No. 11-290

IN THE
Supreme Court of the United States

RICHARD C. DELACY,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

AFFIDAVIT OF SERVICE

I HEREBY CERTIFY that all parties required to be served, have been served, on this 15th day of November, 2011, in accordance with Supreme Court of the United States Rule 29.3, three (3) copies of the foregoing **BRIEF OF AMICUS CURIAE CALIFORNIA RIFLE AND PISTOL ASSOCIATION FOUNDATION, INC., IN SUPPORT OF PETITIONER** by placing said copies in the U.S. Mail, first class postage prepaid, addressed as listed below:

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Sworn to and subscribed before me this 15th day of November, 2011.

WILLIAM R. PIERANGELI
NOTARY PUBLIC
District of Columbia

My commission expires April 30, 2014.

No. 11-290

In the Supreme Court of
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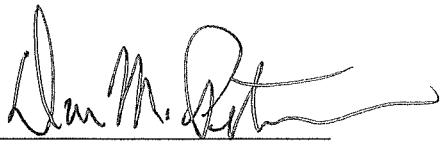
ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA,
FIRST APPELLATE DISTRICT DIVISION ONE

RULE 33.1(h) CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to Supreme Court Rule 33.1(h) that the accompanying Brief of Amicus Curiae California Rifle and Pistol Association Foundation, Inc. complies with the word limits in Rule 33.1(g). The petition was prepared using WordPerfect 13. According to that word processing system the word count, including footnotes but excluding the parts described in Rule 33.1(d), is 5,503.



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BRIEF OF AMICUS CURIAE CALIFORNIA RIFLE AND PISTOL ASSOCIATION FOUNDATION, INC., IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the reference in *District of Columbia v. Heller,* 554 U.S. 570, 627 n.26 (2008), to "presumptively lawful" restrictions on the right to keep and bear arms, such as a prohibition of possession of a firearm by a felon, created a safe harbor exempting restrictions on Second Amendment rights – including possession of a firearm by a misdemeanant – from any level of heightened judicial scrutiny?

2. Whether an Equal Protection challenge to discriminatory classifications that deprive persons of the fundamental right to keep and bear arms is subject merely to rational basis scrutiny?

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STATEMENT OF INTEREST OF AMICUS CURIAE

The California Rifle and Pistol Association (CRPA) Foundation is a non-profit entity classified under section 501(c)(3) of the Internal Revenue Code and incorporated under California law, with headquarters in Fullerton, California.[1] It is affiliated with the California Rifle and Pistol Association, Inc., which has approximately 65,000 members.

The CRPA Foundation seeks to raise awareness about unconstitutional laws, defend and expand the legal recognition of the rights protected by the Second Amendment, promote firearms and hunting safety, protect hunting rights, enhance marksmanship skills of those participating in shooting sports, and educate the general public about firearms. The CRPA Foundation also supports law enforcement and various charitable, educational, scientific, and other firearms-related public interest activities that support and defend the Second Amendment rights of all law-abiding Americans.

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[1] No counsel for any party to this case authored this brief in whole or in part, no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief, and no person or entity other than the Amicus Curiae or its counsel made such a monetary contribution. Counsel of record for all parties received timely notification of intent to file this brief, and this brief is filed with the written consent of all parties.

The CRPA Foundation has considerable experience litigating constitutional rights in relation to firearms before federal and state courts and wishes to bring its unique perspective to this Court's attention.

REASONS FOR GRANTING THE WRIT

Introduction

Petitioner thoroughly demonstrates the important splits among the circuits that exist on the issues presented by this case. Particularly, Petitioner shows the deep divide regarding whether several "longstanding prohibitions" or regulations described in *District of Columbia v. Heller*, 554 U.S. 570, 627 n.26 (2008), as "presumptively lawful" create "safe harbors" in which such laws are immune from constitutional scrutiny. Pet. 7-15. Amicus will not repeat Petitioner's able explication of the divisions in the lower courts.

There is an additional aspect of the "presumptively lawful" issue, mentioned by Petitioner but not developed in as much detail, that further supports the grant of certiorari. That is the expansion of the "presumptively lawful" principle to laws that are supposedly "analogous" to the enumerated prohibitions rather than falling within the actual scope of them. *Heller* characterized "prohibitions on the possession of

firearms by felons" as "longstanding" and "presumptively lawful." *Heller*, 554 U.S. at 626-27 & n.26. In this case, the California Court of Appeal has analogized conviction of a simple misdemeanor to conviction of a felony, and thus held that California's law[2] depriving simple misdemeanants of their Second Amendment rights for ten years is automatically and entirely exempt from constitutional review. Indeed, as in Petitioner's case, an inadvertent and unknowing violation of Cal. Penal Code § 12021(c)(1) may turn mere misdemeanants into convicted felons, with possible imprisonment, loss of civil rights, and permanent loss of firearms rights.

Unlike some presumptively lawful prohibitions, restrictions on possession of firearms by individuals convicted of simple misdemeanors are neither longstanding nor widespread. Nothing this Court said in *Heller* or in *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010), which recognized that the Second Amendment applies to the States, and nothing in our national history and traditions relating to the right to keep and bear arms, justifies expanding the prohibition on possession of firearms by felons to mere misdemeanants.

As Petitioner notes, this case presents the opportunity to clarify the confusion in the courts below regarding the level of scrutiny to be applied, and his

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[2] Cal. Penal Code § 12021(c)(1).

petition particularly addresses the standard of scrutiny when Second Amendment rights are examined in the Equal Protection context. However, the arguments by Amicus concentrate on the closely related question of what heightened standard, or even categorical standard, should be applied to examine the constitutionality of laws that are allegedly "analogous" to "longstanding prohibitions," but which in fact directly infringe on core Second Amendment rights. Granting certiorari would be highly appropriate to resolve this fundamental issue that continues to vex the lower courts.

I. THERE IS NO JUSTIFICATION FOR EXTENDING THE "PRESUMPTIVELY LAWFUL" LANGUAGE IN *HELLER* TO INCLUDE POSSESSION BY SIMPLE MISDEMEANANTS.

A. The Distinction Between Felons and Misdemeanants is Critical, and Early Constitutional History Provides No Support for Disarming Misdemeanants.

The source of the circuit splits identified by Petitioner is the language in *Heller* which states:

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment,

> nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Heller, 554 U.S. at 626-27. The quoted sentence is followed by footnote 26, which continues:

> We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.

Id. at 627 n. 26.

As Petitioner has shown, there is a circuit split on the important question of whether this language was intended to exempt these "longstanding prohibitions" from judicial review, or whether such prohibitions are subject to constitutional scrutiny.

That question is especially critical where, as in this case, the statute does not itself fall within any "longstanding prohibition" but is alleged to be "analogous to a prohibition on felon weapon possession." Pet. App. 8a. Here, the California Court of Appeal believed that felons may be barred from

possession of firearms without any scrutiny being applied at all because "felons are categorically different from the individuals who have a fundamental right to bear arms." Pet. App. 8a (citing *United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010)). It then analogized an individual convicted of simple misdemeanor battery to a felon, and held that § 12021(c)(1) is "immune from means end scrutiny." Pet. App. 13a.

That analogy is seriously misplaced. Historically, persons convicted of violent felonies and, later, felons as a class, could forfeit their right to keep and bear arms. But deprivation of Second Amendment rights for simple misdemeanors in the wholesale manner California has done has never been the prevailing rule, throughout our history or today.

The distinction between felony and misdemeanor is fundamental in our jurisprudence. Traditionally, "'felony' is . . . 'as bad a word as you can give to man or thing.'" 2 Pollock & Maitland, *History of English Law* 465, quoted in *Staples v. United States*, 511 U.S. 600, 618 (1994). "In common usage, the word 'crimes' [felonies] is made to denote such offenses as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprised under the gentler name of 'misdemeanors' only." 4 William Blackstone, *Commentaries on the*

Laws of England *5 (1769).[3]

The Constitution itself reflects these distinctions. The Fifth Amendment provides that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury . . . ." "A felony is an infamous crime." *Ex parte Wall*, 107 U.S. 265, 297 (1883) (Field, J., dissenting). "The fifth amendment had in view the rule of the common law governing the mode of prosecuting those accused of crime, by which an information by the attorney general, without the intervention of a grand jury, was not allowed for a capital crime, nor for any felony . . . ." *Mackin v. United States*, 117 U.S. 348, 350 (1886). The Court contrasted offenses "not deemed capital or otherwise infamous crimes; that is to say, of *all simple assaults and batteries*, and all other misdemeanors not punishable by imprisonment in the penitentiary." *Id.* at 354 (citation omitted) (emphasis added).

One scholar has noted in a comprehensive historical analysis that "bans on convicts possessing firearms were unknown before World War I." C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J. L. & PUB. POL. 695, 708 (2009). *See also*

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[3] "[T]he term felony has come to mean any offense punishable by a lengthy term of imprisonment (commonly more than one year . . .); the term misdemeanor has been reserved for minor offenses . . . ." *Johnson v. United States*, 130 S.Ct. 1265, 1277 (2010) (Alito, J., dissenting).

Heller, 554 U.S. at 625 ("For most of our history, ... the Federal Government did not significantly regulate the possession of firearms by law-abiding citizens."). Indeed, "[f]or relevant authority before World War I ... one is reduced to three proposals emerging from the ratification of the Constitution," and to some imprecise "antecedents" in English common law and Revolutionary practice. Marshall, *supra*, at 712-13. Those proposals indicate that during the founding period, the notion of disarming violent criminals and insurrectionists might have been considered by some to be consistent with the Second Amendment, although such proposals were not implemented.

These three "Second Amendment precursors," proposed at state ratifying conventions, were "New Hampshire's proposal, the Pennsylvania minority's proposal, and Samuel Adams' proposal in Massachusetts." *Heller*, 554 U.S. at 604. All three proposals explicitly mentioned exceptions for certain dangerous persons. The Pennsylvania delegates who dissented from ratification proposed, in December 1787, that the Constitution include a bill of rights that specified "[t]hat the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals . . . . 2 *Documentary History of the Ratification of the Constitution* 623-24 (M. Jensen ed., 1976) (hereinafter

"*Documentary Hist.*").[4]

At the Massachusetts ratification convention in 1788, Samuel Adams proposed a bill of rights which included the following: "And that the said Constitution be never construed to authorize Congress ... to prevent the people of the United States, who are peaceable citizens, from keeping their own arms ...." 6 *Documentary Hist.* 1453 (J. Kaminski & G. Saladino eds. 2000). It is difficult to believe that Adams and his contemporaries would have considered misdemeanants to be excluded from the class of "peaceable citizens." In 1769, Adams saw the right to possess arms as fundamental:

> "To vindicate these rights, says Mr. *Blackstone*, when actually violated or attack'd, the subjects of England are entitled first to the regular administration and *free course of justice* in the courts of law – next to the right of *petitioning the King* and parliament for

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[4] The Pennsylvania Minority proposal speaks of "crimes committed" but in the parlance of the times, "crimes" referred to felonies. *See* 4 William Blackstone, *Commentaries on the Laws of England* *5 (1769), *supra*; 2 *Works of James Wilson* 618 (R. McCloskey ed., 1967) ("The generical term used immemorially by the common law, to denote a crime, is *felony*."). *See also* Marshall, *supra*, at 729 (explaining that "crimes committed" is "best ... read ... as contemplating disarmament not for *any* crime committed—wildly overbroad even by current standards").

> redress of grievances – and lastly, to the right of *having and using arms for self-preservation and defence*." These he calls "auxiliary subordinate rights, which serve principally as *barriers* to protect and maintain inviolate the three great and primary rights of *personal security, personal liberty* and *private property*": And that of *having arms for their defense* he tells us is "a public allowance, under due restrictions, of the *natural right of resistance and self-preservation*, when the sanctions of society and laws are found *insufficient* to restrain the *violence of oppression*."

1 *Writings of Samuel Adams* 317-18 (H. Cushing ed. 1904), quoting 1 Blackstone, *Commentaries*, *140-41, 143-44.

Similarly, the New Hampshire ratifying convention proposed in 1788 that the Constitution include a provision guaranteeing that "Congress shall never disarm any citizen, unless such as are or have been in actual rebellion." 18 *Documentary Hist.* 188 (J. Kaminski & G. Saladino eds. 1995). One commentator justified this proposal as necessary to restrain "deluded wretches, who may otherwise, by the instigation of a dark and bloody ringleader, commit many horrid murders . . . ." "A Foreign Spectator" [Rev. Nicholas Collin], "Remarks on the Amendments

to the Federal Constitutions," No. XI, *Federal Gazette*, Nov. 28, 1788, quoted in Stephen P. Halbrook, *The Founders' Second Amendment* 214 (2008). He added: "Insurrections against the federal government are undoubtedly real dangers of public injury, not only from individuals, but great bodies; consequently the laws of the union should be competent for the disarming of both." *Id.* at 215.

As noted, when exceptions were mentioned to the right to bear arms, the focus was on exceptionally serious transgressions, not misdemeanors. To the extent "one can distill any guidance" from scattered but "relevant aspects of the English right at the Founding" and Revolutionary practices, the above three proposals are generally consistent with a broad understanding that "persons who by their actions ... betray a likelihood of violence against the state may be disarmed." Marshall, *supra*, at 713, 727-28. It is noteworthy that when the federal government, a century and a half later, finally did begin to impose arms restrictions on those convicted of crimes, the restrictions were limited to persons convicted of "crimes of violence," a concept which "the few relevant indications from the Founding ... suggest ... [is] at least close to the original understanding of permissible limitations on the right to keep arms." *Id.* at 698-701, 707-08. *See* discussion of Federal Firearms Act in Part B, below.

One should not, however, overstate the force of

this history, either generally or specifically with respect to the statute at issue here. First, none of the limitations listed in the precursor proposals were actually included in the Second Amendment. Second, as noted above, there was no temporally proximate post-ratification practice of disarming convicts. Third, the English and Revolutionary antecedents were by no means precise analogues to permanent or long term disqualification, often allowing for temporary disarmament (such as the seizure of arms) with an ability to reacquire them. *See* Marshall, *supra*, at 719.

Most importantly, the statute at issue here is concerned with misdemeanors—a category of crime historically seen as undeserving of severe punishment such as the relinquishment of an express constitutional right. *Carrol v. United States*, 267 U.S. 132, 158 (1925) ("In England at the common law the difference in punishment between felonies and misdemeanors was very great."); *McLaughlin v. City of Canton*, 947 F. Supp. 954, 974-76 (S.D. Miss. 1995) (finding that the "historical distinction between felonies and misdemeanors is more than semantic," that "dire sanctions have attached to felony convictions which have not attached to misdemeanor convictions," and, therefore, that non-felony disfranchisement law is subject to, and did not pass, strict scrutiny).

In sum, the framing-era evidence provides only the sketchiest evidence that violent felons and insurrectionists might constitutionally be disarmed. It

provides no support whatsoever for depriving misdemeanants of their right to possess arms.

B. Federal Firearms Statutes Imposing Disabilities Have Historically Been Limited to Violent Felons or Felons as a Class.

The first federal law to touch on the subject of disarming categories of violent criminals was the Federal Firearms Act[5], passed in 1938. That Act did not prohibit possession by felons generally. Instead, it prohibited only shipping, transporting, or receiving through interstate commerce (not mere possession) of firearms by certain persons.[6] The persons prohibited from shipping, transporting, or receiving firearms in interstate commerce included only individuals convicted of a "crime of violence," which was defined as "murder, manslaughter, rape, mayhem, kidnapping, burglary, housebreaking," and specifically defined types of aggravated assault. Obviously, not all felons were included in the prohibition. Prior to 1938, there was no federal prohibition against felons or any class

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[5] Federal Firearms Act, ch. 850, § 1(6), 52 Stat. 1250 (1938).

[6] It did establish a rule that "possession of a firearm or ammunition by any such person shall be presumptive evidence" that the firearm or ammunition was shipped, transported, or received in violation of the Act. Federal Firearms Act, ch 850, § 3(f), 52 Stat. 1251 (1938). This presumption was declared unconstitutional in *Tot v. United States*, 319 U.S. 463 (1943).

of convicted persons possessing, shipping, transporting, or receiving firearms.

The first federal law to impose firearms restrictions on felons as a class is barely fifty years old, having been enacted in 1961 by an amendment[7] to the Federal Firearms Act. The 1961 amendment substituted a prohibition on persons convicted of a "crime punishable by imprisonment for a term exceeding one year" for those convicted of a "crime of violence," as previously defined.

The Omnibus Crime Control and Safe Streets Act of 1968 and the Gun Control Act of 1968 carried forward this general ban on possession by felons. The 1968 legislation imposed a ban on possession of firearms by any person "who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1).

What is notable about these federal statutes is that the general prohibition on possession by felons is a product of the latter part of the twentieth century. Persons convicted of ordinary misdemeanors–if those misdemeanors carry, as they generally do, sentences of one year or less–have never been disqualified from possession of firearms under federal law.

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[7] An Act to Strengthen the Federal Firearms Act, Pub. L. No. 87-342, 75 Stat. 757 (1961).

There is only one specific class of misdemeanors expressly mentioned by federal statutes that leads to disqualification from possession of firearms, and it is very recent. In 1996, just a dozen years before *Heller*, the so-called Lautenberg Amendment added a specific, narrowly defined class of persons convicted of "misdemeanor crimes of domestic violence" to 18 U.S.C. § 922(g)(9).[8] Apart from that one narrow exception, current federal law affirmatively declares that virtually all misdemeanants, and some non-violent felons, are not disqualified from possessing firearms. *See* 18 U.S.C. § 922(g)(1) and § 921(a)(20).[9]

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[8] The definition of "misdemeanor crime of domestic violence" is set forth at 18 U.S.C. § 921(a)(33)(A). The statute also contains a number of limiting provisions and procedural safeguards relating to representation by counsel and trial by jury before the person convicted can be disqualified.

[9] § 921(a)(20) states:

> The term "crime punishable by imprisonment for a term exceeding one year" does not include—
>
> (A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or
>
> (B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

Accordingly, it cannot be said on the basis of federal law that prohibitions against possession by misdemeanants generally, such as persons convicted of simple battery, are presumptively lawful based on their "longstanding" nature.

C. The Disabilities Imposed by Section 12021(c)(1) Are Not Longstanding and Are Atypical of State Firearms Regulations.

Section 12021, including subsection (a), makes possession of firearms a felony offense for felons and a variety of other persons. Section 12021(c)(1), on the other hand, imposes a ten year firearms possession disability on a person convicted of a misdemeanor violation of any one of 43 specified statutory provisions. Those 43 statutes sometimes involve serious offenses, because charges can be brought under them as either felony or misdemeanor charges. The ten year disability, however, is imposed expressly for instances in which the conviction is for a misdemeanor, not felony, violation of those statutes.

The misdemeanor offenses for which a ten year bar from exercising one's constitutional right to possess a firearm may be imposed include such things as simple assault (defined as an attempt) (§ 240), simple battery (§ 242), wearing the uniform of a peace officer while engaged in picketing, regardless of whether or not the person is a peace officer (§ 12590), and discharging a spring-action BB gun in a grossly

negligent manner (§ 246.3). Many of the listed statutes do not involve the actual commission of violent acts, but rather relate only to threats, or simply to possessing or transferring weapons under various circumstances in which no violence has occurred.

When first added in 1953, Section 12021 provided merely that non-citizens, convicted felons, and persons addicted to any narcotic drug were guilty of a public offense if they possessed a pistol, revolver, or other concealable firearm.[10] Such a prohibition was within the mainstream of traditional firearms prohibitions in the United States.

Inclusion of a list of misdemeanors in Section 12021(c)(1) did not begin until 1991.[11] Section 242 was added to that list by amendments in 1993.[12]

It is not uncommon for states to have statutory prohibitions against possession of firearms (or certain classes of firearms) by persons such as felons or those

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[10] Cal. Penal Code § 12021 (West 2009) (Historical and Statutory Notes).

[11] Cal. Stats. 1991, c. 953 (A.B. 108); Cal. Stats. 1991, c. 955 (A.B. 242). These amendments included § 243, the section that establishes a penalty for battery, but not § 242, the section under which Petitioner was convicted.

[12] See Cal. Penal Code § 12021 (West 2009) (Historical and Statutory Notes) for the complex series of amendments that added § 242 to the list of statutes in § 12021(c)(1) in 1993.

convicted of "crimes of violence"; drug addicts or drug offenders; habitual drunkards; minors; the mentally ill or mentally incapacitated; illegal aliens; fugitives from justice; individuals who are incarcerated, on probation, or on parole; individuals who have been dishonorably discharged from the armed services; and/or individuals under protective or restraining orders. Amicus takes no position regarding whether such prohibitions are constitutional or not, but merely notes that they are not unusual features of state laws.

What is highly unusual–indeed, research by amicus has discovered no comparable statute in another state–is for mere possession of any firearm to be criminalized for a period of ten years for violation of a list of dozens of miscellaneous misdemeanors.[13] It is thus particularly unjustifiable for the California court to have immunized § 12021(c)(1) from review by treating the "presumptively lawful" language as an irrebuttable presumption, rather than applying an appropriate level of scrutiny to determine the statute's constitutionality.

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[13] State laws are summarized in Bureau of Alcohol, Tobacco, Firearms and Explosives, *State Laws and Published Ordinances* (27th ed. 2006).

II. CERTIORARI SHOULD BE GRANTED TO CLARIFY THE PROPER STANDARD OF CONSTITUTIONAL SCRUTINY.

As noted, the California Court of Appeal decided that the proper standard of constitutional scrutiny to be applied to § 12021(c)(1) is no scrutiny at all. This case is an excellent vehicle for clarifying that some level of scrutiny must be applied, and what that level should be for statutes that are alleged to be within the "longstanding prohibitions" enunciated by *Heller.* Statutes such as § 12021(c)(1), that directly infringe on the core right to possess firearms within the home for lawful purposes, and that are plainly not a "longstanding prohibition," may properly be struck down categorically, as *Heller* itself did for the handgun ban. At a minimum, strict scrutiny should be applied.

A. Section 12021(c)(1) Is Categorically Invalid Under the Second Amendment.

Heller, it will be recalled, declined to employ any kind of means-end scrutiny, and instead took a categorical approach in striking down an infringement on the core right to keep and bear arms in the home for lawful purposes:

> The handgun ban amounts to a prohibition of an entire class of "arms" that is overwhelmingly chosen by American society for that lawful purpose.

> The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family," * * * would fail constitutional muster.

Heller, 554 U.S. at 628-29.

It is undisputed in this case that Petitioner possessed three ordinary rifles and a shotgun. Pet. App. 3a-4a. They were possessed in his home, the place in which *Heller* located the central core of the Second Amendment right. They were of a kind "typically possessed by law-abiding citizens for lawful purposes," and thus within the protection of the Second Amendment. *Heller*, 554 U.S. at 625. Although Petitioner testified that he possessed them for hunting (Pet. App. 25a-27a)–a lawful purpose under the Second Amendment–they were also suitable for defense of himself and of hearth and home.

Thus, this case implicates what is unquestionably the core of the Second Amendment right: the right to possess an ordinary firearm within the confines of the home for lawful purposes, including defense. *McDonald* observed that "Self-defense is a

basic right, recognized by many legal systems from ancient times to the present day, and in *Heller*, we held that individual self-defense is 'the central component' of the Second Amendment right." *McDonald v. City of Chicago,* 130 S. Ct. at 3036 (citation omitted).

It is not a right that may be balanced away. In *Heller*, Justice Breyer in dissent argued that Second Amendment rights should be subject to an interest-balancing test. *Heller,* 554 U.S. at 689 (Breyer, J., dissenting). The majority in *Heller* rejected that approach, remarking:

> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government – even the Third Branch of Government – the power to decide on a case-by-case basis whether the right is really worth insisting upon.

Id. at 634 (majority opinion).

Heller emphatically stated that the Second Amendment "*elevates above all other interests* the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635 (emphasis added). Because that Second

Amendment right is elevated above all other interests, there is no need to examine the nature of any interests that would allegedly trump that fundamental right. Certainly, the commission of a simple battery, punishable by a maximum term of six months in jail, has never been considered to be an interest that would conceivably justify deprivation of an individual's constitutional rights for ten years.

B. If Section 12021(c)(1) Is Not Held To Be Categorically Invalid, Strict Scrutiny Should Apply.

The plurality in *McDonald* explicitly held, without any qualification, that "the right to keep and bear arms is *fundamental* to our scheme of ordered liberty," and is "deeply rooted in this Nation's history and tradition . . . ." *McDonald,* 130 S.Ct. at 3036 (emphasis added).[14]

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[14] *McDonald* repeatedly characterized the right as fundamental in holding that the Second Amendment is incorporated through the Due Process Clause of the Fourteenth Amendment. *Id.* at 3036, 3050. It noted that Blackstone's view that the arms right is fundamental was "shared by the American colonists." *Id.* at 3037. "The right to keep and bear arms was considered no less fundamental by those who drafted and ratified the Bill of Rights." *Id.* Its inclusion in the Bill of Rights "is surely powerful evidence that the right was regarded as fundamental in the sense relevant here." *Id.* at 3037. *McDonald* noted that the efforts of the Reconstruction Congress "to safeguard the right to keep and bear arms demonstrate that the right was still recognized to be fundamental." *Id.* at 3040. "[T]he Framers and ratifiers of the Fourteenth Amendment counted the right to keep

Justice Thomas, the fifth vote in support of the decision in *McDonald*, stated unmistakably at the outset of his concurrence that:

> the plurality opinion concludes that the right to keep and bear arms applies to the States through the Fourteenth Amendment's Due Process Clause because it is "*fundamental*" to the American "scheme of ordered liberty," *ante*, at 3036 (*citing Duncan v. Louisiana*, 391 U.S. 145, 149 (1968)), and "'deeply rooted in this Nation's history and tradition,'" *ante*, at 3036 (*quoting Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). *I agree with that description of the right.*

McDonald, 130 S.Ct. at 3059 (Thomas, J., concurring) (emphasis added).

Because the right is fundamental, strict scrutiny should apply. A right is "fundamental" if it is "explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny." *San Antonio*

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and bear arms among those fundamental rights necessary to our system of ordered liberty." *Id.* at 3042. *McDonald* concluded that the Second Amendment is "a provision of the Bill of Rights that protects a right that is fundamental from an American perspective" and thus "applies equally to the Federal Government and the States." *Id.* at 3050.

Independent School District v. Rodriguez, 411 U.S. 1, 17, 33 (1973). "[C]lassifications affecting fundamental rights . . . are given the most exacting scrutiny." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 54 (1983) ("strict scrutiny [is] applied when government action impinges upon a fundamental right protected by the Constitution"). "Under the strict-scrutiny test," the government has the burden to prove that a restriction "is (1) narrowly tailored, to serve (2) a compelling state interest." *Republican Party of Minnesota v. White*, 536 U.S. 765, 774-75 (2002).

The California Court of Appeal rejected any degree of scrutiny at all for Petitioner's claim that § 12021(c)(1) violated his Second Amendment rights, and applied only a rational basis test to his Equal Protection claim regarding his right to keep and bear arms. But *Heller* expressly rejected the "rational basis" test for Second Amendment cases:

> [R]ational-basis scrutiny is a mode of analysis we have used when evaluating laws under constitutional commands that are themselves prohibitions on irrational laws. *See, e.g., Engquist v. Oregon Dept. of Agriculture*, 553 U.S. 591, ___ (2008). In those cases, "rational basis" is not just the standard of scrutiny, but the very substance of the constitutional guarantee. Obviously, the same test could

> not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms . . . . 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.

Heller, 554 U.S. at 628 n.27.

In addition to *Heller*'s repudiation of that test, *McDonald* expressly rejected an argument that would allow "state and local governments to enact any gun control law that they deem to be reasonable . . . ." *McDonald*, 130 S.Ct. at 3046.

During oral argument in the *Heller* case, Chief Justice Roberts cast doubt on whether overly refined standards such as intermediate scrutiny should be injected into Second Amendment jurisprudence. He questioned counsel, who was proposing intermediate scrutiny as the standard, as follows:

> Well, these various phrases under the different standards that are proposed, "compelling interest," "significant

> interest," "narrowly tailored," none of them appear in the Constitution; and I wonder why in this case we have to articulate an all-encompassing standard. Isn't it enough to determine the scope of the existing right that the amendment refers to, look at the various regulations that were available at the time, including you can't take the gun to the marketplace and all that, and determine how these -- how this restriction and the scope of this right looks in relation to those?

Transcript of Oral Argument, *District of Columbia v. Heller*, March 18, 2008, at 44.

In fact, the Court did not enunciate or apply an intermediate scrutiny standard in *Heller*. Instead, it invalidated the District's law outright.

Intermediate scrutiny is a form of "interest balancing." *Heller* rejected Justice Breyer's "judge-empowering 'interest-balancing inquiry' that 'asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests.'" *Id.* at 2821. Such a test would allow "arguments for and against gun control" and the upholding of a handgun ban "because handgun violence is a problem . . . ." *Id.* Justice Breyer's dissent relied on cases such as *Burdick v. Takushi*, 504 U.S.

428 (1992), *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997), and *Thompson v. Western States Medical Center,* 535 U.S. 357 (2002), which are undeniably intermediate scrutiny cases. *See Heller,* 554 U.S. at 690 (Breyer, J., dissenting). Thus, Justice Breyer's interest-balancing test is nothing other than intermediate scrutiny, and the Court's rejection of that approach in *Heller* demonstrates that intermediate scrutiny should not be applied in Second Amendment cases where, as in this case, the core right to possess firearms in the home has been statutorily abrogated for ten years for reasons that cannot withstand strict scrutiny.

To fail to apply strict scrutiny would be to disregard what this Court has characterized as "our central holding in *Heller*: that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home." *McDonald v. City of Chicago,* 130 S. Ct. at 3044.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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