

No. \_\_\_\_\_

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In The  
**Supreme Court of the United States**

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FREDERICK M. WEBER,

*Petitioner,*

v.

STATE OF OHIO,

*Respondent.*

—◆—  
**On Petition For Writ Of Certiorari  
To The Ohio Supreme Court**

—◆—  
**PETITION FOR WRIT OF CERTIORARI**

—◆—  
STEPHEN E. PALMER  
*Counsel of Record*  
YAVITCH & PALMER CO., L.P.A.  
511 South High Street  
Columbus, Ohio 43215  
(614) 224-6142  
spalmer@ohiolegaldefense.com

*Counsel for Petitioner*

**QUESTION PRESENTED FOR REVIEW**

What is the proper standard of constitutional review of a law that impacts the core value of the Second Amendment—possession and use of a firearm within the home?

## **PARTIES TO THE PROCEEDING**

The Petitioner is Frederick M. Weber, who was the defendant at the trial court level, the appellant in the court of appeals, and the petitioner in the Ohio Supreme Court.

The Respondent is the State of Ohio, which was the plaintiff at the trial court level, the appellee in the court of appeals, and the respondent in the Ohio Supreme Court.

## **STATEMENT OF RELATED PROCEEDINGS**

1. *State of Ohio v. Weber*, Clermont County Court of Common Pleas, No. 2018 CRB 00659. Judgment entered for State of Ohio on June 5, 2018.
2. *State of Ohio v. Weber*, 2019-Ohio-0916, State of Ohio Twelfth Appellate District, No. CA2018-06-040. Judgment entered for State of Ohio on March 18, 2019.
3. *State of Ohio v. Weber*, Slip Opinion No. 2020-Ohio-6832, Ohio Supreme Court, No. 2019-0544. Judgment entered for State of Ohio on December 23, 2020.

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**OPINIONS BELOW**

The Ohio Supreme Court entered its judgment on December 21, 2020. On March 19, 2020, this Court extended the deadline for filing a petition for certiorari. The deadline for petitions filed on or after March 19, 2020 is 150 days from the date of the order denying relief. The due date for this Petition is May 22, 2021.

**JURISDICTION**

This Court has jurisdiction under 28 U.S. Code § 1257(a).

**CONSTITUTIONAL AND  
STATUTORY PROVISIONS INVOLVED**

The Second and Fourteenth Amendments to the United States Constitution and relevant portions of the Ohio Revised Code are reproduced at Appendix 97a-99a.

**STATEMENT OF THE CASE**

As exemplified by the Ohio Supreme Court opinion below (wherein the dissent specifically expressed the need for this Court's guidance), courts are looking for "much-needed clarity on how to approach a challenge to a law or regulation under Second Amendment." *State of Ohio v. Weber*, Slip Opinion No. 2020-Ohio-

6832, Ohio Supreme Court, No. 2019-0544, n. 4 (Fischer, dissenting). This case presents a perfect opportunity to provide such clarification, particularly for regulation that impacts the use and possession of firearms within the home.

### **A. Material Facts.**

The case arose when Weber’s wife called 911 at approximately 4:00 am on February 17, 2018. She reported that Weber was in possession of a firearm and intoxicated. Officers were dispatched to investigate. When they arrived, Weber’s wife told them “everything was alright,” and he had put the gun away. App. to Pet. for Cert. 93a. Officers nonetheless entered the house and saw Weber holding a shotgun, barrel pointing downward. *Id.* He told them the gun was unloaded, and Officers took it from him without incident. *Id.* They confirmed it was not loaded, and there was no ammunition in sight. Officers observed (and evidence confirmed) that Weber was intoxicated from alcohol. App. to Pet. for Cert. 93a-95a.

### **B. Procedural History.**

#### **1. Trial Court—Clermont County Municipal Court.**

Weber was charged with *Using a Weapon While Intoxicated* under Section 2923.15 of the Ohio Revised Code, a misdemeanor offense carrying a possible penalty of six months in jail and a \$1000.00 fine. The matter proceeded to trial before a judge in the Clermont

County Municipal Court, located in Batavia, Ohio. Weber argued at trial that there was insufficient evidence to convict him and that Section 2923.15 of the Ohio Revised Code (as applied in this case) violated his individual right to bear arms under the Second Amendment as established in *District of Columbia et al. v. Heller*, 554 U.S. 570 (2008). App. to Pet. for Cert. 95a. The trial court disagreed, declined to declare the statute unconstitutional, and convicted Weber of the charged offense. *Id.* The court imposed a ten-day suspended sentence, placed Weber on community control (probation), and imposed a \$100.00 fine. *Weber*, 2020-Ohio-6832, ¶¶ 2-5.

## **2. Direct Appeal—Twelfth District Court of Appeals for Clermont County, Ohio.**

Weber appealed the decision to the Twelfth District Court of Appeals for Clermont County, Ohio. The court stayed execution of the sentence pending outcome of the appellate process. Weber again argued that Section 2923.15 violated the Second Amendment as applied to his case. The court disagreed and affirmed Weber's conviction. Noting that *Heller* stopped short of establishing a definitive standard of review, the court relied on subsequent Ohio decisions, and applied an intermediate scrutiny standard. *State v. Weber*, 2019-Ohio-916, State of Ohio Twelfth Appellate District, No. CA2018-06-040, ¶ 24; App. to Pet. for Cert. 83a. Under this standard, the Twelfth District held that the statute did not violate the Second Amendment. *Id.* at ¶ 32 (citing *Heller*, 554 U.S. at 571 and *Perry Ed. Assn. v.*

*Perry Local Educators' Assn.*, 460 U.S. 37 (1983)); App. to Pet. for Cert. 86a-87a.

### **3. Discretionary Review—Ohio Supreme Court.**

Weber timely sought discretionary review by the Ohio Supreme Court. The court accepted jurisdiction to decide whether Ohio's law violated the Second Amendment, whether strict scrutiny was the proper standard of review, and whether any standard of scrutiny would permit a prohibition of having firearms while intoxicated in the home "where defense of self, family and property is most acute." *State of Ohio v. Weber*, Slip Opinion No. 2020-Ohio-6832, Ohio Supreme Court, No. 2019-0544, ¶ 6; App. to Pet. for Cert. 3a.

In a split decision (4-3), the Ohio Supreme Court affirmed Weber's conviction, holding that Ohio's law did not violate the Second Amendment. Relying on *Heller, supra*, the court generally agreed that the core protection of the Second Amendment was defense of "hearth and home." But there was disagreement regarding the analytical framework and the proper standard of review.

The majority concluded that the standard of review should be based on "how close a particular law comes to the core Second Amendment right and whether it imposes a severe burden on that right." *Weber*, 2020-Ohio-6832, ¶ 26; App. to Pet. for Cert. 13a-14a. Reasoning that Section "2923.15 does not come close to the core of the right and imposes, at most, only a slight

burden on Weber’s Second Amendment right,” the majority rejected strict scrutiny review in favor of intermediate scrutiny. *Id.* at ¶ 27-30; App. to Pet. for Cert. 14a-16a (relying on *Stimmel v. Sessions*, 879 F.3d 198, 204 (6th Cir. 2018) and related Circuit Court cases involving firearm regulation outside the home). Applying intermediate scrutiny, the majority then concluded that Section 2923.15 of the Ohio Revised Code did not violate the Second Amendment. *Id.* at ¶ 47; App. to Pet. for Cert. 25a.

Three justices dissented. Relying on the reasoning in *Heller* and this Court’s subsequent opinion in *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010), the dissenting justices would have adopted the “text, history, and tradition” approach in reviewing constitutional challenges to the Second Amendment. Since the trial and appellate courts below applied intermediate scrutiny, the dissent would have remanded the matter for further analysis under this alternative standard of review. *Weber*, 2020-Ohio-6832, ¶ 111 (Fischer, dissenting); App. to Pet. for Cert. 63a-64a.

The Ohio Supreme Court issued a decision on December 23, 2020, affirming Weber’s conviction.



## **REASONS FOR GRANTING THE PETITION**

### **A. Introduction.**

In *District of Columbia v. Heller*, 554 U.S. 570, 622 (2008), this Court took a significant step in clarifying

the nature and extent of the Second Amendment. *Heller* definitively established that the Second Amendment protected an individual right to keep and bear firearms for lawful purposes. The decision also recognized that the inherent and central purpose of the Second Amendment is self-defense in the home. *Id.* at 628. Two years later, this Court reviewed (and struck down) a Chicago law similar to that in *Heller*, concluding that the Second Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. *McDonald v. City of Chicago*. 561 U.S. 742, 791 (2010).

But both *Heller* and *McDonald* stopped short of pronouncing a standard of constitutional review for future Second Amendment cases. It was not necessary in light of the regulations in question. The District of Columbia’s law required that firearms be “kept inoperable” in the home, where “the need for defense of self, family, and property is most acute.” *Id.* at 628. This law so directly and broadly impacted the core value of the Second Amendment—self-defense of the home—that it was unconstitutional “[u]nder any of the standards of scrutiny” historically “applied to enumerated Constitutional rights. . . .” *Id.* at 629.

It was clear in *Heller* that the Court anticipated a variety of Second Amendment challenges in its wake. And wisely, *Heller* resisted the call to establish a definitive standard for all cases. That task was left to the jurisprudence of the courts below as they considered a myriad of fact patterns in various cases and controversies involving the Second Amendment. This made perfect sense at the time. *Heller* did not have the factual

foundation to support a pronouncement of a complete analytical framework. The common law had to do its job first: “since this case represents this Court’s first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field . . . there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.” *Heller* at 635 (citing *Reynolds v. United States* 98 U.S. 145 (1897)). Lower courts needed to apply *Heller* to a broader range of factual scenarios to build the proper foundation to support a more definitive analytical framework.

The courts below have answered the call, at least to the extent possible within the confines of *Heller*. And now, more than a decade after *Heller*, the Second Amendment is ripe for additional guidance. Lower courts have developed standards of review as they have worked through various cases. And though some consistency has emerged, there still exists an air of uncertainty. The facts of *Heller* did not necessitate a pronouncement on these questions. But other cases do, and this case is a perfect example of that.

## **B. Standards of Review in the Lower Courts.**

Short of establishing a definitive standard of review, *Heller* provided two bits of constitutional guidance. First, the *Heller* Court was clear that the standard *was not* rational basis. “If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would

be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.” *Id.* at 629, n. 27. Second, the Court recognized that there are historical regulations impacting firearms that are presumptively lawful. The decision expressly left room for “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 626-627.

Armed with this guidance, federal and state courts below have developed several different approaches. Some courts advocate for strict scrutiny for all Second Amendment cases. Other courts suggest an entirely different standard that relies upon the “text, history, and tradition” of the Second Amendment. But the predominant approach applies a balancing test to determine the impact on the “core” of the Second Amendment. Under this approach, if the challenged law has a significant impact, the result is strict scrutiny. If it is not so significant, courts apply intermediate scrutiny. Courts applying this approach implicitly recognize that there are only two choices—strict or intermediate scrutiny. But there are still questions about *when and under what circumstances* a law impacts the core value and warrants heightened scrutiny.



## **1. Predominant Approach—Two-Step Balancing Analysis.**

Most lower courts (including the Ohio Supreme Court in this case) have applied a two-step analysis to Second Amendment challenges. The first step, seemingly rote in most cases, involves a threshold determination of whether the regulated activity is within the scope of conduct protected by the Second Amendment. The second step involves an application of heightened scrutiny to determine whether the government’s justification for the restriction of protected conduct is sufficient to pass constitutional muster.

### **a. Step One—Determine If the Regulation Implicates the Second Amendment.**

In the first step, courts analyze whether a challenged law regulates conduct within the scope of the right protected by the Second Amendment. Courts determine whether the “challenged statute regulates activity falling outside the scope of the Second Amendment right as it was understood at the relevant historical moment—1791 [Bill of Rights ratification] or 1868 [Fourteenth Amendment ratification].” *Stimmel v. Sessions*, 879 F.3d 198, 204 (6th Cir. 2018) (quoting *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012)). The Sixth Circuit places the burden of proving that the conduct is unprotected upon the government. *Id.* Other Circuits espouse a similar reference to historical analysis of protected conduct. *Mance v.*

*Sessions*, 896 F.3d 699, 704 (5th Cir. 2018); *United States v. Marzzarella*, 614 F.3d 85, 89-94 (3d Cir. 2010).

In practice, such analysis frequently references the historical discussion by the Court in *Heller*, and its description of conduct which was unequivocally protected—possession of firearms for self-defense—and that which is presumptively not, such as possession of firearms by the mentally ill.

**b. Step Two—Balance the Impact on Core of Second Amendment.**

Once a challenged law is determined to implicate the Second Amendment, courts proceed to evaluate whether the infringement is constitutionally permissible. Following *Heller's* rejection of rational basis scrutiny, most courts have employed an intermediate scrutiny analysis. “[T]here 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.” *Mai v. United States*, 952 F.3d 1106, 1115 (9th Cir. 2020) (quoting *United States v. Torres*, 911 F.3d 1253, 1257 (9th Cir. 2019) (Petition for Writ of Certiorari Denied, April 26, 2021, Case No. 20-819)).

Similarly, the Sixth Circuit has described the decision regarding the appropriate level of scrutiny as one “informed by (1) how close the law comes to the core of the Second Amendment right, and (2) the severity of the law’s burden on the right.” *Stimmel v. Sessions*, 879 F.3d 198, 206 (6th Cir. 2018). The Ninth

Circuit has described strict scrutiny as appropriate where a challenged law implicates a core Second Amendment right and places a substantial burden upon it. *Mai*, 952 F.3d at 1115.

Though not precluding the application of strict scrutiny, the Sixth Circuit has also determined that “[t]he risk inherent in firearms and other weapons distinguishes the Second Amendment right from other fundamental rights that have been held to be evaluated under a strict scrutiny test.” *Tyler v. Hillsdale Cty. Sheriff’s Dep’t*, 837 F.3d 678, 691 (6th Cir. 2016) (quoting *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015)).

In discussing the appropriate level of scrutiny to apply, the Third Circuit analogized the protections in the Second Amendment to free speech rights in the First Amendment. *Marzzarella*, 614 F.3d at 96. In making this comparison, the Third Circuit noted the distinction between content-based speech restrictions, which receive strict scrutiny, and content-neutral restrictions on the time, place, and manner of speech, which are analyzed using intermediate scrutiny. *Id.* It then determined that federal prohibitions on certain firearms with obliterated serial numbers should receive intermediate scrutiny, as it did not approach the level of infringement posed by the outright handgun ban at issue in *Heller*. *Id.* at 97. Similarly, the same court determined that restrictions applying to firearms outside the home were not part of the core of the Second Amendment, and therefore received intermediate scrutiny. *Drake v. Filko*, 724 F.3d 426 (3d Cir.

2013); *see also Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121 (10th Cir. 2015) (“If Second Amendment rights apply outside the home, we believe they would be measured by the traditional test of intermediate scrutiny.”).

The Fourth Circuit has likewise analogized Second Amendment challenges to First Amendment speech restrictions relative to the appropriate level of scrutiny. *Kolbe v. Hogan*, 849 F.3d 114, 133 (4th Cir. 2017) (en banc) (applying intermediate scrutiny in the context of regulating military-style weapons and detachable magazines).

All (or nearly all) of the decisions in lower courts reference *Heller’s* description of the core of the Second Amendment, defense of hearth and home, in their analysis.

## **2. Alternative Approach—Text, History, and Tradition Analysis.**

Some courts (or dissenting justices within them) have advocated for a different approach altogether. As suggested by the dissent in the Ohio Supreme Court below, this requires a review of “the text, history, and the tradition of the Second Amendment to see if the challenged law or rule is consistent with the scope of the right as originally understood.” *Weber*, 2020-Ohio-6832, ¶ 120-121 (Fischer, dissenting) (citing *Heller* at 634-635 and *McDonald* at 785), App. to Pet. for Cert. 68a.

The Ohio Supreme Court dissent in Weber’s case advocates this approach as an independent analytical framework (in lieu of traditional strict or intermediate scrutiny). *Id.* Few courts (if any) have adopted it as such. But several judges have argued for such a standard in minority opinions. *See Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, dissenting); *Heller v. District of Columbia*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, dissenting). Many courts, however, incorporated a text, history, and tradition analysis in the threshold question of whether the regulated activity is within the scope of conduct protected by the Second Amendment. *See, e.g., United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Mance v. Sessions*, 896 F.3d 699, 704 (5th Cir. 2018); *United States v. Marzarella*, 614 F.3d 85, 89-94 (3d Cir. 2010).

### **C. Uncertainty in the Lower Courts.**

As described above, lower courts have promulgated fairly uniform standards following *Heller*. The two-step standard, however, has been employed with some reluctance. Moreover, courts have expressed unease when determining what level of scrutiny to apply. As the Third Circuit has reflected: “much of the scope of the right remains unsettled.” *United States v. Marzarella*, 614 F.3d 85, 92 (3d Cir. 2010).

Notably, the Fifth Circuit has applied strict scrutiny to a federal regulation regarding state residency requirements for firearm sales. *Mance v. Sessions*, 896 F.3d 699 (5th Cir. 2018). In its opinion, the court noted:

“Because we conclude that the laws and regulations at issue withstand strict scrutiny we will assume, without deciding, that they are not ‘longstanding regulatory measures’ and are not ‘presumptively lawful regulatory measures.’ We will also assume, without deciding, that the strict, rather than intermediate, standard of scrutiny is applicable.” *Id.* at 704. This analysis, which applies the strict scrutiny standard out of convenience, acknowledges the lack of a coherent, binding test to determine the appropriate standard of review.

At least two states have taken the extraordinary step of amending their constitutions to clarify the standard of review. Following a 2012 ballot initiative, Louisiana’s constitution now provides: “The right of each citizen to keep and bear arms is fundamental and shall not be infringed. Any restriction on this right shall be subject to strict scrutiny.” La. Const. art. I, section 11. As noted by the Louisiana Supreme Court,

The voters of Louisiana did not ratify this constitutional amendment in a vacuum. In our opinion, the reference to restrictions on the right to keep and bear arms in the proposition reflects an expectation of sensible firearm regulation held by the voters, and comports with historical restrictions with respect to the acquisition, possession or use of firearms for lawful purposes found in Louisiana law.

*In re J.M.*, 144 So.3d 853 (La. 2014).

Missouri has similarly amended its constitution, although its Supreme Court held that strict scrutiny

applied to Second Amendment challenges following the *McDonald* decision. *State v. McCoy*, 468 S.W.3d 892, 895-896 (Mo. 2015). The Missouri court acknowledged *McDonald's* holding that the right to bear arms is a fundamental right applicable to the states, and it has previously held that laws affecting fundamental rights are to be reviewed under strict scrutiny. *Id.*

The steps taken by these states to amend their constitutions reflect the growing uncertainty regarding the appropriate standard of review in Second Amendment cases. The states are undoubtedly appropriate laboratories for the possible avenues of regulation in our federal system. But in this instance their behavior is symptomatic of greater uncertainty and need for guidance.

#### **D. Ohio Supreme Court Decision Below.**

The uncertainty in the standard of review is reflected in the opinions by the divided Ohio Supreme Court in this case. The plurality applied a version of the two-step approach and determined that intermediate scrutiny was appropriate. *Id.* at ¶ 27; App. to Pet. for Cert. 14a. In a dissent joined by two of his colleagues, Justice Fischer noted the confusion about the proper standard of review, expressing the need for clarification. *Weber*, 2020-Ohio-6832, ¶ 118 (Fischer, dissenting); App. to Pet. for Cert. 66a-67a. In an opinion concurring in judgment, Justice DeWine also argued for the application of a standard “based upon the text,

history, and tradition of the Second Amendment.” *Id.* at ¶ 71; App. to Pet. for Cert. 39a.

The disagreement in the Ohio Supreme Court is emblematic of the confusion gripping the nation’s lower courts. But confusion is not the only problem. The outcome of a wrongfully applied standard can significantly dilute the core protection of the Second Amendment.

The Ohio law at issue provides that “[n]o person, while under the influence of alcohol or any drug of abuse, shall carry or use any firearm.” Ohio Rev. Code § 2923.15(A); App. to Pet. for Cert. 99a. The law makes no provision or exception for the use of a firearm within the home. And there is no exception to allow for the use of a firearm for self-defense (in the home or otherwise).

Though he was under the influence of alcohol and carrying an unloaded shotgun, Weber was inside his home and was not engaged in any unlawful behavior (aside from the law in question). App. to Pet. for Cert. 93a-96a. Nor was he acting recklessly or engaged in any dangerous conduct *with* the firearm, other than merely possessing it. *Id.* He was, nonetheless, plainly violating Ohio’s law.

The question here cuts to the core of the Second Amendment. As applied to anyone inside their home who happens to be under the influence, the law prohibits carrying or using a firearm, including for self-defense. Extended logically, a homeowner cannot sleep with a firearm close by or keep it ready at hand if under the



influence, even if they were aware of a credible threat to their own safety.

The core purpose of the Second Amendment does not merely protect the *active use* of a firearm in the home in a real-life self-defense situation. To have any meaning at all, it must protect the right to maintain, possess, and use a firearm in the home in the event self-defense is necessary, however unlikely that may be.

Alcohol use has been part of Western Civilization since the beginning. For most of our history, the law and constitution have permitted its consumption. It is impossible to imagine that Second Amendment core protection of self-defense of the home would not apply to those who have over-imbibed in it.

The problem is that the standard of review applied below led to the opposite conclusion. Under the permissive standard of intermediate scrutiny, the Ohio Supreme Court found no constitutional problem with Ohio's law. The analytical approach derailed at the threshold question—whether the law impacted the core of the Second Amendment. In balancing the impact on the core of the Second Amendment, the court recognized that Weber was in his home at the time of the offense. But it provided no real gravitas to that fact. The court concluded that the intoxication component was tantamount and that there was “only a slight” Second Amendment burden. *Weber*, 2020-Ohio-6832, ¶ 27; App. to Pet. for Cert. 14a. The court thus applied intermediate scrutiny, essentially treating this

situation the same as any other regulatory scheme for firearms outside the home. *Id.*

Applying intermediate scrutiny, the court quickly dispensed of the issue. Concluding that the law in question furthered “an important governmental interest and does so by means that are substantially related to that interest,” the court found no constitutional problem with the law. *Id.* at ¶ 31; App. to Pet. for Cert. 16a.

The outcome would most certainly be different under strict scrutiny. Though the law prohibiting use of weapons while intoxicated may further a compelling governmental interest (firearm safety), it is not narrowly tailored to serve that interest—at least as applied to the hearth and home. *Fed. Election Comm. v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 464 (2007). Ohio’s law could easily be tailored more narrowly. It could provide for an exception within the home. It could provide an exception for self-defense. It could provide for an exception permitting firearms use while intoxicated within the home for the limited purposes of self-defense. But short of any such exceptions, the law fails strict scrutiny.

Though it may seem factually narrow, this case sets a dangerous precedent. It permits courts to marginalize the importance of the core value of the Second Amendment simply by comparing it to the perceived government interest in the proposed regulation. Under that reasoning, the standard of review in Second Amendment cases—even laws that impact use in the

home—will almost inevitably result in intermediate scrutiny. This would essentially limit *Heller* and *McDonald* to their respective facts. It effectively would adopt the interest balancing approach proposed by Justice Breyer—and rejected by the majority—in *Heller*. *Heller*, 554 U.S. at 634-635.

Like the content of certain protected speech, the use, possession, and ownership of firearms can be controversial and unpopular (even inside the home). As in *Heller* and *McDonald*, the government can easily justify an interest in limiting and regulating firearms to the point where the core value is left meaningless. After all, firearms by their very nature are dangerous. But that is why the Second Amendment exists—to protect against overreaching regulation, even if well-intended. And like the core of the First Amendment, (which guarantees against content-based regulation), it must be guarded with the strictest of scrutiny.

### **E. Proposed Approach—Two Standards.**

The landscape of the post-*Heller* jurisprudence suggests a bifold approach to Second Amendment review. The logical conclusion of *Heller* is that regulations impacting the core purpose of the Second Amendment—possession and use of firearms for the defense of home—warrants strict scrutiny review. Other regulatory laws may warrant lesser intermediate scrutiny.

As various courts have recognized, a similar approach is utilized with regulation that impacts the

First Amendment. *United States v. Marzzarella*, 614 F.3d 85, 96 (3d Cir. 2010); *Kolbe v. Hogan*, 849 F.3d 114, 133 (4th Cir. 2017). This analogy is drawn from a reference to the similarity in the rights as discussed in *Heller*, “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.” *Heller*, 554 U.S. at 595 (2008).

Laws that amount to content-based regulation of speech—the core value of the First Amendment—warrant strict scrutiny. “[R]estriction based on the content of the speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest.” *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 469 (2009). Intermediate scrutiny is appropriate for laws that impact the time, place, and manner of speech. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 447 (2002). These standards are sensible and readily applied by lower courts.

The Second Amendment equivalent of content-based regulation are laws (like Ohio’s law in this case) that impact the use, possession, and ownership of firearms in the home. The decision in *Heller* was clear on that. “[W]hatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.” *District of Columbia et al. v. Heller*, 554 U.S. 570, 635 (2008). It makes sense that such regulations warrant heightened scrutiny.

Applying the balancing test, most courts recognize that even though *Heller* stopped short of pronouncing a standard, it should be more than just intermediate scrutiny concerning restrictions on possession in the home. And as most decisions post-*Heller* involve regulation of firearms outside the home, the balancing test has worked by employing intermediate scrutiny. The core value has remained protected by a heightened standard in dicta, even if not in actual case resolution.

But the danger of the balancing test is that it leaves room for courts to encroach dangerously into the realm of the core values of the Second Amendment and justify regulation under intermediate scrutiny. Such laws should not be given a pass with anything less than strict scrutiny. Absent any firm boundaries to the balancing test, that is what occurred in Weber's case.

The law at issue in *Heller* obviously reached too far into the home and the core value of the Second Amendment. There was no need to analyze any hypothetical fact pattern where the law did not reach as far, but still impacted the core of the Second Amendment. This case fills that void. And by virtue of the facts and law, it presents an opportunity to pronounce a workable standard of review for regulation of firearms in the home.



**CONCLUSION**

For the reasons stated, the Court should grant the petition for certiorari.

Respectfully submitted,

STEPHEN E. PALMER

*Counsel of Record*

YAVITCH & PALMER CO., L.P.A.

511 South High Street

Columbus, Ohio 43215

(614) 224-6142

spalmer@ohiolegaldefense.com