No. 20-1639

IN THE
Supreme Court of the United States

GEORGE K. YOUNG, JR., *Petitioner*,

v.

HAWAII, *ET AL.*, *Respondents*.

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

Brief *Amicus Curiae* of Gun Owners of America, Inc., Gun Owners Foundation, Heller Foundation, Virginia Citizens Defense League, Conservative Legal Defense and Education Fund, and Restoring Liberty Action Committee in Support of Petitioner

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INTEREST OF THE *AMICI CURIAE*[1]

Gun Owners of America, Inc. and Virginia Citizens Defense League are nonprofit social welfare organizations, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). Gun Owners Foundation, Heller Foundation, and Conservative Legal Defense and Education Fund are nonprofit educational and legal organizations, exempt from federal income tax under IRC section 501(c)(3). Restoring Liberty Action Committee is an educational organization.

Amici organizations were established, *inter alia*, for the purpose of participating in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

Several of these *amici* also filed an *amicus* brief in this case on November 19, 2018 during *en banc* proceedings in the Ninth Circuit, as well as *amicus* briefs in unsuccessful efforts to urge this Court to review earlier Ninth Circuit Second Amendment rulings, including:

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

- Mai v. United States, U.S. Supreme Court No. 20-819, Brief *Amicus Curiae* of Gun Owners of America, Inc. *et al.* (January 19, 2021);
- Rodriguez v. City of San Jose, U.S. Supreme Court No. 19-1057, Brief *Amicus Curiae* of Gun Owners of America, Inc. *et al.* (May 20, 2020);
- Peruta v. California, U.S. Supreme Court No. 16-894, Brief *Amicus Curiae* of Gun Owners of America, Inc., *et al.* (February 16, 2017); and
- Jackson v. San Francisco, U.S. Supreme Court No. 12-17803, Brief *Amicus Curiae* of Gun Owners of America, Inc. *et al.* (July 3, 2014).

STATEMENT OF THE CASE

The State of Hawaii has some of the most draconian firearms laws in the country, requiring that firearms be kept in the owner's "place of business, residence, or sojourn," with a few limited exceptions to transport firearms in a closed container. Petition for Certiorari ("Pet. Cert.") at 4.

Neither open nor concealed carry is permissible without obtaining a license which requires the applicant demonstrating to the chief of police highly unusual circumstances — much more than a desire for effective self-defense. A concealed carry permit requires "an exceptional case" and "reason to fear injury." No open carry is permissible without a showing of "urgency" and a sufficient "need." Even then, for both cases, the decision is left to the chief of police under "may issue" provisions. HRS section 134-9. Although these statutory standards for licensing may give the appearance that Hawaii has a licensing

scheme which provides meaningful exceptions to the ban, in practice they function as a thin veneer concealing a near total ban on bearing arms in the entire State of Hawaii. In fact, "[T]he statute has been used to deny all permit applications during the nine years this case has been in litigation." Pet. Cert. at 1.

Petitioner brought a Second Amendment challenge to the Hawaii state statute restricting the carrying of firearms in the U.S. District Court for the District of Hawaii. In spite of this Court's decisions in District of Columbia v. Heller, 554 U.S. 570 (2008) and McDonald v. Chicago, 561 U.S. 742 (2010) the district court concluded that the Second Amendment only protects at its "core" the right of law-abiding responsible citizens to use arms in defense of hearth and home. Young v. Hawaii, 911 F. Supp. 2d 972, 988-89 (D. Ha. 2012). While the court believed those cases did not foreclose the possible existence of a Second Amendment right outside the home, the court found that issue was rendered uncertain by those decisions. The district court followed the Ninth Circuit's two-step interest balancing test and concluded that, since "Heller and McDonald establishes only a **narrow individual right** to keep an operable **handgun at home** for self-defense," a challenge to carrying outside the home was outside the Second Amendment, thus not requiring the court to proceed to the second part of that two-step test. The district court did not appear to base this conclusion on the longstanding nature of the challenged restriction, but simply that bearing arms did not fall within the core of the constitutional right. *See* Young, 911 F. Supp. 2d at 989 (emphasis added).

Petitioner appealed the district court's order to the Ninth Circuit, which reversed and sided with Petitioner in a split opinion. *See* Young v. Hawaii, 896 F.3d 1044 (9th Cir. 2018) *reh'g en banc granted*, 915 F.3d 681 (9th Cir. 2019). The panel viewed the Ninth Circuit's *en banc* decision in Peruta v. County of San Diego, 824 F.3d 919 (9th Cir. 2016) (*en banc*), which upheld a concealed carry licensing scheme, as foreclosing consideration of such a challenge. *See* Young, 896 F.3d at 1050. However, with respect to the challenge to the open carrying licensing scheme, the panel, after applying the two-step test (*id.* at 1051), concluded that, under Heller and McDonald, "the right to bear arms must guarantee *some* right to self-defense in public." *Id.* at 1068.

With Peruta having taken the concealed carry issue off the table, the panel ruled "we are satisfied that the Second Amendment encompasses a right to carry a firearm openly in public for self-defense," and therefore the Hawaii statute "burdens conduct protected by the Second Amendment." *Id.* at 1068. Then, viewing "the core purpose of the Second Amendment as self-defense" and that "'bear'[ing] effectuates such core purpose of self-defense in public ... the right to carry a firearm openly for self-defense falls within the core of the Second Amendment." *Id.* at 1070. In dissent, Judge Clifton concluded that, since the statute does not infringe on a core portion of the Second Amendment right, he would have applied intermediate scrutiny and upheld the ban. *Id.* at 1080-82.

Thereafter, the Ninth Circuit granted rehearing *en banc* and vacated the panel decision and, as the panel had done, addressed on review only the right to carry arms openly in public. The *en banc* court affirmed the district court dismissal of the challenge by a vote of 7 to 4, over two vigorous dissents. Young v. Hawaii, 992 F.3d 765 (9th Cir. 2021) (*en banc*). The Court's reasoning in its *en banc* opinion is analyzed *infra*.

SUMMARY OF ARGUMENT

Petitioner seeks this Court's review of the Ninth Circuit *en banc* decision upholding a Hawaii statute imposing a virtual ban on carrying firearms outside the home for self-defense. Having previously held that "individuals do not have a Second Amendment right to carry concealed weapons in public" the Ninth Circuit had no problem denying a challenge to Hawaii's near total ban on open carry. Young, 992 F.3d at 773. The Ninth Circuit explained that it was joining the majority of circuits that had considered the issue of open carry, which it characterized as "a question that has divided the circuits...." *Id.* at 784. Moreover, in rejecting Petitioner's challenge, the *en banc* court took the extreme view that since "Hawai'i's restrictions on the open carrying of firearms reflect longstanding prohibitions ... the conduct they regulate is therefore outside the historical scope of the Second Amendment." *Id.* at 773. Petitioner explained that this position is different from that of the First, Second, Third, and Fourth Circuits which "have either held or assumed that the Second Amendment right extends outside the home..." even while allowing it to be restricted. Pet. Cert. at 1-2.

The method by which the Ninth Circuit reached its decision is likewise flawed. The two-step test allows any reviewing court to circumvent a determination as to whether a challenged statute is unconstitutional just because it has been unconstitutional for a long while. The two-step test is deeply flawed, raising an important federal constitutional issue at variance with the Second Amendment, and in conflict with this Court's decisions in Heller and McDonald. As this Court's review of the Second Circuit's New York State Rifle and Pistol Association decision raises only a licensing issue, it appears unlikely that the Court in that case will reach either the scope of the right to bear arms outside the home for self-defense, or the folly of the two-step test. Both issues are at issue here.

Even if an unconstitutional statute could be said to attain constitutionality by longevity, surely the fact that it was enacted when Hawaii was a kingdom, and under the control of outside forces desiring to limit the ability of the people to resist them, should undermine any such argument.

Lastly, the two-step test used by the Ninth Circuit to invalidate the constitution's protection for "bearing arms" has been criticized by no fewer than four sitting Justices, and this case provides an excellent vehicle to restore order in the lower courts.

ARGUMENT

I. THE *EN BANC* DECISION USED THE JUDICIAL LEGERDEMAIN OF THE TWO-STEP TEST TO RULE THAT BEARING ARMS IS NOT PROTECTED BY THE SECOND AMENDMENT.

The *en banc* decision of the Ninth Circuit concluded that the Hawaii statute was a longstanding prohibition that was outside the historical scope of the Second Amendment and thus never needed to reach step two of that Circuit's two-step test. Young, 992 F.3d at 772. By employing the two-step test and examining only historical sources without any analysis of the text itself, the majority opinion was able to circumvent the constitutional text which guarantees the right to "bear" arms, and was able to undermine the Heller and McDonald decisions by treating a "longstanding" restriction as conclusively presumed to be constitutional. By the end of its opinion, the *en banc* court was able to ignore the text and justify a near plenary ban on the "right to ... bear arms" on the theory that historically the Amendment did not protect bearing arms.

The two dissenting opinions eviscerated the *en banc* opinion in all respects. In dissent, on behalf of all four dissenting judges, Judge O'Scannlain concluded that the Hawaii statute completely destroyed, as in Heller, a Second Amendment right — rendering the right to carry ("bear") a firearm for self-defense outside the home "to a mere inkblot." *Id.* at 829. He also exposed the soft underbelly of the majority's historical

analysis. The dissent concluded that the statute was unconstitutional under any level of scrutiny. *See id*. at 861.

Judge Nelson's dissent endorsed the O'Scannlain dissent and was joined in by the other dissenting judges, but Judge Nelson chose to write "separately to highlight the brazenly unconstitutional County of Hawaii Regulations..." implementing the statute. *Id*. at 861. Judge Nelson agreed with the O'Scannlain dissent that the Hawaii statute was facially unconstitutional, but he then added his view that the statute should have been ruled to be unconstitutional as applied. *See id*. at 861.

The dissenting judges had the better of the argument, by far. The Heller decision never stated that any and all longstanding restrictions are always valid. Rather, Justice Scalia made reference to certain — not all — longstanding restrictions not at issue in the case as being "presumptively lawful." *See* Heller at 625-27, 627 n.26. Of course, all statutes are presumptively lawful until those who challenge them establish that they are unconstitutional. However, under the two-step test, challenges are denied any opportunity to demonstrate that a longstanding restriction is invalid, because the two-step test treats longstanding restrictions as immune from challenge, as though Justice Scalia had declared them "conclusively lawful."

Additionally, by some applications of the two-step test, the Ninth Circuit is itself able to limit the scope of the Second Amendment to what it believes to be the

"core" right that Heller protected. If the challenged restriction does not impede the "core" right, circuit court judges can follow their personal views and determine the activity deserves no protection. Like other circuit courts which use the two-step, the Ninth Circuit finds the Second Amendment's core right to be identical to the facts of the Heller decision, as read in the most narrow possible manner. As the Ninth Circuit explains, "*Heller* held that an **outright ban** of firearms **in the home** violates the Second Amendment.... The extent to which the Second Amendment protects the right to keep and bear arms **outside the home** is less clear." Young, 992 F.3d at 782-83 (emphasis added). On the contrary, the word "bear" is just as plain and clear as the word "keep." Since bearing a firearm outside the home is apparently not part of this purported core right identified by the Ninth Circuit, which is limited to the home, it is thus up for grabs — depending on how the judge personally may feel about firearms.

To be sure, the Ninth Circuit opinion recognized that Heller tied "the Second Amendment to the need to **defend one's self** [implying] that some right to bear arms may exist outside the home." Young, 992 F.3d at 783 (emphasis added). The court also recognized that the McDonald decision identified "that [**s]elf-defense** is a basic right [and] ... the *central component* of the Second Amendment right...." *Id*. (internal quotation marks omitted) (bold added). However, the Ninth Circuit chose to disregard what this Court twice identified as the central component of the Second Amendment, finding it not relevant as "Young's challenge to Hawai'i's restrictions fails at step one of

our framework and 'may be upheld without further analysis.'" *Id*. at 826 (citation omitted). In a battle between the text and "judge-empowering 'interest-balancing'" (Heller at 634) two-step test, the test won yet again.

As the two-step test used below allows the Second Amendment text to be ignored, in violation of Heller and McDonald, it requires review by this Court and cannot be allowed to stand.

II. HAWAII'S CARRY BAN IS, INDEED, "LONGSTANDING," DATING TO THE ISLANDS' TIME AS A MONARCHY, WHEN SOVEREIGN KINGS AND QUEENS DENIED THEIR SUBJECTS ACCESS TO ARMS.

The Ninth Circuit triumphantly declared that "Hawai'i law began limiting public carriage of dangerous weapons, including firearms, more than 150 years ago.... Hawaii enacted its first statutory regulation of public carry in 1852." Young, 992 F.3d at 773. In fact, the central issue decided by the *en banc* court was that the Hawaii statute was a longstanding restriction, and thus — according to its skewed reading of Heller — not even subject to a Second Amendment challenge.

Among the many reasons to believe that the Hawaii longstanding restriction could never be considered self-validating is the fact that its pedigree is badly tainted. For most of Hawaii's history, the island nation had no republican form of government — rather, it was a monarchy, ruled by kings and queens.

Even after later transitioning to a constitutional monarchy, the Kingdom of Hawaii Constitution of 1840[2] did not recognize a right of the people to bear arms. Quite to the contrary, it declared unequivocally that the "four Governors over these Hawaiian Islands ... shall have charge of ... the arms and all the implements of war." Kingdom of Hawaii Constitution of 1840, "Governors." Consistent with an exclusive claim to arms, the 1840 Constitution declared that the king "is the sovereign of all the people and all the chiefs." *Id.*, "Prerogatives of the King."

The Hawaii stranglehold on arms was easy to accomplish, since native Hawaiians had no experience with firearms prior to the arrival of Europeans in the late 1700s. Indeed, traders and settlers selectively doled out firearms in order to "unite[] Hawaii's eight main islands into a single kingdom [under] Kamehameha I...."[3] Thereafter, native Hawaiians continued to be disarmed, as more and more settlers arrived, with generally only the European-installed government (and select Caucasian inhabitants) being permitted to possess arms.[4] The monopoly on arms was later used to solidify American control over the

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[2] *See* http://www.hawaii-nation.org/constitution-1840.html.

[3] J. Greenspan, "Hawaii's Monarchy Overthrown with U.S. Support, 120 Years Ago," *History.com* (Jan. 17, 2013).

[4] *See, e.g.*, "Odd Fighting Units: The Honolulu Rifles during the Hawaii Rebellions, 1887-1895," *Brainexplor Blog* ("The downfall of both the Kingdom of Hawaii and the independent Hawaiian republic in 1893 & 1895 respectively were both directly linked to actions of the Honolulu Rifles brigade.").

Hawaiian Islands through the "Bayonet Constitution" of 1887.[5]

This is hardly a noble pedigree to apply when determining the right of a sovereign people to keep and bear arms as a bulwark against tyranny. *See* Heller at 598. Rather, Hawaii's monarchial history undermines its claims, making it an extreme outlier among the states — embracing a view of its rulers and people that was utterly rejected by our Declaration of Independence and the Constitution of 1787.

It was (i) not until 1898 that the United States annexed Hawaii as a territory, (ii) not until 1950 that the current state constitution was adopted (including language mirroring the Second Amendment),[6] and (iii) not until 1959 that Hawaii was granted statehood — more than a century after California, whose laws the Court examined in Peruta v. Cnty. of San Diego, 824 F.3d 919 (9th Cir. 2016). In short, Hawaii's history on firearm regulation is utterly irrelevant here. Rather than being embraced as "longstanding" and/or "presumptively lawful," Hawaii's antiquated firearms regulatory scheme should be rejected out of hand — a relic of history, not unlike the sovereign prerogatives

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[5] "July 6, 1887: Bayonet Constitution," *National Geographic* ("The guns surrounding Kalakaua on that fateful day belonged to members of a militia nicknamed the Honolulu Rifles, made up largely of white settlers. Kalakaua's successor as monarch, his sister Liliuokalani, later speculated Kalakaua would have been killed had he not signed the new constitution.")

[6] *See* HRS Const. Art. I, § 17; *see also* State v. Mendoza, 920 P.2d 357, 362 (Ha. 1996).

of King George, against which this country's Second Amendment was designed to protect.[7] This Court should decline the government of Hawaii's invitation to embrace its racist history of disarmament of persons like Plaintiff, "who is part native Hawaiian and part descendant of Japanese plantation workers...."[8] Yet this is the longstanding history on which the Ninth Circuit relied to blithely dismiss the challenge "'without further analysis.'" Young, 992 F.3d at 826.[9]

III. THE PETITION RAISES AN IMPORTANT ISSUE NOT BEING ADDRESSED IN NEW YORK STATE RIFLE & PISTOL ASSOCIATION V. CORLETT.

The Petition for Certiorari presents two questions:

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[7] The Ninth Circuit seemed unable to distinguish between the powers of a monarch and the powers of a constitutionally limited Republic. It argued: "[t]he states, in place of the king, assumed primary responsibility for maintaining the 'king's peace,'" and "carrying of weapons in public areas was an affront to the king's authority." Young, 992 F.3d at 815-16. From this, the court appears to argue, free citizens of the United States would have no more rights than subjects of the British Crown. *Id.*

[8] D. Trotta, "Unlikely pair could usher gun rights case to U.S. Supreme Court," *Reuters* (Aug. 8, 2018).

[9] Should certiorari be granted, there will be time enough to explore other curiosities of the Ninth Circuit decision, such as its view that since some colonies **mandated** the bearing of arms out of the home, once can conclude that those colonies also possessed the power to **prohibit** the bearing of arms. Young, 992 at 796. By this argument, the requirement that members of the militia come armed to muster on the Village Green would have forever undermined the "bear arms" constitutional text.

> 1. Whether the Ninth Circuit erred in holding, in direct conflict with the holdings of the First, Seventh and D.C. Circuits, that the Second Amendment does not **apply outside the home** at all.
>
> 2. Whether the **denial** of petitioner's **application** for a handgun carry license for self-defense violated the Second Amendment. [Pet. Cert. at i (emphasis added).]

This case has been working its way up to this Court for almost nine years, as the complaint was filed on June 12, 2012. The Ninth Circuit completed its work with the issuance of its *en banc* decision on March 24, 2021. As sometimes happens, as the Petition for Certiorari was being prepared in this case, this Court granted certiorari on April 26, 2021 in a similar case — New York State Rifle & Pistol Ass'n v. Corlett, No. 20-843 ("NYSRPA"). However the order granting review limited this Court's review to a licensing issue:

> Whether the State's denial of petitioners' applications for concealed-carry **licenses** for self-defense violated the Second Amendment. [Emphasis added.]

This Court declined to address a broader question raised by NYSRPA, which was:

> Whether the Second Amendment allows the government to prohibit ordinary law-abiding citizens from carrying handguns **outside the home** for self-defense. [Emphasis added.]

While it is impossible at this time to know what will be the scope of this Court's decision in the NYSRPA case, these *amici* urge this Court either to grant this Petition for Certiorari, or, failing that, to defer consideration of this Petition until after the NYSRPA case is argued and decided. If this Court's decision in that case remains limited to the issue of the denial of the issuance of a license, these *amici* believe that the Court should grant certiorari here to resolve the more fundamental issue as to whether the Second Amendment has any application outside the home and, if it does, whether a state may deny a citizen the right to carry a firearm for self-defense outside the home.

IV. FOUR SITTING JUSTICES AND OTHER JUDGES HAVE AFFIRMED THE PROTECTIONS AFFORDED BY THE SECOND AMENDMENT AND EXPRESSED DISSATISFACTION WITH THE TWO-STEP TEST EMPLOYED BELOW.

It is the belief of these *amici* that this case would be a good vehicle to determine the application of the Second Amendment outside the home, as it was argued by the Petitioner based on sound principles according to Heller and McDonald. Moreover, the fact that the lower courts have not been faithful to this Court's 2008 and 2010 decisions has been repeatedly recognized by members of this Court.

A. Criticism of the Two-Step Test by Supreme Court Justices.

In Heller and again in McDonald, this Court refused to treat the Second Amendment "as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees...." McDonald at 780. However, that is exactly what the Ninth Circuit's two-step test does, violating judges' duty to act consistently with this Court's last word on the subject — its decisions in Heller and McDonald. So egregious is the Ninth Circuit's departure from this Court's holdings that for the last six years, four sitting justices have gone out of their way to comment about the need to bring the Second Amendment jurisprudence of certain lower federal courts back into line.

In 2015, this Court declined to review San Francisco's highly restrictive requirement that a handgun in a home must be stored in a gun safe when it is not physically on the person. Justices Thomas and Scalia dissented from this Court's denial of certiorari, explaining that "Second Amendment rights are no less protected by our Constitution than other rights enumerated in that document" and that, "[d]espite the clarity with which we described the Second Amendment's core protection for the right of self-defense, lower courts ... have failed to protect it." Jackson v. City & Cnty. of San Francisco, 576 U.S. 1013, 1014 (2015). Disagreeing with the Ninth Circuit's "tiers-of-scrutiny analysis," the dissenters noted that the Court should have granted the petition "to reiterate that courts may not engage in this sort of

judicial assessment as to the severity of a burden imposed on core Second Amendment rights." *Id.* at 1016-17.

Later in 2015, Justices Thomas and Scalia once again dissented from a denial of certiorari from a Seventh Circuit decision upholding an Illinois city's ban on so-called "assault weapons." Justice Thomas criticized the Seventh Circuit's "crabbed reading of *Heller*," which left the Circuit "free to adopt a test for assessing firearm bans that eviscerates many of the protections recognized in *Heller* and *McDonald*." Friedman v. City of Highland Park, 577 U.S. 1039, 1041 (2015). The dissent reiterated that "*Heller* ... forbids subjecting the Second Amendment's 'core protection ... to a freestanding "interest-balancing" approach.'" *Id.* at 1042 (quoting Heller at 634). And the dissent pointed out the disparity of treatment that the Second Amendment has received: "The Court's refusal to review a decision that flouts two of our Second Amendment precedents stands in marked contrast to the Court's willingness to summarily reverse courts that disregard our other constitutional decisions." *Id.* at 1043 (citing several summary reversals).

Also, in 2011, while still a circuit court judge, Justice Kavanaugh explained that he would have struck down the District of Columbia's modified gun regulation scheme because "*Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny." Heller v. District of Columbia, 670 F.3d

1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). Justice Kavanaugh emphasized his reliance on "text, history, and tradition," an understanding that has come to be viewed as the test which embodies the Scalia opinion for the Court, while the two-step test used by the Ninth Circuit reflects Justice Breyer's dissent in Heller.[10]

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

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[10] *See* Allen Rostron, "Justice Breyer's Triumph in the Third Battle over the Second Amendment," 80 GEO. WASH. L. REV. 703 (2012) ("[T]he lower courts' decisions strongly reflect the pragmatic spirit of the dissenting opinions that Justice Stephen Breyer wrote in Heller and McDonald.")

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

In Rogers v. Grewal, 140 S. Ct. 1865 (2020), Justices Thomas and Kavanaugh dissented from the denial of a petition for certiorari, observing: "[i]n the years since [Heller and McDonald], lower courts have struggled to determine the proper approach for analyzing Second Amendment challenges...." and "many courts have resisted our decisions.... " *Id*. at 1866 (Thomas, J., dissenting). Not the least of the "numerous concerns" raised by the "two-step inquiry"

is that the test "appears to be entirely made up. The Second Amendment provides no hierarchy of 'core' and peripheral rights." *Id*. at 1867.

Last year, when this Court dismissed New York State Rifle & Pistol Association v. New York, 140 S. Ct. 1525 (2020) based on mootness, Justice Kavanaugh concurred, but noted: "I share Justice Alito's concern that some federal and state courts may not be properly applying Heller and McDonald. The Court should address that issue soon." *Id*. at 1527 (Kavanaugh, J., concurring). Justice Alito, dissenting from the dismissal and joined by Justices Thomas and Gorsuch, concluded, "I believe we should" rule in the case, and "hold, as petitioners request ... that [the challenged statute] violated petitioners' Second Amendment right.... We are told that the mode of review in this case is representative of the way Heller has been treated in the lower courts. If that is true, there is cause for concern." *Id*. at 1535, 1544 (Alito, J., dissenting).

B. Criticism of the Two-Step Test by Lower Court Judges.

Robust criticism of the two-step test has also come from some lower court judges. When the Ninth Circuit upheld the ban on firearms possession by an individual who had been convicted of a misdemeanor crime of domestic violence[11] in Fisher v. Kealoha, 855 F.3d 1067 (9th Cir. 2017), Judge Kozinski concurred in the *per*

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[11] *See* 18 U.S.C. § 922(g)(9).

curiam decision, but issued a separate "ruminating" opinion to encourage equal treatment of the Second Amendment among the Bill of Rights:

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

Although the Fifth Circuit also uses the two-step test, many judges on that court disagree with interest balancing in the Second Amendment context. *See* Houston v. City of New Orleans, 675 F.3d 441, 448 (5th Cir. 2012) (Elrod, J., dissenting), opinion withdrawn and superseded on reh'g, 682 F.3d 361 (5th Cir. 2012) (*per curiam*); NRA v. BATFE, 714 F.3d 334 (5th Cir. 2013) (six judges dissenting from a denial of rehearing *en banc*). When the Fifth Circuit once again denied rehearing *en banc* in a Second Amendment case involving a challenge to the residency requirement for firearms purchases from federally licensed firearms dealers,[12] seven judges vigorously dissented from the

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

denial of rehearing, explaining, "[s]imply put, unless the Supreme Court instructs us otherwise, we should apply a test rooted in the Second Amendment's text and history — as required under Heller and McDonald — rather than a balancing test like strict or intermediate scrutiny." Mance v. Sessions, 896 F.3d 390, 394 (5th Cir. 2018) (Elrod, J., dissenting). Also, Judge Willett commented on the judicial hostility to the Second Amendment:

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

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be granted, or held in abeyance pending this Court's decision in New York State Rifle & Pistol Association v. Corlett.

Respectfully submitted,

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