. But the lower courts' eager embrace of the "intermediate scrutiny" standard threatens to undo this. The First Circuit admitted that the challenged firearm ban burdens the right of self-defense in the home—which it described as the "core" of the Second Amendment—yet it proceeded to apply a standard as lenient as intermediate scrutiny. Pet. App. 20, 22. In no other area of constitutional law would a court apply intermediate scrutiny to a law that burdens the "core" of a textual constitutional guarantee.

The Court should reaffirm the Second Amendment's guarantee and remand with instructions to apply the test that the Constitution itself provides: (1) Whether the prohibited semiautomatic firearms and standard-capacity magazines qualify as "arms" within the meaning of the Second Amendment; and (2) Whether a prohibition on this subset of weaponry qualifies as an "infringement" of the people's constitutional right to keep and bear arms.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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