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 30th day of December, 2011, in accordance with Supreme Court of the United States Rule 29.3, three (3) copies of the foregoing **REPLY BRIEF** by placing said copies in the U.S. Mail, first class postage prepaid, addressed as listed below:

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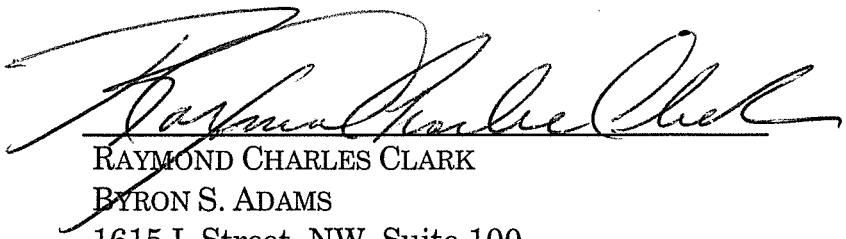

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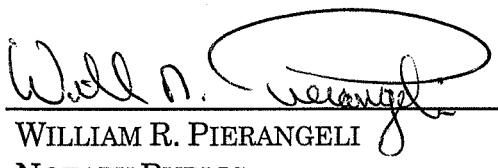
Sworn to and subscribed before me this 30th day of December, 2011.



WILLIAM R. PIERANGELI
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District of Columbia

My commission expires April 30, 2014.

No. 11-290

Richard C. Delacy v. People of the State of California

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the Reply Brief contains 2,434 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 29, 2011.

JOHN C. EASTMAN

No. 11-290

In The

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On Petition for Writ of Certiorari
to the Court of Appeal of the State of California,
First Appellate District, Division One

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INTRODUCTION

Respondent, the State of California, identifies no real vehicle problem with Delacy's petition.[1] It articulates no misstatement of either law or fact in the petition. Instead, it describes Petitioner's argument that simple battery cannot be included within *Heller*'s list of "presumptively lawful" restrictions on Second Amendment rights without at least *some* constitutional scrutiny as too "trivial" an issue for this Court's review, and contends that whether the "presumptively lawful" language in *Heller* even creates a safe harbor or is merely dicta is "a too slender legal thread for review." Brief in Opposition ("BIO") at 12. Given the well-documented circuit split on the meaning of *Heller*'s "presumptively lawful" language, and this Court's manifest interest in the subject, *see* Order Requesting Response, *Delacy v. California,* No. 11-290 (Oct. 18, 2011); *Dist. of Columbia v. Heller*, 554 U.S. 570, 635 (2008) ("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"), Respondent's "slender" and "trivial" claims fall flat.

Nor does Respondent dispute that the court below applied rational basis review to Petitioner's Equal Protection, despite this Court's admonition in *Heller* and *McDonald v. City of Chicago,* 130 S.Ct. 3020 (2010), that something more was required. More than just correction of error by a single court, the application by the court below of the erroneous stan-

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[1] The only hint of such an argument is its erroneous claim, rebutted in Part I below, that Petitioner had repackaged its argument into one not made below.

dard of review flows directly from its interpretation of *Heller*, reflecting one side of a "morass" of split authority. Certiorari is therefore warranted to address the appropriate standard of review as well.

ARGUMENT

I. Delacy Clearly Challenged the Constitutionality of 12021(c) under *Heller*.

Respondent claims that Petitioner has "repackage[d] the decision below as one rejecting the effort of petitioner to rebut *Heller*'s presumption," and then claims that petitioner never made such an argument below, instead contending that petitioner's argument below was "that the State's gun prohibition based on a battery conviction is not within the regulatory exceptions in *Heller*." BIO at 11. Not to put too fine a point on it, but Respondent reads into Petitioner's argument more nuance than is actually there.

What Petitioner argued below, and repeats in his petition for certiorari, is that the misdemeanor battery dispossession provision of California Penal Code § 12021(c) is an unconstitutional infringement of Petitioner's Second Amendment rights. *See* Appellant's Opening Brief at 5, *People v. Delacy*, 122 Cal. Rptr. 3d 216 (Cal. App. 2011) (No. A125803) (arguing that Section 12021(c) "is unconstitutional under the Second and Fourteenth Amendments" and *Heller*'s holding "that maintaining a firearm in the home for self defense is a fundamental right"); *id.* at 22 (arguing that the decision of the California Court in *People v. Flores*, 86 Cal. Rptr. 3d 824 (Cal. App. 2008), was distinguishable because it involved a conviction for violent assault, whereas "[a] conviction for misdemeanor battery does not necessarily entail vi-

olence or an inability to contain 'violent criminal impulses'" and, as such, the application of the firearms ban to appellant because of his misdemeanor battery "is violative of appellant's Second Amendment right to bear arms"); *id.* at 26 (Section 12021(c) is "facially unconstitutional" because "it cannot be applied to appellant or any other person of a nonviolent misdemeanor without violating the Second Amendment right to bear arms"); *id.* at 27 (Section 12021(c) is unconstitutional as applied because "Appellant has not suffered a conviction for a violent or serious felony or even a violent misdemeanor for that matter").

The court below rejected that contention because of several missteps. First, it treated the *Heller* "presumptively lawful" language as a holding rather than as *dicta*. Pet.App. 8a ("because *Heller* held that prohibitions on possession of weapons by felons are presumptively lawful, 'felons are categorically different from the individuals who have a fundamental right to bear arms'") (citing *United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010) (underscore emphasis added)); *cf.* BIO at 12 ("It is difficult to see how the safe harbor for such laws is dicta").

Second, it read "presumptively" as if it were "*per se*," thereby creating an irrebutable presumption, a safe harbor, by which statutes such as Section 12021(c) are "immune from means-end scrutiny"—that is, immune from any level of heightened scrutiny, much less the strict scrutiny this Court normally applies to rights that are deemed "fundamental." Pet.App. 13a; *cf.* BIO at 12 (describing *Heller* passage as creating a "safe harbor").

Finally, the court below equated misdemeanors with felonies to try to shoe-horn Section 12021(c) into

Heller's language, finding the historic distinction between misdemeanors and felonies to be "unconvincing." Pet.App. 6a; *cf.* BIO at 13-16 (repeatedly refeencing cases addressing *felon* dispossession laws to press its claim that California's *misdemeanor* dispossession statute "is no different in its legislative character than other common criteria" such as mental imcompetency).[2]

Not only is the holding by the court below at odds with the decisions from several federal circuit courts of appeal, *see* Pet. at 8-16, but the circuit split is acknowledged, even discussed at length, in the opinion below, and the side of the split represented by the

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[2] As *Amicus* correctly noted, "the difference in punishment between felonies and misdemeanors" has long been recognized as significant. Br. of *Amicus Curiae* California Rifle and Pistol Association Foundation at 12 (quoting *Carrol v. United States*, 267 U.S. 132, 158 (1925)). "The historical distinction between felonies and misdemeanors is more than semantic. Traditionally, dire sanctions have attached to felony convictions which have not attached to misdemeanor convictions." *McLaughlin v. City of Canton*, 947 F. Supp. 954, 974-76 (S.D. Miss. 1995). Moreover, Petitioner's predicate misdemeanor was simple battery. Although Battery is defined as "any willful and unlawful use of force or violence upon the person of another," 86 Cal. Rptr. 3d 824 (Cal. App. 2008), the "force needed to constitute battery can be *de minimus*. "'[T]he least touching' may constitute battery. In other words, force against the person is enough, it need not be violent or severe, it need not cause bodily harm or even pain, and it need not leave any mark." *People v. Colantuono*, 865 P.2d 704, 709 n.4 (Cal. 1994) (quoting *People v. Rocha*, 479 P.2d 372, 377 n.12 (Cal. 1971)). Accordingly, a citizen could spit on another, be charged with Section 242 misdemeanor battery, and have the Second Amendment right to bears arms stripped away under Section 12021(c)(1). Such a view treats the Second Amendment as a mere privilege that can be revoked on legislative whim, rather than a protected enumerated right.

Seventh Circuit's decision in *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010), is explicitly rejected. Pet. App. 8a-14a.

In addition to Delacy's case *sub judice*, the consequences of treating *Heller*'s "presumptively lawful" language as a safe harbor, and then expanding the harbor to include misdemeanants in addition to felons, were made starkly evident in a case just decided by the District Court for the District of Columbia. *Schrader v. Holder*, No. 10–1736, 2011 WL 6651231 (D.D.C. Dec. 23, 2011), involved a Navy veteran who was denied authorization to purchase a firearm because, forty years earlier when he was 20, he had been convicted of common law misdemeanor assault and battery following a fistfight with a gang member who had previously attacked him. Although Schrader was fined only $100 and received no jail time back in 1968 (and has had no meaningful encounters with law enforcement since), the Federal Bureau of Investigation refused him authorization in 2009 because it interprets 18 U.S.C. § 922(g)(1)–which prohibits firearm possession by persons convicted of misdemeanors *punishable* by more than two years in prison (18 U.S.C. § 922(g)(1)–to include convictions under Maryland's common law misdemeanor assault and battery, which had no legislatively capped punishment. *Id.* at *1. As in *Delacy*, the District Court rejected Schrader's Second Amendment challenge to his prohibited status based on a simple misdemeanor, relying on the "presumptively lawful" passage from *Heller*. *Id.* at *6-*7.

The interpretation of *Heller* which allows such a minor infraction to result in a lifetime ban on the exercise of Second Amendment rights undermines this

Court's description in both *Heller* and *McDonald* of those rights as "fundamental." *Heller*, 554 U.S. at 594; *McDonald*, 130 S.Ct. at 3036-38, 3050 (quoting, *inter alia*, J. Story, Commentaries on the Constitution of the United States § 1890, p. 746 (1833) (referring to the right to keep and bear arms as "the palladium of the liberties of a republic")); *cf. Small v. United States,* 544 U.S. 385, 392 (2005) (noting that Congress's exemption of state misdemeanor crimes punishable by less than two years imprisonment is "presumably based on the determination that such state crimes are not sufficiently serious or dangerous so as to preclude an individual from possessing a firearm"). The present case will allow this Court to address whether that interpretation is correct.

II. Respondent's Heavy Reliance on *Lewis* is Misplaced.

Respondent relies heavily on this Court's decision in *Lewis v. United States*, 445 U.S. 55 (1980), asserting that Petitioner's argument "redistills the view that a restriction of gun rights based on a prior crime 'can rationally be supported only if the historical fact of conviction is indeed a reliable indicator of potential dangerousness,'" an argument that *Lewis* interred. BIO at 17 (quoting *Lewis*, 445 U.S. at 72 (Brennan, J., dissenting) and citing *Lewis*, 445 U.S. at 65-67).

Respondent fails to mention that *Lewis* was pre-*Heller*, involved a Due Process challenge rather than a Second Amendment challenge, and applied rational basis review rather than some form of heightened scrutiny as required by this Court in *Heller*. All this alters the calculus rather dramatically. *See Lewis*, 445 U.S. at 65. Nor does Respondent mention this

Court's dismissive treatment, in *Heller*, of *Lewis*'s claim, "gratuitously" made in a footnote, that restrictions on firearms do not "trench upon constitutionally protected liberties." The *Heller* Court found it "inconceivable that [it] would rest [its] interpretation of the basic meaning of any guarantee of the Bill of Rights upon such a footnoted dictum in a case where the point was not at issue and was not argued." *Heller*, 554 U.S. at 625 n.25 (citing *Lewis*, 445 U.S. at 65-66 n.8)..

The issue is not, as Respondent claims, whether "a legislature constitutionally may prohibit a convicted felon from engaging in activities far more fundamental than the possession of a firearm." BIO at 14 (quoting *Lewis*, 445 U.S. at 66). The issue, instead, is whether it may do so free of serious judicial scrutiny, and then expand that scrutiny-free zone beyond restrictions on convicted felons to restrictions on those convicted of simple battery. This Court has already rejected the claim that the Second Amendment right recognized in *Heller* is a "second-class right." *McDonald*, 130 S.Ct. at 3044. And it has already rejected the notion that mere rationality, the standard discussed in *Lewis*, is the appropriate standard for review of restrictions on Second Amendment rights. *Heller*, 554 U.S. at 628 n.27 ("Obviously, the [rational-basis] 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" (citing *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938))). It would seem that Respondent's reliance on *Lewis*-type rationality is what needs to be interred. *Cf. Ezell v. City of Chicago*, 651 F.3d 684,

708 (7th Cir. 2011) (applying even more than intermediate scrutiny to Chicago's firing-range ban). But in any event, given the "morass" of conflicting lower court opinion on the subject, certiorari is certainly warranted.

III. Whether the Court Below Applied the Correct Standard of Review to Petitioner's Equal Protection Claim is Worthy of Certiorari.

With respect to Petitioner's Equal Protection and standard of review argument, Respondent contends that because Petitioner and the dissent below argued that Section 12021(c) should fail even rational basis review, granting certiorari would serve no purpose "beyond mere error correction." BIO at 19. But Petitioner's contention that California's asserted interests are weak does not render moot his related contention that the appellate court proximately caused him injury by applying the wrong standard of review. And because, as this Court noted in *Heller*, "almost all laws" survive rational basis review, the appellate court's decision to apply the wrong standard of review was almost certainly outcome determinative.

Moreover, Respondent's assertion that reviewing Petitioner's claim under rational basis was essentially harmless error because *Lewis* commands the same result is baseless. Aside from the reasons already provided as to why *Lewis* is not authoritative here, in the Equal Protection context it is even less so. Respondent itself describes *Lewis* as upholding a firearm prohibition that includes "*all* felons." BIO at 19 (emphasis added). But the law Petitioner challenges here treats misdemeanants differently, prohibiting some while not others from firearm possession, even

if convicted of essentially identical crimes. The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (citation omitted).

Also baseless is Respondent's characterization of *Heller*'s footnote 27 as only proscribing rational basis review for laws like those in *Heller* that "fail any means-end scrutiny." It states, in relevant part, that rational basis "could not be used to *evaluate* the extent to which a legislature may *regulate* a specific, enumerated right." *Heller*, 554 U.S. at 629 n.27 (emphasis added). "Evaluating regulations" is not necessary for striking down patent bans on a right as this Court did in *Heller*.

Furthermore, disregarding that Petitioner's conviction under 12021(c)(1) puts him in a worse position than Mr. Heller, for rational basis to apply here the Second Amendment would also have to be construed as protecting merely "a second-class right," undeserving of the protections other fundamental rights receive under Equal Protection (*Clark v. Jeter*, 486 U.S. 456, 461 (1988) (holding "classifications affecting fundamental rights, are given the most exacting scrutiny"));[3] a notion this Court has expressly rejected. *McDonald*, 130 S.Ct. at 3044.

But whatever standard of review this Court ultimately determines is appropriate, this case provides a clear opportunity for addressing this fundamentally important open issue.

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[3] *See also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985); *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966); *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969).

CONCLUSION

For the reasons stated above and previously, Petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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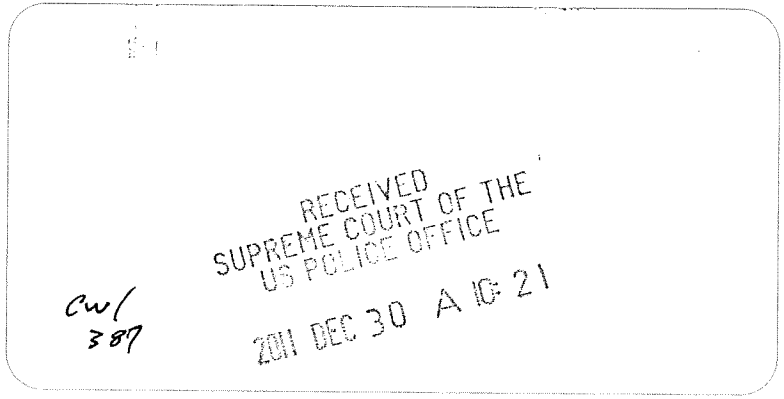
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