No. 14-704

In The Supreme Court of the United States

ESPANOLA JACKSON, *et al.*,

Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

The San Francisco Police Code allows individuals to keep and use handguns for self-defense inside the home, but requires individuals to store handguns in a lockbox or secured with a trigger lock when handguns are not carried on the person of an adult. Petitioners unsuccessfully sought a preliminary injunction to enjoin enforcement of this law. The question presented is:

Whether the district court abused its discretion by finding that petitioners were unlikely to succeed on the merits of their claim that San Francisco's storage requirement violates the Second Amendment in light of its finding that the ordinance imposes an insubstantial burden on the right to keep and bear arms.

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BRIEF IN OPPOSITION

Petitioners seek to enjoin a San Francisco ordinance that requires handguns kept in the home to be stored locked when not carried on the person of an adult. Pet. App. 50-51. The ordinance does not require that gun owners keep their handguns unloaded, and it places no limits on the manner of keeping long guns. In opposition to petitioners' motion for a preliminary injunction, respondents submitted evidence that handguns stored in modern lockboxes can quickly and easily be retrieved in the event of a self-defense emergency; that the simple measure of storing firearms locked reduces the risks of suicide and unintentional shootings, particularly among children and teens; and that measures making guns harder to steal can reduce gun thefts, a significant source of guns used in subsequent crimes. The district court denied petitioners' motion for a preliminary injunction. In a unanimous opinion by Judge Ikuta, the Ninth Circuit Court of Appeals found no abuse of discretion by the district court. The circuit court held that although the ordinance imposed some burden on petitioners' Second Amendment rights, San Francisco's evidence supported the conclusion that the burden was insubstantial. Pet. App. 14-17. Moreover, San Francisco showed that the ordinance was reasonably likely to advance its important interests in public safety. *Id.* at 18-21.

The court's interlocutory decision does not warrant further review. Judge Ikuta's opinion was consistent with *District of Columbia v. Heller*, which

noted that nothing in its analysis "suggest[s] the invalidity of laws regulating the storage of firearms to prevent accidents," 554 U.S. 570, 632 (2008). Petitioners attempt to equate San Francisco's storage ordinance – which allows gun owners an unfettered right to carry guns in the home – with the absolute trigger-lock requirement that this Court invalidated in *Heller*. But the court of appeals rightly relied on a critical difference between the two laws: the ordinance invalidated in *Heller* had no self-defense exception, while San Francisco's storage ordinance does not need one, because it allows gun owners to carry their guns for any purpose. Pet. App. 15.

The petition should be denied for the further reason that there is no division among the circuits or the state and federal courts concerning the constitutionality of storage laws like San Francisco's. Petitioners do not even argue there is a conflict in these cases, but nonetheless warn that the appeals court "crossed the Rubicon," and that this Court must grant review to forestall a "disturbing trend" of cases where lower courts have upheld *other kinds of gun laws*, such as those restricting public carrying or gun purchases by people under age 21. Pet. 12, 18-21, 26. But petitioners never explain why this case presents a suitable vehicle for addressing decisions about different laws.

Finally, petitioners argue that the Court should summarily reverse the decision of the court of appeals in light of *Heller*. But, as just noted, *Heller* addressed a law that effectively prohibited the use of firearms in

the home for self-defense, a far cry from San Francisco's ordinance regulating only the manner of storing guns and not their use. And even if there were a conflict between *Heller* and the decision below, summary reversal would not be appropriate here. Several jurisdictions have storage laws similar to San Francisco's, and a great many more have laws that treat locked storage as a safe harbor from criminal liability where a child foreseeably gains unauthorized access to a gun. Summarily striking down San Francisco's law compelling locked storage on a facial challenge would likely invalidate storage laws in other jurisdictions, and could, at a minimum, raise doubts about the validity of state laws that require locked storage to avoid criminal liability in some circumstances. Such a result should come about only after the benefit of full briefing and argument.

OPINIONS BELOW

The order of the court of appeals denying rehearing en banc (Pet. App. 29-30) is unpublished. The opinion of the court of appeals (Pet. App. 1-28) is reported at 746 F.3d 953. The order of the district court denying petitioners' motion for a preliminary injunction (Pet. App. 31-42) is unpublished.

JURISDICTION

The court of appeals entered judgment on March 25, 2014. That court denied a petition for rehearing en banc on July 17, 2014. Justice Kennedy extended the time for filing a petition for a writ of certiorari to December 12, 2014, and the petition was filed on that date. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

1. San Francisco enacted Police Code § 4512 in 2007. In relevant part, that ordinance bars any person other than a peace officer from "keep[ing] a handgun within a residence owned or controlled by that person unless the handgun is stored in a locked container or disabled with a trigger lock" or unless the handgun "is carried on the person of an individual over the age of 18." Pet. App. 50-51. The ordinance does not require handguns to be unloaded at any time, and it does not apply to long guns or rifles.

In extensive findings, San Francisco has explained that its storage ordinance was intended to reduce intentional and accidental handgun-related injuries. Pet. App. 44-48. Each year in the United States, there are approximately 30,000 firearm deaths, and firearm injuries are the third leading cause of injury in San Francisco. *Id.* at 44-45. San Francisco found that there is wide consensus among medical professionals and law-enforcement officers

that using trigger locks and lockboxes can dramatically reduce firearm-related injuries. *Id.* at 48. San Francisco also found that lockboxes and trigger locks can easily be used without meaningfully diminishing gun owners' ability to use their weapons in self-defense. *Id.* at 49. Modern lockboxes, which are operated by pressing numbers on a keypad or by scanning a fingerprint, can be opened in seconds, and can enable guns to be safely stored in convenient locations, like a bedside table or a kitchen counter. *Id.*

2. Petitioners are the National Rifle Association, the San Francisco Veteran Police Officers Association, and six San Francisco residents who wish to store their handguns outside a locked container and without a trigger lock. Pet. 5. On May 15, 2009, petitioners filed suit in the United States District Court for the Northern District of California. Petitioners' complaint alleged that San Francisco's storage ordinance operated as an impermissible restriction on their Second Amendment right to bear arms.[1] Pet. App. 3. More than three years after filing their complaint, petitioners sought a preliminary injunction. *Id*.

[1] At the district court, petitioners also challenged an ordinance regulating the sale of particularly dangerous ammunition, S.F. Police Code § 613.10(g). Although the district court and court of appeals also decided that issue against them, petitioners do not challenge those rulings.

In opposition to the motion, respondents offered evidence in support of San Francisco's legislative findings, including expert testimony demonstrating that the locked storage of firearms reduces the risks of gun suicides, homicides, and accidents. Ct. App. Dkt. 6-2 at 79-81. Respondents also offered evidence substantiating San Francisco's findings that guns stored in modern lockboxes can easily be accessed. Ct. App. Dkt. 6-2 at 91–93.[2] For the first time on reply, petitioners tried to substantiate their factual claim that handguns are not readily accessible for use in an emergency when they are locked, but their evidence was largely limited to anecdotal claims that lockboxes sometimes fail, that some lockboxes are difficult to use under stress, and that it might be hard to remove a gun from a lockbox if an attacker were only a short distance away. Ct. App. Dkt. 6-2 at 58-59.

3. The district court denied petitioners' motion for a preliminary injunction, finding that they had failed to show a likelihood of success on the merits of their claims. Pet. App. 32. In particular, the court noted that petitioners had made an insufficient "showing as to the severity of the burdens imposed" by San Francisco's storage law. *Id.* at 40. It stated

[2] Respondents' evidence included results of a test with a biometric gun lockbox that opens instantly when the owner's fingerprints touch a scanner. Ct. App. Dkt. 6-2 at 58-59. The operation of that very lockbox is demonstrated in a video available at http://www.youtube.com/watch?v=3sR9r_4VjmE (last accessed Mar. 10, 2015). A demonstration of the fast and simple fingerprint scan access process begins at minute 6 of the video.

that they "have offered only the *possibility* that in a very narrow range of circumstances, the delay inherent in rendering a handgun operable or retrieving it from a locked container *theoretically* could impair" the ability to use it in self defense. *Id.* at 41 (emphasis added). Accordingly, petitioners failed to meet their burden at the preliminary injunction stage of showing their entitlement to relief. The court also concluded that the storage ordinance could not contravene *Heller* given that the ordinance "provides exactly the relief the *Heller* plaintiff sought and obtained, or even more, in that it does not require an explicit need for self-defense" for San Franciscans to unlock and use their guns. Pet. App. 34 n.2.

4. The court of appeals unanimously affirmed in an opinion by Judge Ikuta. Pet. App. 1-28. That opinion noted that the Ninth Circuit, "[l]ike the majority of [its] sister circuits, [has] discerned from *Heller*'s approach a two-step Second Amendment inquiry." *Id*. at 7. Under this approach, federal courts first "ask[ ] whether the challenged law burdens conduct protected by the Second Amendment." *Id.* If the law does burden such conduct, the court then determines how exactingly it should be scrutinized, with the greatest scrutiny reserved for laws that substantially burden Second Amendment rights. *Id.*; *see also id.* (explaining that this two-part inquiry is necessary because *Heller* itself "did not specify the appropriate level of scrutiny for Second Amendment claims").

Applying this test, the court concluded that because San Francisco's storage ordinance regulates handguns within the home possessed by lawful gun owners, it burdens conduct protected by the Second Amendment. Pet. App. 12. But the court further determined that petitioners had not shown the burden was substantial because the ordinance permits San Franciscans to carry their guns on the person at all times. *Id.* at 15. The court also credited San Francisco's evidence that modern gun safes can be opened quickly during emergencies. *Id.*

In light of the limited and indirect burden imposed by the ordinance, the court of appeals held that the proper standard for reviewing the regulation was intermediate scrutiny. Pet. App. 17. When applying intermediate scrutiny, federal courts consider whether "(1) the government's stated objective is significant, substantial, or important" and (2) whether there is "a reasonable fit between the challenged regulation and the asserted objective." *Id.* at 18. The court found that it is "self-evident" that "public safety is an important government interest." *Id.* (citation omitted). And on the question of fit, the court relied on San Francisco's "ample evidence that storing handguns in a locked container reduces the risk of both accidental and intentional handgun-related deaths, including suicide" to conclude that the regulation was constitutional. *Id.* at 19-20.

5. The court of appeals denied petitions for rehearing and rehearing en banc. Pet. App. 29-30. No

judge of the circuit court requested a vote on the petition for rehearing en banc. *Id.* at 30.

REASONS FOR DENYING THE PETITION

The petition does not present a question that warrants this Court's review. The decision below is faithful to *Heller* and presents no conflict with decisions of other circuits or the state courts. Nor is summary reversal warranted. Even if petitioners were correct that this case is in conflict with *Heller*, a holding to that effect would have consequences significant enough to warrant full briefing and argument.

I. The Decision Below Is Consistent With *Heller*.

Petitioners contend that, because this Court invalidated an absolute trigger-lock requirement in *Heller*, 554 U.S. at 634, it must also invalidate San Francisco's storage ordinance. Pet. 13-18. This argument sweeps aside the important distinctions between the District's absolute trigger-lock requirement and San Francisco's storage law.

The District of Columbia ordinance at issue in *Heller* "totally ban[ned] handgun possession in the home." 554 U.S. at 628. The ordinance also required "that firearms in the home be rendered and kept inoperable *at all times*," even during emergencies. *Id.* at 630 (emphasis added). Although the Court's opinion

in *Heller* was lengthy, it devoted only a single paragraph to the validity of the District's trigger-lock requirement. What petitioners characterize as "crystal clear" evidence of the impermissibility of San Francisco's ordinance, Pet. 10, reads in its entirety: "We must also address the District's requirement (as applied to respondent's handgun) that firearms in the home be rendered and kept inoperable at all times. This makes it *impossible* for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional." *Heller*, 554 U.S. at 630 (emphasis added).

In contrast, San Francisco's ordinance allows citizens to carry loaded and unlocked handguns on their person at any time, including in a holster. It also allows citizens to store loaded handguns within an easily opened lockbox rather than "disassembled or bound by a trigger lock at all times." *Heller*, 554 U.S. at 628. San Francisco's ordinance does not regulate the use or storage of long guns. Perhaps most importantly, San Francisco's storage law allows handguns to be used for self-defense, in contrast to the District's absolute inoperability requirement, which contained no exception allowing a gun to be assembled or untethered from a trigger lock for self-defense uses. *Id.* at 630 (holding that any self-defense exception was "precluded by the unequivocal text" of the District's ordinance). Moreover, the district court found, and the court of appeals agreed, that in light of San Francisco's showing that modern lockboxes allow ready access to handguns, the ordinance did

not impair the ability of citizens to use those guns for self-defense.

Thus, petitioners are flatly wrong when they suggest that San Francisco's ordinance "has the very same forbidden effect" as the District's absolute ban. Pet. 10. On the contrary, *Heller* itself disavows "the invalidity of laws regulating the storage of firearms to prevent accidents" because such laws "do not remotely burden the right of self-defense as much as an absolute ban on handguns." 554 U.S. at 632. The circuit court's determination that the San Francisco law imposes only an insubstantial burden on the Second Amendment right, and is therefore a valid storage law, is consistent with *Heller*'s reasoning and its conclusion.

II. The Decision Below Is Consistent With The Opinions Of Other Lower Courts.

1. Petitioners do not contend – nor could they – that the Ninth Circuit's decision conflicts with a decision of any other court of appeals. Pet. 21-26. In fact, other than the decisions here, no federal court has considered a Second Amendment challenge to a storage ordinance since *Heller*. Decisions in the state courts, however, are consistent with the decision here, upholding laws requiring locked storage either on their face or as applied. *See Commonwealth v. McGowan*, 982 N.E.2d 495, 502-03 (Mass. 2013) (holding that Massachusetts's storage law falls outside

the scope of the Second Amendment because it imposes a minimal burden and prevents unauthorized users from accessing firearms); *Commonwealth v. Reyes*, 982 N.E.2d 504, 513-14 (Mass. 2013) (Massachusetts storage statute is constitutional as to firearms left in cars); *Commonwealth v. Patterson*, 946 N.E.2d 130, 133 (Mass. App. Ct. 2011) (storage statute constitutional as applied to a defendant in his home); *Tessler v. City of New York*, 952 N.Y.S.2d 703, 716 (N.Y. Sup. Ct. 2012) (New York City locked-storage ordinance was constitutional because a gun owner could easily unlock his handgun for "immediate use").

2. The Ninth Circuit's analytical approach in this case is also consistent with the framework adopted by most courts of appeals considering Second Amendment cases since *Heller*. The court below employed the "two-step" approach to Second Amendment cases – an approach that the petitioners concede is "prevailing" among the lower courts. Pet. App. 7. Under this "two-step" approach, courts first ask "whether the challenged law burdens conduct protected by the Second Amendment"; if it does, the court then determines the "appropriate level of scrutiny" and applies that scrutiny to the facts of the instant case. *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013), *cert. denied*, 135 S. Ct. 187 (2014); *accord, e.g., United States v. Greeno*, 679 F.3d 510, 518 (6th Cir.), *cert. denied*, 133 S. Ct. 375 (2012); *Heller v. District of Columbia*, 670 F.3d 1244, 1252 (D.C. Cir. 2011); *Ezell v. City of Chicago*, 651 F.3d

684, 701-04 (7th Cir. 2011); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 958 (2011); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *United States v. Reese*, 627 F.3d 792, 800-05 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 2476 (2011).

3. Unable to identify any division of authority, petitioners instead seek review in order to remedy what they perceive as the lower courts' "resistance" to *Heller* and *McDonald v. City of Chicago*, 561 U.S. 742 (2010). Pet. 18.[3] But petitioners' general disagreement with the development of Second Amendment jurisprudence is not a reason to grant review in this case.

Petitioners contend that with the prevailing two-step approach, "courts have managed to make serious mischief" by characterizing protected rights as outside the core of the Second Amendment's protections, and then subjecting restrictions on those rights to deferential scrutiny. Pet. 19-22. But here, their examples

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[3] This is a familiar refrain from petitions the Court has recently denied. *See, e.g.,* Cert. Petn., *Drake v. Jerejian*, No. 13-827, 2014 WL 117970, at *3 (*certiorari* warranted in light of "the lower courts' massive resistance to *Heller*"), *cert. denied*, 134 S. Ct. 2134 (2014); Cert. Petn., *Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, No. 13-137, 2013 WL 8147798, at *1, *18 (noting lower courts' purported "stubborn" and "massive" resistance to *Heller*), *cert. denied*, 134 S. Ct. 1364 (2014); Nat'l Rifle Ass'n Br., *Woollard v. Gallagher,* No. 13-42, 2013 WL 4093292, at *3 (citing the lower courts' purported "massive resistance" to *Heller*), *cert. denied*, 134 S. Ct. 422 (2013).

are a case upholding restrictions on handgun purchases by people under age 21, *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 195 (5th Cir. 2012), *cert. denied*, 134 S. Ct. 1364 (2014); cases concerning the public carrying of firearms, *see Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013), *cert. denied sub nom., Drake v. Jerejian*, 134 S. Ct. 2134 (2014); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir.), *cert. denied*, 134 S. Ct. 422 (2013); *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1806 (2013), and a case concerning whether the right to possess a handgun in the home applies with equal force to a summer home, *Osterweil v. Bartlett*, 706 F.3d 139 (2d Cir. 2013). The present case does not present any occasion to decide whether these very different restrictions impinge on core Second Amendment rights, nor does it afford the Court the opportunity to revisit the careful historical analyses conducted by the courts that already decided those cases.

Petitioners also contend that lower courts are denigrating the Second Amendment by applying a deferential form of intermediate scrutiny to restrictions on the right to bear arms. They assert that, "in every instance in which courts have reached the point of selecting a level of scrutiny under the post-*Heller* two-step, the inevitable result has been to reject the Second Amendment claim." Pet. 11. This is simply untrue. *See, e.g.*, *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 775 F.3d 308, 344 (6th Cir. 2014) (successful

challenge to 18 U.S.C. § 922(g)(4)'s prohibition on the possession of firearms by a person who has been committed to a mental institution); *Ezell v. City of Chicago*, 651 F.3d 684, 690-91 (7th Cir. 2011) (enjoining an ordinance that banned all firing ranges in Chicago but required individuals to undergo range training in order to lawfully possess a firearm). In any event, petitioners' claim that the circuit court here "deferred entirely to the city's post-hoc findings," Pet. 9 – findings that San Francisco backed with expert evidence that petitioners left unanswered in the record below – is simply a plea for error-correction that does not merit this Court's review. That is especially true in the procedural posture of this case, where the district court denied a preliminary injunction on the factual record before it, and its decision is subject to review for abuse of discretion. *See, e.g.*, *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32 (1975).

III. Summary Reversal Is Unwarranted.

Petitioners also contend that the Court should summarily reverse the lower courts' decisions here. Their argument is based exclusively on their claim that San Francisco's ordinance, requiring locked storage only of handguns not carried on the person, is functionally the same as an ordinance requiring *all* guns to be disassembled or locked with trigger locks at *all* times. *See supra* Section I. If these two ordinances are in fact the same, it is a similarity that eluded not only the district court and the three judges

on the panel issuing the Ninth Circuit's decision, but also the active judges of that court, none of whom called for a vote on petitioners' request for rehearing en banc. Pet. App. 29-30. This is not an error "so apparent as to warrant the bitter medicine of summary reversal." *Spears v. United States*, 555 U.S. 261, 268 (2009) (Roberts, C.J., dissenting).

Moreover, reversal of the decisions below would have sufficiently significant consequences for laws in other jurisdictions that full briefing and argument is appropriate here if the Court views this case as meriting further review. Both the State of Massachusetts and New York City require locked storage of all guns, not just handguns, and apply their restrictions inside and outside the home. Mass. Gen. Laws Ann. ch. 140, § 131L(a); N.Y.C. Admin. Code § 10-312(a). These laws have exceptions only when a gun is carried or in the immediate control of the owner – a requirement that in Massachusetts at least is equivalent to San Francisco's carry exception, in light of the restrictive construction its courts have placed on that exception. *See Commonwealth v. Cantelli*, 982 N.E.2d 52, 65 (Mass. App. Ct. 2013); *Patterson*, 946 N.E.2d at 133. Any decision invalidating San Francisco's law would almost certainly invalidate these laws.

Furthermore, a number of States have storage laws that, although they vary in their particulars, generally create criminal liability where a child can or does foreseeably gain access to a firearm, with a safe harbor where the defendant stored the firearm locked. *See* Conn. Gen. Stat. Ann. § 29-37i; Del. Code

Ann. tit. 11, § 1456; Fla. Stat. Ann. § 790.174(a); Haw. Rev. Stat. § 134-10.5; 720 Ill. Comp. Stat. 5/24-9(a); Iowa Code § 724.22(7); N.H. Rev. Stat. § 650-C:1; N.J. Stat. Ann. § 2C:58-15(a); R.I. Gen. L. § 11-47-60.1(b); Tex. Penal Code Ann. § 46.13; Wis. Stat. Ann. § 948.55. These statutes differ from San Francisco's ordinance, of course, in that they impose liability only where a gun is stored unlocked and a child obtains it. But there is no evidence before this Court to show whether or not the individual petitioners reside with children who could foreseeably gain access to the firearms they would like to store unlocked, and the injunction they seek would prohibit San Francisco from enforcing its ordinance against anyone. For this Court to invalidate San Francisco's ordinance on its face would amount to a holding that "no set of circumstances exists under which [a locked storage requirement] would be valid, or that the [ordinance] lacks any plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (internal quotation marks and citations omitted). That, in turn, would call into serious question the validity of locked storage laws that apply in narrower circumstances, such as where a child could foreseeably gain access to a gun. The prospect of a decision that could unsettle so many state laws indicates that summary reversal here would be precipitous.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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