No. 20-843

IN THE

Supreme Court of the United States

NEW YORK STATE RIFLE & PISTOL ASSOCIATION, ET AL.,
Petitioners,

v.

KEVIN P. BRUEN, in His Official Capacity as Superintendent of New York State Police, ET AL.,
Respondents.

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

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the State of New York's denial of a petitioner's application for concealed-carry licenses for self-defense violated the Second Amendment.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies works to restore limited constitutional government, which is the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

This case interests Cato because it concerns the individual right to armed self-defense; its resolution should begin to flesh out the constitutional contours of this much-maligned fundamental right.

INTRODUCTION AND SUMMARY OF ARGUMENT

It has been more than a decade since this Court affirmed the right of individuals to keep firearms for the purpose of self-defense. *District of Columbia v. Heller*, 554 U.S. 570 (2008). That message appears not to have reached many lower courts. Instead, courts around the country have upheld virtually every restriction on keeping or bearing arms, short of a complete ban of all arms in the home.

New York is among the last states in which the right to bear arms remains discretionary. Under New York's regime, law-abiding citizens must demonstrate "proper cause" for carrying a handgun in public.

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[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

Kachalsky v. Cty. of Westchester, 701 F.3d 81, 84 (2d Cir. 2012). Good moral character plus the desire to exercise an enumerated constitutional right is not sufficient to meet the "proper cause" threshold. *In re O'Connor*, 585 N.Y.S.2d 1000, 1003 (N.Y. Cty. Ct. 1992). Living or working in an area with a high crime rate is also insufficient. *Kachalsky*, 701 F.3d at 86–87.

The Second Circuit's treatment of the Second Amendment is emblematic of the way lower courts have dispensed with right-to-bear-arms claims. Although lower courts are bound by "not only the result but also those portions of the opinion necessary to that result," *Burnham v. Superior Court of Cal.*, 495 U.S. 604, 613 n.2 (1990) (plurality opinion), lower courts have abandoned *Heller*'s history-based inquiry. Instead, they have adopted an interest-balancing test, even though this Court clearly repudiated this approach. *Heller*, 554 U.S. at 634 ("We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach.").

The balancing inquiry that many circuits use diverges from circuit to circuit and from panel to panel. The Seventh Circuit alone has offered up four distinct tests. Brief of Petitioners at 36, *Friedman v. City of Highland Park*, *cert. denied*, 577 U.S. 1039 (2015) (No. 15-133); *see Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015); *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012); *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011); *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (en banc). Although they differ in their approaches, the cases tend to share similar outcomes: millions of law-abiding Americans are denied their constitutional rights.

Despite this Court's claim that the Second Amendment is not "a second-class right," *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality opinion), its inaction has contributed to the Second Amendment's demise. It's no secret that many federal courts have engaged in systematic resistance to *Heller* and *McDonald*. *See N.Y. State Rifle & Pistol Ass'n v. New York City*, 140 S. Ct. 1525, 1527 (2020) (Alito, J., joined by Thomas & Gorsuch, JJ., dissenting) ("[T]he lower courts have decided numerous cases involving Second Amendment challenges to a variety of federal, state, and local laws. Most have failed. We have been asked to review many of these decisions, but until this case, we denied all such requests."); *Silvester v. Becerra*, 138 S. Ct. 945 (2018) (Thomas, J., dissental) (the Ninth Circuit's "deferential analysis was indistinguishable from rational-basis review. And it is symptomatic of the lower courts' general failure to afford the Second Amendment the respect due an enumerated constitutional right"); *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1033 (2016) (Alito, J., concurring) ("Although the Supreme Judicial Court [of Massachusetts] professed to apply *Heller*, each step of its analysis defied *Heller*'s reasoning."). Yet this Court has declined opportunity after opportunity to step in and correct the lower courts.

The Court should use this case as a concrete example of the proper and required standards for analyzing Second Amendment claims and respecting constitutional rights. The lack of clarity around the history of longstanding provisions, the scope of the Second Amendment, and the appropriate standard of review left lower courts with a great deal of discretion.

Clear ground rules will enable lower courts to develop a coherent and consistent approach to the array of issues that will continue to arise under the Second Amendment. *Heller* engaged in an informed analysis based on constitutional text, history, and tradition. The Court should now reaffirm and elaborate that standard for lower courts to follow.

ARGUMENT

I. LOWER COURTS HAVE CONTINUOUSLY IGNORED *HELLER* AND *MCDONALD*

Heller was "this Court's first in-depth examination of the Second Amendment." *Heller*, 554 U.S. at 635. Even though the Court found that this provision guarantees a core individual right to possess a firearm for self-defense, it did not purport to "clarify the entire field" of Second Amendment jurisprudence. *Id.* Nor did it prescribe a standard of review for evaluating Second Amendment claims.

In leaving key questions open, the hope was that lower courts would define the scope of permissible regulations. Thirteen years after *Heller*, we can see that they have failed in that task. *N.Y. State Rifle & Pistol Ass'n*, 140 S. Ct. at 1527 (Alito, J., joined by Thomas & Gorsuch, JJ., dissenting).

After *Heller* and *McDonald*, courts have faced numerous challenges to federal, state, and local firearm laws. With minimal guidance, they have largely ignored *Heller*'s holding and methodology. Instead, lower courts have opted for the familiar balancing tests to determine whether a particular law is constitutional. In many cases, like this one, these tests are used to uphold severe restrictions on the

rights of law-abiding citizens that would be unthinkable in any other constitutional context.

In *McDonald*, the Court "held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense." 561 U.S. at 749–50. The holding is not limited to the home. Instead, *McDonald* characterized the D.C. ban on defensive home handguns as an example of the types of laws that violate the fundamental right to self-defense.

But many courts have ignored this reading. Some state courts have openly declared they will not extend *Heller* beyond its narrow facts, absent further action by this Court. In Illinois, the court of appeals announced that "both *Heller* and *McDonald* made clear that the only type of firearms possession they were declaring to be protected under the Second Amendment was the right to possess handguns in the home for self-defense purposes." *People v. Williams*, 2011 IL App (1st) 091667-B, ¶ 11 (Ill. App. Ct. Dec.15, 2011). Kansas echoed that holding, saying that the Court "was drawing a narrow line regarding the violations related solely to use of a handgun in the home for self-defense purposes." *State v. Knight*, 241 P.3d 120, 133 (Kan. Ct. App. 2010). And finally, Maryland's high court asserted that "[i]f the Supreme Court . . . meant its holding to extend beyond home possession, it will need to say so more plainly." *Williams v. State*, 10 A.3d 1167, 1177 (Md. 2011).

Some federal courts have shown a similar resistance to building on *Heller*. They see the Second Amendment as "a vast *terra incognita* that courts should enter only upon necessity and only then by small degree." *United States v. Masciandaro*, 638 F.3d

458, 475 (4th Cir. 2011). Addressing a ban on firearms in national parks, the Fourth Circuit explained that it is "prudent to await direction from the Court itself." *Id.* Other courts have voiced similar reservations in resolving *Heller*'s unresolved questions. *See*, *e.g.*, *Dearth v. Lynch*, 791 F.3d 32, 41 (D.C. Cir. 2015) (Griffith, J., concurring) ("I would extend *Heller* no further unless and until the Supreme Court does so"); *Hightower v. City of Boston*, 693 F.3d 61 (1st Cir. 2012) ("[W]e should not engage in answering the question of how *Heller* applies to possession of firearms outside of the home"); *Friedman*, 784 F.3d at 412 ("Whether those limits should be extended is in the end a question for the Justices."); *Skoien*, 614 F.3d at 640 ("We do not think it profitable to parse . . . passages of *Heller* as if they contained an answer to the question . . . we must confront."). Unless this Court acts, many lower courts will continue to restrict the *Heller* decision to its facts.

II. LOWER COURTS' INTEREST-BALANCING TESTS CONTRAVENE *HELLER* AND ITS PROGENY

The courts that have been willing to evaluate Second Amendment claims have strayed from this Court's methodological analysis. Gone is the historical test and back is the familiar judge-empowering balancing test.

It would be one thing if the circuits agreed on one test. But the methods courts have taken vary from circuit to circuit and panel to panel. Perhaps the only consistency among the courts is their deference to the legislative bodies that enact the restrictive gun laws.

At every step, the government can justify firearm regulations. The government wins if it can show the regulation is longstanding, or if it shows the law one of those identified by *Heller* as presumptively lawful. In some cases, a challenged restriction might not be among those listed in *Heller* but still be found as presumptively lawful—because *Heller* noted that its list was not exhaustive. The government also can win if it can overcome the applied level of scrutiny. While some courts require the government to provide meaningful evidence to support its assertions, others require only that the government show it has an important interest—which it always does in uttering the magic words, "public safety."

A. A Minority of Courts Have Followed *Heller* and Use Only Text, History, and Tradition

To find that the Second Amendment protects an individual right to self-defense, this Court looked to the text and structure of the Second Amendment as well as an exhaustive survey of its history. The Court also looked to tradition—post-ratification history—to see how scholars, courts, and legislators interpreted the Second Amendment.[2] This Court argued that a history-focused method "is much less subjective, and intrudes much less upon the democratic process" than an interest-balancing test. *McDonald*, 561 U.S. at 804 (Scalia, J., concurring).

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[2] While tradition is a critical tool of constitutional interpretation, tradition inconsistent with the "original meaning of the constitutional text obviously cannot overcome or alter that text." *Heller v. District of Columbia*, 670 F.3d 1244, 1274 n.6 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) .

Only a minority of judges have followed this historical approach. In *Madigan,* a Seventh Circuit panel conducted a textual and historical analysis to invalidate Illinois's ban on carrying firearms in public. 702 F.3d 933. *See also Peruta v. Cty. of San Diego*, 742 F.3d 1144, 1166–75, *rev'd* 824 F.3d 919 (9th Cir. 2016) (en banc) (invalidating a San Diego policy restricting the right to bear arms in public based on an "analysis of text and history," and expressly declining to "apply a particular standard of heightened scrutiny.").

Other judges have employed a historical analysis of the Second Amendment, albeit in dissent. Writing in the second iteration of *Heller*, then-Judge Kavanaugh rejected the panel majority's balancing test, opting instead for a test based on text, history, and tradition. *Heller v. District of Columbia*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("*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."). Then-Judge Barrett likewise argued that courts should look to "history and tradition" to determine whether there is precedent for the restriction at issue. *Kanter v. Barr*, 919 F.3d 437, 452 (7th Cir. 2019) (Barrett, J., dissenting). *See also Ass'n of N.J. Rifle & Pistol Clubs Inc. v. Att'y Gen. N.J.*, 974 F.3d 237, 251 (3d Cir. 2020) (en banc) (Matey, J., dissenting) (arguing that text, history, and tradition was the proper test); *Mance v. Sessions*, 896 F.3d 390, 394 (5th Cir. 2018) (Elrod, J., dissental) (same).

Finally, some courts acknowledge the problems of using a balancing test but argue they are bound to

keep applying it. *See, e.g.*, *Duncan v. Becerra*, 970 F.3d 1133, 1143 n.6 (9th Cir. 2020) (acknowledging criticism of the two-step test but arguing the panel was bound by Ninth Circuit precedent to apply it); *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 775 F.3d 308, 319 (6th Cir. 2014), *vacated en banc*, No. 13-1876, 2015 U.S. App. LEXIS 6638 (6th Cir. Apr. 21, 2015) ("There is significant language in *Heller* itself . . . that would indicate that lower courts should not conduct interest balancing or apply levels of scrutiny," but applying the two-step test because of circuit precedent.); *NRA of Am., Inc. v. Swearingen*, No. 4:18cv137-MW/MAF, 2021 U.S. Dist. LEXIS 117837, at *10 n.7 (N.D. Fla. June 24, 2021) (rejecting a "text, history, and tradition analysis" because the court was bound to "follow the two-step test as set out by the Eleventh Circuit.").

B. Most Courts Have Adopted a Two-Step Balancing Test That Has Diluted the Second Amendment

Although every circuit has purportedly applied heightened scrutiny to Second Amendment claims, history and tradition have often taken a backseat to policy concerns—undeterred by *Heller*'s proscription of such an approach.

Circuit courts have largely adopted a two-step approach. The court first determines whether the restricted activity is protected by the Second Amendment. *See, e.g.*, *United States v. Jimenez*, 895 F.3d 228, 232 (2d Cir. 2018). If it is not, the inquiry ends and the law is upheld. If the regulation does burden protected conduct, then the court moves to

step two, where it applies means-end scrutiny to determine whether the law survives. *Id.*

This test is especially problematic because it bears no resemblance to the heightened scrutiny applied to laws infringing other fundamental rights. Each step in the process dilutes the Second Amendment protections.

1. Courts do not know how much weight history should be given in determining whether a regulation burdens the "core" of the Second Amendment.

The first step asks whether the challenged law targets conduct within the scope of the Second Amendment's protections. In making this determination, reviewing courts typically engage in a textual and historical inquiry. But they don't agree on how much weight history should be given.

Some courts use the first step as a significant threshold before engaging in any constitutional scrutiny. *Ezell*, 651 F.3d at 700–03; *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010). Other courts take an intermediate approach and look to see if the regulation is analogous to another restriction that has historical roots. *See, e.g.*, *United States v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010); *United States v. Bena*, 664 F.3d 1180, 1183 (8th Cir. 2011). And finally, some courts don't use history at all. Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After* Heller, 67 Duke L.J. 1433, 1492 (2018) (finding that of the more than 1,100 post-*Heller* cases, only 29 cite any source from before 1791 and

only 42 any source from 1791–1868); *Drake v. Filko*, 724 F.3d 426, 431 (3d Cir. 2014) ("Appellants contend also that 'text, history, tradition and precedent all confirm that individuals enjoy a right to publicly carry arms for their defense.' At this time, we are not inclined to address this contention by engaging in a round of full-blown historical analysis."); *Kachalsky*, 701 F.3d at 91 (declining to engage in a historical analysis as the "history and tradition" of "the meaning of the Amendment" is "highly ambiguous").

2. Courts have shrunk the "core" of the Second Amendment, so regulations are evaluated under a less-exacting form of scrutiny.

When many courts find that the Second Amendment is implicated in a given claim, they then consider whether the regulation at issue burdens the core of the constitutional rights or rests at its periphery. To determine what level of scrutiny to apply, courts typically will "consider the nature of the conduct being regulated and the degree to which the challenged law burdens the right." *Kolbe v. Hogan*, 849 F.3d 114, 133 (4th Cir. 2017) (en banc) (citation omitted). Most courts agree that any law that burdens core Second Amendment rights receives strict scrutiny. *E.g.*, *Masciandaro*, 638 F.3d at 471 ("We assume that any law that would burden the 'fundamental,' core right of self-defense in the home by a law-abiding citizen would be subject to strict scrutiny."). But both the Ninth and Second Circuits have applied intermediate scrutiny to laws that "burden[] the core of the Second Amendment." *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 963–65 (9th Cir. 2014); *New York State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d

242, 258 (2d Cir. 2015). For less severe burdens, the courts apply a standard that resembles intermediate scrutiny. *Skoien*, 614 F.3d at 641–42; *United States v. Reese*, 627 F.3d 792, 801 (10th Cir. 2010). But the Second Circuit applies rational basis for "[l]aws that neither implicate the core protections of the Second Amendment nor substantially burden their exercise do not receive heightened scrutiny." *N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 258.

The search for the "core" of the Second Amendment is designed to discount the rights that lay at the "periphery." There is no mechanism for determining what is a part of the core and what is a part of the periphery. Instead, many judges seemingly use their preferences to determine what the core should be. As seen in the section above, many lower courts have reduced *Heller*'s core holding to say that the Second Amendment only guarantees the right of self-defense in the home. *See, e.g.*, *Masciandaro*, 638 F.3d at 467 ("[T]he right to keep and use firearms in self-defense in the home."). By shrinking the core of the Second Amendment, courts are then able to apply a less exacting level of scrutiny to a given law.

3. Almost every gun regulation is upheld under a form of watered-down scrutiny.

At the final step, courts apply the proper level of scrutiny to the regulation. Although they claim to be applying intermediate scrutiny to non-core Second Amendment regulations, their tests resemble rational basis review, in which the government always wins. *See, e.g.*, *Ass'n of N.J. Rifle & Pistol Clubs v. New Jersey*, 910 F.3d 106 (3d Cir. 2018); *Jackson*, 746 F.3d 953; *Kachalsky*, 701 F.3d 81; *Friedman*, 784 F.3d 406;

NRA of Am., Inc. v. BATFE, 700 F.3d 185 (5th Cir. 2012).

Under intermediate scrutiny, the government must show that the regulation is substantially related to an important governmental interest. Some courts have thus demanded "actual, reliable evidence" substantiating the government's claim. *See Ezell*, 651 F.3d at 709. When analyzing both the genuineness of the purported dangers and the effectiveness of the proposed restrictions in alleviating those dangers, this Court has further emphasized the need for precision rather than vague generalities. *Edenfield v. Fane*, 507 U.S. 761, 774 (1993).

But time and again, lowers courts have simply deferred to the government's "policy judgment" about how "the state can best protect public safety." *Drake*, 724 F.3d at 439; *see also Pena v. Lindley*, 898 F.3d 969, 981–82 (9th Cir. 2018); *Silvester v. Harris*, 843 F.3d 816, 827 (9th Cir. 2016); *Kachalsky*, 701 F.3d at 97–99. Although the right is "fundamental," the perceived danger of guns leads courts to defer to the legislature in making policy judgments. Often, all the government needs to show is that there's a logical and plausible basis for the law's benefits.

The Ninth Circuit is perhaps the most notorious for applying a rational basis-type test, going out of its way to bless the most restrictive gun regulations. *Jackson*, 746 F.3d 953; *Silvester v. Harris*, 843 F.3d 816, *cert. denied* 138 S. Ct. 945 (2018); *Teixeira v. Cty. of Alameda*, 873 F.3d 670 (9th Cir. 2017) (en banc). Although the Ninth Circuit previously acknowledged that "rational basis review is not appropriate," *United States v. Chovan*, 735 F.3d 1127, 1137 (9th Cir. 2013),

it more recently declared that heightened scrutiny is appropriate only if the law "meaningfully" burdens the right to bear arms. *Teixeira*, 873 F.3d at 680.

While this Court struck down a requirement "that firearms in the home be rendered and kept inoperable at all times," as "mak[ing] it impossible for citizens to use them for the core lawful purpose of self-defense," *Heller*, 554 U.S. at 630, the Ninth Circuit upheld a nearly functionally identical law that required all firearms to be "stored in a locked container or disabled with a trigger lock." *Jackson*, 746 F.3d at 958. It did not matter that the law was overinclusive or that it made it more difficult for citizens to use firearms for self-defense and burdened "the core of the Second Amendment right." *Id.* at 964. The court still applied intermediate scrutiny. *See also Silvester*, 843 F.3d at 828 (upholding a 10-day waiting-period for all firearms purchases as applied to those who already own firearms, under the guise of public safety).

Three years after *Jackson*, the Ninth Circuit upheld a county zoning ordinance that forbids a firearms business from being "within five hundred feet of a '[r]esidentially zoned district; elementary, middle or high school; pre-school or day care center; other firearms sales business; or liquor stores or establishments in which liquor is served.'" *Teixeira*, 873 F.3d at 675 n.2. Instead of applying a weak form of intermediate scrutiny, the court applied rational basis review. While the county did not provide any evidence that the regulation was permissible at the adoption of the Second Amendment, the "majority went to bat for the County, unearthing its own historical narrative to that effect." *Id.* at 699 (Bea, J., dissenting) (cleaned up) (cert denied). For the Ninth

Circuit, the Second Amendment is not burdened until a plaintiff can prove that they are unable to obtain a firearm somewhere else. *Id.* at 680. *But see Ezell*, 651 F.3d at 697 ("In the First Amendment context, the Supreme Court long ago made it clear that 'one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.' The same principle applies here." (quoting *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 76–77 (1981)). Having this strict view of what it is to burden the Second Amendment allows regulations to continue to escape meaningful review.

Unfortunately, the Ninth Circuit is not alone in applying a form of deferential scrutiny to gun regulations. *See, e.g.*, *Ass'n of New Jersey Rifle & Pistol Clubs*, 910 F.3d at 126 (Bibas, J., dissenting) (criticizing the majority and five other circuits that "err in subjecting the Second Amendment to different, watered-down rules and demanding little if any proof."); *Kachalsky*, 701 F.3d at 93 (allowing state officials to refuse handgun-carry permits solely because they oppose the idea of ordinary citizens' carrying arms for protection); *United States v. Decastro*, 682 F.3d 160, 166 (2d Cir. 2012) (determining that "marginal, incremental, or even appreciable restraint[s] on the right to keep and bear arms" necessitate nothing more than rational basis review); *Friedman*, 784 F.3d at 412 (upholding a ban on assault weapons under intermediate scrutiny because, while it may not reduce the overall dangerousness of crime, it "may increase the public's sense of safety."); *Piszczatoski v. Filko*, 840 F. Supp. 2d 813, 829 (D.N.J. 2012), *aff'd sub nom*, *Drake v.*

Filko, 724 F.3d 426 (3d Cir. 2013) ("[T]his Court does not intend to place a burden on the government to endlessly litigate and justify every individual limitation on the right to carry a gun in any location for any purpose."). Although the just-listed cases are among the worst offenders in applying a deferential form of scrutiny, such decisions can be found in every circuit. *See, e.g.*, Ruben & Blocher, *supra*, at 1473 (finding that of the more than 1,100 gun cases since *Heller*, only 9 percent have been successful). Such treatment of the Second Amendment led one court to quip that it "says more about the courts than the Second Amendment." *United States v. Weaver*, No. 2:09-cr-00222, 2012 U.S. Dist. LEXIS 29613, at *14 n.7 (S.D. W. Va. Mar. 7, 2012).

C. *Heller*'s List of "Presumptively Lawful" Measures Has Encouraged Lower Courts to Flout the Second Amendment

In *Heller*, this Court indicated that "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" were "presumptively lawful." *Heller*, 554 U.S. at 626–27. Unsurprisingly, that list of regulations has become the go-to citation for gun-control advocates.

But courts have not been completely certain of how "presumptively lawful" measures fit in the two-part test. Some courts look to apply presumptively lawful measures at step one. *See, e.g.*, *Marzzarella*, 614 F.3d at 91; *Bena*, 664 F.3d at 1183; *Jackson*, 746 F.3d at 960. Others apply it at step two. *Masciandaro*,

638 F.3d at 472; *United States v. Rozier*, 598 F.3d 768, 771 (11th Cir. 2010) (per curiam). Courts are also split on whether a litigant can rebut the presumption. Whether at step one or two, they have struggled with what makes a particular firearm restriction "longstanding" and "presumptively lawful."

1. Courts have expanded the "presumptively lawful" exceptions in Heller *to include laws not on the original list.*

Courts have enthusiastically embraced *Heller*'s list of "presumptively lawful" regulations. They have especially focused on the footnote that said the list "does not purport to be exhaustive," *Heller*, 554 U.S. at 627 n.26, using that line to approve not just of longstanding restrictions but laws that might be analogized to something on *Heller*'s list.

To determine whether a regulation is longstanding, courts consult history. In blessing a law like the one here, a Third Circuit panel determined that the regulation was longstanding because New York had required "proper cause" to carry a handgun since 1913, and New Jersey's "justifiable need" standard had antecedents dating to 1924. *Drake*, 724 F.3d at 432–34; *see also Silvester*, 843 F.3d at 823–25 (finding that a California statute from 1923 was sufficiently longstanding). Yet, as one judge noted,

> laws dating to the 1920s may seem to belong to a "historical tradition" of regulation. But they were enacted more than 130 years after the states ratified the Second Amendment. Why should regulations enacted 130 years after the Second Amendment's adoption (and nearly 60 years after the Fourteenth's) have more

> validity than those enacted another 90 years later?

Friedman, 784 F.3d at 408.

Laws aligning neatly with those specifically recited by the *Heller* majority have been upheld as falling into *Heller*'s safe harbor. But even laws falling outside that harbor have generally been found to be longstanding without a "precise founding-era analogue." *NRA*, 700 F.3d at 196; *see also Skoien*, 614 F.3d at 641 ("We do take from *Heller* the message that exclusions need not mirror limits that were on the books in 1791."). For all practical purposes, presumptively lawful regulatory measures act as "a kind of 'safe harbor' for unlisted regulatory measures." *Chester*, 628 F.3d at 679.

To determine whether a law is analogous to the *Heller* list, the court identifies the governmental interest at stake as well as the "contexts in which those interests could be successfully invoked." *Masciandaro*, 638 F.3d at 469. In *NRA v. BATFE*, the Fifth Circuit upheld a statute prohibiting licensed firearms dealers from selling handguns to persons between the ages of 18 and 20. The court reasoned that the law is like "federal bans targeting felons and the mentally ill" and wanting to "regulate certain groups' access to arms for the sake of public safety." 700 F.3d at 205–06; *see also Swearingen*, 2021 U.S. Dist. LEXIS 117837, at *38–39 (finding that a prohibition on the sale of firearms to 18-to-20-year-olds are analogous to the restrictions on *Heller*'s list).

Courts have similarly analogized gun-possession bans for felons to bans on those with domestic violence misdemeanors. *United States v. Booker*, 644 F.3d 12,

24–25 (1st Cir. 2011) ("§922(g)(9) fits comfortably among the categories of regulations that *Heller* suggested would be 'presumptively lawful.'"); *United States v. White*, 593 F.3d 1199, 1206 (11th Cir. 2010) ("We see no reason to exclude § 922(g)(9) from the list of longstanding prohibitions on which *Heller* does not cast doubt."). They have also extended the *Heller* list to people who unlawfully use or are addicted to drugs. *United States v. Dugan*, 657 F.3d 998, 999–1000 (9th Cir. 2011) ("Because Congress may constitutionally deprive felons and mentally ill people of the right to possess and carry weapons, we conclude that Congress may also prohibit illegal drug users from possessing firearms."); *United States v. Yancey*, 621 F.3d 681, 684–85 (7th Cir. 2010) ("Keeping guns away from habitual drug abusers is analogous to disarming felons."). And they have extended the *Heller* list to persons subject to domestic-violence restraining orders. *Bena*, 664 F.3d at 1184 ("Although persons restricted by § 922(g)(8) need not have been convicted of an offense involving domestic violence, this statute—like prohibitions on the possession of firearms by violent felons and the mentally ill—is focused on a threat presented by a specific category of presumptively dangerous individuals."). Finally, courts have extended the list to illegal aliens. *E.g.*, *United States v. Carpio-Leon*, 701 F.3d 974 (4th Cir. 2012); *United States v. Huitron-Guizar*, 678 F.3d 1164 (10th Cir. 2012). Although many courts refuse to extend *Heller* beyond its facts, they have no problem extending its dicta to restrict the rights of millions.

2. Many courts treat the Heller *list as irrebuttable.*

This Court described the *Heller* list of regulations as "presumptively lawful." In applying that list, courts have been divided on whether the presumption can be rebutted or not. The Third and Sixth Circuit argue that once the government carries its burden of proving that a certain law is "presumptively lawful," the burden of proof shifts to the party challenging the law. *United States v. Barton*, 633 F.3d 168, 173 (3d Cir. 2011) ("By describing the felon disarmament ban as 'presumptively' lawful, the Supreme Court implied that the presumption may be rebutted.").

But many courts have turned "presumptively lawful" into "conclusively lawful." *Heller*, 554 U.S. at 627 n.26. The Second, Fourth, Fifth, Tenth, and Eleventh Circuits do not allow the presumption to be challenged. *See United States v. Bogle*, 717 F.3d 281, 281–82 (2d Cir. 2013) (upholding the felon firearm ban simply by citing to *Heller*); *United States v. Scroggins*, 599 F.3d 433, 451 (5th Cir. 2010) (rejecting challenge to possession of firearms by a felon pointing to *Heller*'s language); *In re United States*, 578 F.3d 1195, 1200 (10th Cir. 2009) ("We have already rejected the notion that Heller mandates an individualized inquiry concerning felons pursuant to § 922(g)(1)."); *Flick v. Att'y Gen.*, 812 F. Appx. 974, 975 (11th Cir. 2020) (foreclosing as-applied challenges to § 922(g)(1)). And while the Fourth Circuit had previously "recognized the possibility that an as-applied challenge to a felon disarmament law could succeed in rebutting the presumption," *Hamilton v. Pallozzi*, 848 F.3d 614, 622–23 (4th Cir. 2017), it switched to not allowing the presumption to be

rebutted. *Id.* at 626 ("[W]e simply hold that conviction of a felony necessarily removes one from the class of 'law-abiding, responsible citizens' for the purposes of the Second Amendment"); *see also Harley v. Wilkinson*, 988 F.3d 766, 769 (4th Cir. 2021) (refusing to consider any individual characteristics in an as-applied challenge, instead focusing "entirely on the statute itself and the evidence addressing the statutory purpose and fit.").

But a presumption is, by definition, rebuttable. Accordingly, *Heller* "did not invite courts onto an analytical off-ramp to avoid constitutional analysis." *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 686 (6th Cir. 2016).

3. Considering certain regulations to be presumptively lawful is ahistorical and leads to millions' being deprived of their Second Amendment rights.

The most striking part of the "presumptively lawful" language is its inclusion in the historically based inquiry in *Heller*, given that many of the regulations on the list themselves are not longstanding. Indeed, every one of the regulations the Court listed were 19th- or 20th-century inventions. *See NRA*, 700 F.3d at 196 ("*Heller* considered firearm possession bans on felons and the mentally ill to be longstanding, yet the current versions of these bans are of mid–20th century vintage."); *Skoien*, 614 F.3d at 640 ("The first federal statute disqualifying felons from possessing firearms was not enacted until 1938"); David Kopel & Joseph Greenlee, *The "Sensitive Places" Doctrine: Locational Limits on the Right to Bear Arms*, 13 Charleston L. Rev. 203 (2018),

https://tinyurl.com/y3ztcpg2 (finding little historical precedent for sensitive place restrictions).

Some courts have recognized the ahistorical origins of the list of presumptively lawful measures. *See, e.g.*, *United States v. McCane*, 573 F.3d 1037, 1049 (10th Cir. 2009). But many judges still use the list to approve every sort of restriction, especially felon-in-possession laws. Over and over, courts have quickly brushed aside these claims by citing *Heller*. Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 Geo. Wash. L. Rev. 703, 729 (2012); *see, e.g.*, *Schrader v. Holder*, 704 F.3d 980, 989–91 (D.C. Cir. 2013); *Bogle*, 717 F.3d at 281–82; *United States v. Moore*, 666 F.3d 313, 318–19 (4th Cir. 2012); *United States v. Joos*, 638 F.3d 581, 586 (8th Cir. 2011); *United States v. Frazier*, 314 F. Appx. 801, 807 (6th Cir. 2008). The Tenth Circuit remarked that "[g]iven the uncertain pedigree of felon dispossession laws, though, the dictum sanctioning their application while simultaneously sidestepping the Second Amendment's original meaning is odd. One wonders, at least with regard to felon dispossession, whether the *Heller* dictum has swallowed the *Heller* rule." *McCane*, 573 F.3d at 1049.

This Court's confusing dictum has led many lower courts to uphold extreme restrictions on firearm ownership for nonviolent felons and other groups of people. It is even more pressing that this Court addresses the "presumptively lawful" language given that recent Supreme Court dicta is generally considered to be nearly as binding as the holding. *Newdow v. Peterson*, 753 F.3d 105, 108 n.3 (2d Cir. 2014) ("[W]e have an obligation to accord great deference to Supreme Court dicta.") (cleaned up);

Schwab v. Crosby, 451 F.3d 1308, 1325 (11th Cir. 2006) ("We have previously recognized that 'dicta from the Supreme Court is not something to be lightly cast aside.'"); *Oyebanji v. Gonzales*, 418 F.3d 260, 264–65 (3d Cir. 2005) ("[A]s a lower federal court, we are advised to follow the Supreme Court's considered dicta.") (cleaned up); *Wynne v. Town of Great Falls*, 376 F.3d 292, 298 n.3 (4th Cir. 2004) ("[W]ith inferior courts, like ourselves . . . carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative.") (cleaned up); *United States v. Marlow*, 278 F.3d 581, 588 n.7 (6th Cir. 2002) ("Appellate courts . . . are obligated to follow Supreme Court dicta, particularly when there is no substantial reason for disregarding it, such as age or subsequent statements undermining its rationale."); *United States v. Gaudin*, 28 F.3d 943, 956 n.2 (9th Cir. 1994) ("Even if it were dicta, we could not lightly ignore it."). Until this Court addresses *Heller*'s "presumptively lawful" language, courts will continue to apply it, no matter ahistorical it is.

D. The Slipshod Way Courts Have Approached the Second Amendment Has Left a Jurisprudence of Doubt

Although united in applying a two-step test, circuits vary in their approaches. Consequently, Second Amendment analysis "resembles a patchwork quilt that largely reflects local custom." *Drake*, 724 F.3d at 440 (Hardiman, J., dissenting). And while our Founders designed our system to allow for a diverse level of practices develop, it is unlikely that they intended the Second Amendment to turn on judicial vagaries. *Binderup v. Att'y Gen.*, 836 F.3d 336, 372–73 (3d Cir. 2016) (en banc) (Hardiman, J., concurring).

As this Court has remarked elsewhere: "Liberty finds no refuge in a jurisprudence of doubt." *Planned Parenthood v. Casey*, 505 U.S. 833, 844 (1992).

This Court presumably hoped that the lower courts would help define the scope of the Second Amendment. In response, however, these courts have developed a slipshod way of handling cases. The only thing that they have in common is their need for additional guidance. *See Gould v. Morgan*, 907 F.3d 659, 670 (1st Cir. 2018) ("*Heller* did not supply us with a map to navigate the scope of the right of public carriage for self-defense."); *Wrenn v. District of Columbia*, 864 F.3d 650, 655 (D.C. Cir. 2017) ("[T]he Supreme Court has offered little guidance. . . . And by its own admission, [*Heller*] manages to be mute on how to review gun laws in a range of other cases."); *Masciandaro*, 638 F.3d at 475 ("This case underscores the dilemma faced by lower courts in the post-*Heller* world . . . we think it prudent to await direction from the Court itself."); *Kachalsky*, 701 F.3d at 89 ("What we do not know is the scope of that right beyond the home and the standards for determining when and how the right can be regulated by a government. This vast 'terra incognita' has troubled courts since *Heller* was decided."); *Swearingen*, 2021 U.S. Dist. LEXIS 117837, at *8 ("And when it comes to what test applies, *Heller* is about as clear as the Suwannee River," which is a blackwater river in northern Florida). Until this Court provides additional guidance, lower courts will continue to limit *Heller* to its facts and thus eviscerate the Second Amendment.

III. LAWS INFRINGING ON THE RIGHT TO KEEP AND BEAR ARMS REQUIRE A MEANINGFUL STANDARD OF REVIEW THAT ESCHEWS BALANCING TESTS

The Second Amendment is not inferior to other constitutional rights. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 484 (1982) ("[W]e know of no principled basis on which to create a hierarchy of constitutional values."); *Ullmann v. United States*, 350 U.S. 422, 428–29 (1956) ("To view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted application of it."). Members of this Court have continued to recognize that the Second Amendment cannot be singled out for second-class treatment. *Silvester*, 138 S. Ct. at 945 (Thomas, J., dissental) ("If a lower court treated another right so cavalierly, I have little doubt that this Court would intervene. But as evidenced by our continued inaction in this area, the Second Amendment is a disfavored right in this Court."); *Peruta v. California*, 137 S. Ct. 1995, 1999 (2017) (Thomas, J., joined by Gorsuch, J., dissental) ("The Court's decision to deny certiorari in this case reflects a distressing trend: the treatment of the Second Amendment as a disfavored right."). To the contrary, this Court has insisted that the Second Amendment is "deeply rooted in this Nation's history and tradition" and is "among those fundamental rights necessary to our system of ordered liberty." *McDonald*, 561 U.S. at 787, 778 (plurality) (quoting *Washington* v. *Glucksberg,* 521 U.S. 702, 721 (1997)).

But by declining to answer key methodological questions, the Court has allowed the Second

Amendment to be "singled out for special—and specially unfavorable—treatment." *Id.* at 745–46. Lower courts use watered-down forms of intermediate scrutiny that would be unimaginable if applied to other rights. *Compare Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (A First Amendment restriction must be "'narrowly tailored to serve a significant governmental interest.'" (citations omitted)), *with Silvester*, 843 F.3d at 822–23 (citing *Chovan*, 735 F.3d at 1139) (Second Amendment restriction requires that "(1) the government's stated objective must be significant, substantial, or important; and (2) there must be a 'reasonable fit' between the challenged regulation and the asserted objective.").

The denigration of the Second Amendment is usually done in the name of public safety. The Second Circuit claimed that if the First and Second Amendments were treated equally, it "could well result in the erosion of hard-won First Amendment rights." *Kachalsky*, 701 F.3d at 92. According to the Ninth Circuit, a comparison between a gun seller and a book seller was inapt because guns "change[] the constitutional calculus." *Teixeira*, 873 F.3d at 688. The Third, Sixth, and Tenth Circuits also believe that the Second Amendment can be treated as inferior, because of its inherent dangers. *Ass'n of N.J. Rifle & Pistol Clubs*, 910 F.3d at 124 n.28 ("While our Court has consulted First Amendment jurisprudence concerning the appropriate level of scrutiny to apply to a gun regulation, we have not wholesale incorporated it into the Second Amendment: the risk inherent in firearms and other weapons distinguishes the Second Amendment right from other fundamental

rights.") (cleaned up); *Stimmel v. Sessions*, 879 F.3d 198, 206 (6th Cir. 2018) ("The risk inherent in firearms distinguishes the right to keep and bear arms from other fundamental rights that have been held to be evaluated under a strict scrutiny test." (cleaned up); *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015) (contrasting bearing arms with the right to marry). *See also Holloway v. Att'y Gen.*, 948 F.3d 164, 177 n.16 (3d Cir. 2020) ("[O]ur precedent is cautious in applying the intermediate scrutiny test used in First Amendment cases.").

But the Bill of Rights is not an ordinal hierarchy, with the Second Amendment occupying a spot one place below the First in terms of importance. The Framers were well aware of the "risk inherent in firearms," in the words of the *Bonidy* court, as much as they were aware of the risks inherent in free speech. Yet, on its face, the Constitution explicitly protects both to the same degree.

Constitutional protections exist to guard against the strong temptation to restrict certain conduct. The Second Amendment, like the other Bill of Rights, recognize the freedoms individuals have while preventing government overreach. And each right reflected a tradeoff by the Founders between freedom and public safety. *Heller*, 554 U.S. at 634–35 ("The very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is really worth insisting upon. . . . 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."). While lower courts recognize that other constitutional

rights outweigh public-safety considerations—most notably, the Fourth Amendment—they have not done so for the Second Amendment. *McDonald*, 561 U.S. at 783 ("The right to keep and bear arms . . . is not the only constitutional right that has controversial public safety implications. All of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes fall into the same category.").

Approving the two-step approach would only guarantee continued chaos. What is needed is a clear standard under which Americans have their rights respected, while recognizing that no right is absolute.

To ensure that the Second Amendment is restored to its place in the Bill of Rights, this Court should direct lower courts to engage in informed analyses based on constitutional text, history, and tradition. One of the best aspects of our system of government is that the scope of rights doesn't change over time"; it was fixed at the Founding and adjusted at the "Second Founding," the adoption of the post-Civil War Amendments. Regardless of how public perception changes, a right's enumeration must stand for something, as it "takes out of the hands 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." *Heller*, 554 U.S. at 634.

This is not to suggest that an approach based on text, history, and tradition is an easy one to frame or apply. *See McDonald*, 561 U.S. at 804 (Scalia, J., concurring) ("Historical analysis can be difficult; it

sometimes requires resolving threshold questions, and making nuanced judgments about which evidence to consult and how to interpret it."). After all, history and tradition show that states have adopted a variety of gun regulations. But this Court is tasked with the duty to decide what is right, not what is easy. In so doing, lower courts will be able to evaluate Second Amendment claims consistently while affording them their proper respect.

CONCLUSION

For the foregoing reasons, and those stated by the petitioners, this Court should reverse the Second Circuit.

Respectfully submitted,

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