

CIVIL NO. 07-15763

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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RUSSELL ALLEN NORDYKE, et al.,

*Plaintiffs-Appellants,*

vs.

MARY V. KING, et al.,

*Defendants-Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
THE HONORABLE MARTIN J. JENKINS, JUDGE PRESIDING  
(CASE No. CV-99-4389-MJJ)

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**BRIEF OF *AMICUS CURIAE* BRADY CENTER TO PREVENT  
GUN VIOLENCE IN SUPPORT OF DEFENDANTS-APPELLEES**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* the Brady Center to Prevent Gun Violence states that it is a non-profit organization, has no parent companies, and has not issued shares of stock.

DATED this 18th day of August, 2010.

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## STATEMENT OF INTEREST<sup>1</sup>

The Brady Center to Prevent Gun Violence is a non-profit organization dedicated to reducing gun violence through education, research, and legal advocacy. The Brady Center has a substantial interest in ensuring that gun laws are properly interpreted to allow strong government action to prevent gun violence. Through its Legal Action Project, the Brady Center has filed numerous briefs *amicus curiae* in cases relating to gun violence prevention and firearms laws, including in the recent U.S. Supreme Court cases *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), *United States v. Hayes*, 129 S. Ct. 1079 (2009), and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

## STATEMENT OF ISSUE

After the Supreme Court decision in *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3047 (2010), what standard of review should this Court apply to assess Second Amendment challenges?

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<sup>1</sup> *Amicus Curiae* The Brady Center to Prevent Gun Violence files this brief with the consent of the parties pursuant to Federal Rule of Appellate Procedure 29(a).

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## ARGUMENT

### I. INTRODUCTION

In determining what standard of review to apply in Second Amendment cases, many courts have limited their inquiry to the three choices offered by First Amendment jurisprudence.<sup>2</sup> As *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (“Heller”), rejected “rational basis” explicitly, and “strict scrutiny” implicitly,<sup>3</sup> courts have tended to settle on “intermediate scrutiny.”<sup>4</sup> The Seventh Circuit avoided “the ‘levels of scrutiny’ quagmire” by recognizing that “preventing armed mayhem, is an important governmental objective,” and then finding that “[b]oth logic and data establish a substantial relation between [the law] and this objective.” *United States v. Skoien*, No. 08-3770, 2010 WL 2735747, \*3 (7th Cir. July 13, 2010).<sup>5</sup>

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<sup>2</sup> See, e.g., *United States v. Marzzarella*, No. 09-3185, 2010 WL 2947233 (3d Cir. July 29, 2010).

<sup>3</sup> See, e.g., *Heller v. District of Columbia*, 698 F. Supp 2d 179, 187 (D.D.C. 2010) (“strict scrutiny standard of review would not square with the [*Heller*] majority’s references to ‘presumptively lawful regulatory measures’...”)

<sup>4</sup> See, e.g., *Marzzarella*, *supra* n.1; *United States v. Miller*, 604 F. Supp. 2d 1162 (W. D. Tenn. 2009); *United States v. Schultz*, No. 1:08-CR-75-TS, 2009 WL 35225 (N.D. Ind. January 5, 2009); *United States v. Radencich*, No. 3:08-CR-00048, 2009 WL 127648 (N.D. Ind. January 20, 2009); *United States v. Walker*, No. 3:09CR366-HEH, 2010 WL 1640340 (E.D.Va. July 28, 2010); see also *United States v. Tooley*, No. 3:09-00194, 2010 WL 2842915 (S.D.W.Va. May 4, 2010) (intermediate scrutiny continues to apply after *McDonald*); but see *United States v. Engstrum*, 609 F.Supp.2d 1227 (D.Utah 2009) (applying strict scrutiny).

<sup>5</sup> Other courts have found it unnecessary to apply any level of scrutiny by relying on *Heller*’s approval of certain types of gun laws. See, e.g., *United States v. McCane*, 573 F.3d 1037, 1050 (10th Cir. 2009).

The First Amendment analogy may seem obvious, but it is not apt. The exercise of Second Amendment rights creates unique risks that threaten the safety of the community, and are far more lethal than even the most dangerous speech, or the exercise of any other Constitutional right. While “words can never hurt me,” guns are designed to inflict grievous injury and death – and often do. To protect the public from the risks of gun violence, states must be allowed wide latitude in exercising their police power authority, a core responsibility of government. Otherwise, the exercise of Second Amendment rights could infringe on the most fundamental right of others – the preservation of life.

More relevant than cases construing regulations of speech are decisions considering the regulation of arms – the question facing this Court. While an individual right to keep and bear arms is newly-recognized under the Second Amendment, state courts have weighed the right, recognized in state constitutions, against the need to protect the public from gun violence for well over a century. “[T]hese courts have uniformly upheld the police power of the state through its legislature to impose reasonable regulatory control over the state constitutional right to bear arms in order to promote the safety and welfare of its citizens.” *State v. Comeau*, 448 N.W.2d 595, 597 (Neb. 1989) (citations omitted). More demanding than “rational basis,” but more deferential than “intermediate scrutiny,” this “reasonable-regulation” test protects gun rights without unduly restricting the

state from protecting the public from gun violence.<sup>6</sup> Such a test is best-suited to the Second Amendment.

## **II. *HELLER* AND *MCDONALD* SUGGEST A STANDARD OF REVIEW DEFERENTIAL TO REASONABLE REGULATION**

*Heller* and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (“*McDonald*”), offer a framework for determining a standard of review. First, the Second Amendment right recognized by the Court was limited. Rather than find a broad right to use arms, the Court recognized “the right of law-abiding, responsible citizens to use arms in defense of hearth and home.” *Heller*, 128 S. Ct. at 2821. The only “policy choice[]” taken “off the table” by *Heller* was a ban on guns in the home. *Id.* at 2822. An entire section of the majority opinion, Section III, explains limitations of the right, restricting its scope at inception. *Id.* at 2816-2817. The Court emphasized that the right “is not unlimited,” and that it has been recognized as “not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” *Id.* at 2816. *Heller* acknowledged that “gun violence is a serious problem,” and that broad categories of firearms laws remain presumptively lawful. *Id.* at 2822, 2816-2817.

*McDonald* again put to rest “doomsday proclamations” by emphasizing that

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<sup>6</sup> Whether resort to any standard of review is needed here is far from clear, as “the Ordinance does not meaningfully impede the ability of individuals to defend themselves in their homes with usable firearms, the core of the right as *Heller* analyzed it.” *Nordyke v. King*, 563 F.3d 439, 460 (9th Cir. 2009) (vacated July 12, 2010).

“incorporation does not imperil every law regulating firearms.” *McDonald*, 130 S. Ct. at 3047. Making clear that the decision to incorporate the right did not broaden it, *McDonald* reiterated *Heller*’s limitations, and stated, “We repeat those assurances here.” *Id.* “Assurances” from the highest Court in the land, stated twice in two years, are not “dicta” that can be disregarded.<sup>7</sup>

Second, *Heller* “implicitly, and appropriately, reject[ed]” a strict scrutiny standard. *Heller*, 128 S. Ct. at 2851 (Breyer, J., dissenting) (“Indeed, adoption of a true strict-scrutiny standard for evaluating gun regulations would be impossible”). Rather than state that existing gun laws would be upheld as sufficiently necessary (suggesting strict or intermediate scrutiny), the Court deemed such laws “presumptively lawful.”<sup>8</sup> Under strict scrutiny, however, their lawfulness would

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<sup>7</sup>See *United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010) (*Heller*’s “presumptively lawful” language is an “integral” limitation to the holding); *United States v. Rozier*, 598 F.3d 768, 771 n.6 (11th Cir. 2010); but see *United States v. Scroggins*, 599 F.3d 433, 451 (5th Cir. 2010). Further, this Court’s “precedent requires that [it] give great weight to dicta of the Supreme Court.” *Coeur D’Alene Tribe of Idaho v. Hammond*, 384 F.3d 674, 683 (9th Cir. 2004); see also *McCalla v. Royal Maccabees Life Ins. Co.*, 369 F.3d 1128, 1132 (9th Cir. 2004) (“We do not treat considered dicta from the Supreme Court lightly. Rather, we treat such dicta with due deference, as it serves as a prophecy of what that Court might hold.”) (internal citations and quotation marks omitted).

<sup>8</sup> The fact that Constitutional rights are deemed “fundamental” for incorporation purposes certainly does not require strict scrutiny. In addition to the First Amendment cases discussed *infra*, see *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (Takings Clause subjected to balancing test); *Burdick v. Takushi*, 504 U.S. 428, 432 (1992) (rejecting argument that “any burden upon the right to vote must be subject to strict scrutiny.”)

not be presumed absent some showing of need and/or fit.

*Heller* and *McDonald* thus leave lower courts with the task of determining an appropriate standard of review, less rigorous than strict scrutiny, that continues to “presume” the lawfulness of a wide gamut of gun laws, while allowing law-abiding, responsible citizens to have guns in the home for self-defense.

### **III. UNLIKE FIRST AMENDMENT RIGHTS, THE EXERCISE OF SECOND AMENDMENT RIGHTS CREATES GRAVE RISKS OF DEATH AND INJURY**

While the exercise of First Amendment rights rarely pose grave risks to others, when it does – when Walter Chaplinsky used “fighting words,” or religions engaged in snake handling or drinking poison, for example – the Supreme Court has held such activity not constitutionally protected.<sup>9</sup> The regulation of *protected* First Amendment activity has often been upheld under intermediate scrutiny, which permits a reasonable restriction that “promotes a substantial government interest that would be achieved less effectively absent the regulation” and leaves open alternative channels for communication; yet does not demand the least

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<sup>9</sup> See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); *McDaniel v. Paty*, 435 U.S. 618, 628 n.8 (1978) (discussing religion cases) (“Thus, the courts have sustained government prohibitions on handling venomous snakes or drinking poison, even as part of a religious ceremony....”) (citing *State ex rel. Swann v. Pack*, 527 S.W.2d 99 (Tenn. 1975)); See also *Cantwell v. Connecticut*, 310 U.S. 296, 303-304, 308 (1940) (although the Free Exercise Clause protects “the freedom to believe and freedom to act,” “[t]he first is absolute but ... the second cannot be”); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam).



restrictive means to achieve the government's goals.<sup>10</sup> Intermediate scrutiny has been applied to uphold restrictions on speaking to further the government's interests in "protecting its citizens from unwelcome noise,"<sup>11</sup> "avoiding congestion and maintaining [] orderly movement,"<sup>12</sup> maintaining public parks "in an attractive and intact condition,"<sup>13</sup> and preventing "secondary effects" of particular kinds of speech, and "preserv[ing] the quality of urban life."<sup>14</sup> *See also Nordyke*, 563 F.3d at 461 (applying intermediate scrutiny to Plaintiffs' First Amendment claim).

In contrast to these important, but not life and death matters, guns in America kill more than 30,000 people in homicides, suicides, and unintentional shootings nationwide each year, injure 70,000 more,<sup>15</sup> and result in more than 340,000 incidents of firearm use in non-fatal crimes.<sup>16</sup> Gun violence costs Americans about \$100 billion annually.<sup>17</sup> These costs would be higher if not for reasonable firearms regulations—including laws of the type deemed "presumptively lawful" in *Heller*, 128 S. Ct. at 2816-2817 & n.26.

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<sup>10</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 799 (1989).

<sup>11</sup> *Id.* at 796 (citation omitted).

<sup>12</sup> *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 652 (1981).

<sup>13</sup> *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 296 (1984).

<sup>14</sup> *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48-50 (1986).

<sup>15</sup> Centers for Disease Control and Prevention, available at: [www.cdc.gov/ncipc/wisqars/](http://www.cdc.gov/ncipc/wisqars/) (2006 data).

<sup>16</sup> Bureau of Justice Statistics, *Criminal Victimization, 2008*, Text Table 3, Sept. 2009, NCJ 227777, available at: <http://www.ojp.usdoj.gov/bjs/pub/pdf/cv08.pdf>.

<sup>17</sup> *See* PHILLIP J. COOK & JENS LUDWICK, GUN VIOLENCE: THE REAL COSTS 117 (2000).



Firearm ownership poses substantial risks to the owner, the owner's family, and the community. Because firearms are much more readily available in the United States, our nation's homicide rate is several times greater than in other western democracies, even though our overall crime rate is comparable.<sup>18</sup> "[A]n increase in gun prevalence causes an *intensification* of criminal violence—a shift toward greater lethality, and hence greater harm to the community."<sup>19</sup> This "lethality effect" frequently transforms what would be minor crimes or arguments into confrontations more likely to cause severe injury or death. As a result, as the rate of gun ownership in a community increases, the homicide rate increases.<sup>20</sup>

The risk of homicide in the home is three times higher in homes with firearms.<sup>21</sup> Abused women face a six times higher risk of homicide when living in homes with guns.<sup>22</sup> Guns, often improperly stored,<sup>23</sup> result in an average of 16,340

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<sup>18</sup> Franklin E. Zimring & Gordon Hawkins, *Crime is Not the Problem: Lethal Violence in America* (1997) *reprinted in* CRIME, INEQUALITY AND THE STATE at 125 (Mary E. Vogel ed., 2007).

<sup>19</sup> Philip J. Cook & Jens Ludwig, *The Social Cost of Gun Ownership*, 90 J. PUB. ECON. 379, 387 (2005).

<sup>20</sup> Mark Duggan, *More Guns, More Crime*, 109 J. POL. ECON. 1086 (2001). States with the highest levels of gun ownership have 114% higher firearm homicide rates and 60% higher overall homicide rates than states with the lowest levels of gun ownership. Miller et al., *State-level homicide victimization rates in the US in relation to survey measures of household firearm ownership, 2001-2003*, 64 SOC. SCI. & MED. 656, 659-660 (2007).

<sup>21</sup> Arthur L. Kellermann et al., *Gun Ownership As A Risk Factor For Homicide In the Home*, 329 NEW ENG. J. MED. 1084, 1089 (1993).

<sup>22</sup> Jacquelyn C. Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide*, NAT'L INST. JUST. J., Nov. 2003, at 15-16. *See also United States v.*

unintentional deaths and injuries annually in the U.S.<sup>24</sup> The risk of suicide is three to five times higher in homes with firearms.<sup>25</sup>

Deaths and injuries resulting from easy access to firearms are not offset by a decrease in criminal acts through deterrence or self-defense uses. One study estimated that gun crimes exceed self-defense gun uses by a ratio of between 4 to 1 and 6 to 1.<sup>26</sup> Another study found that “gun possession by urban adults was associated with a significantly increased risk of being shot in an assault,” and “guns did not protect those who possessed them from being shot in an assault.”<sup>27</sup>

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*Hayes*, 129 S. Ct. 1079, 1087 (2009) (“[f]irearms and domestic strife are a potentially deadly combination nationwide.”)

<sup>23</sup> More than 40% of gun-owning households with children store their guns unlocked. Mark A. Schuster et al., *Firearm Storage Patterns in U.S. Homes With Children*, 90 AM. J. PUB. HEALTH 588, 590 (2000).

<sup>24</sup> Centers for Disease Control and Prevention (“CDC”), available at: <http://webappa.cdc.gov/sasweb/ncipc/leadcaus10.html> (2006 data).

<sup>25</sup> Arthur L. Kellermann et al., *Suicide in the Home in Relation to Gun Ownership*, 327 NEW ENG. J. MED. 467 (1992); Douglas J. Wiebe, *Homicide and Suicide Risks Associated With Firearms in the Home: A National Case-Control Study*, 41 ANNALS INTERNAL MED. 771 (2003).

<sup>26</sup> David Hemenway & Deborah Azrael, *The Relative Frequency of Offensive and Defensive Gun Uses: Results from a National Survey*, 15 VIOLENCE & VICTIMS 257, 269 (2000).

<sup>27</sup> Charles C. Branas et al., *Investigating the Link Between Gun Possession and Gun Assault*, AMER. J. PUB. HEALTH, Vol. 99, No. 11, at 1, 4 (Nov. 2009).

The fact that more than one million Americans have been wounded or killed by gunfire in the last decade alone<sup>28</sup> serves to distinguish the Second Amendment right from those protected by any other constitutional provision.

**IV. GIVEN THE GOVERNMENTAL INTEREST IN PROTECTING THE PUBLIC FROM HARMS ASSOCIATED WITH FIREARMS, DEFERENCE TO LEGISLATIVE JUDGMENTS IS APPROPRIATE**

There is a profound governmental interest in regulating the possession and use of firearms. States have “cardinal civic responsibilities” to protect the health, safety, and welfare of their citizens. *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 342 (2008); *see also Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80, 83 (1946) (“[T]he legislature may choose not to take the chance that human life will be lost...”). States are generally afforded “great latitude” in exercising “police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons . . .” *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (internal quotation marks omitted). Firearm regulations are an essential exercise of those powers, for the “promotion of safety of persons and property is unquestionably at the core of the State’s police power.” *Kelley v. Johnson*, 425 U.S. 238, 247 (1976).

While others may differ on the net risks posed by guns in our society, such disagreement underlines that firearms regulation is best suited for the legislative

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<sup>28</sup> CDC National Center for Injury Prevention and Control, Web-based Injury Statistics Query and Reporting System (2006 (deaths) and 2007 (injuries), most recent year available), available at: [www.cdc.gov/ncipc/wisqars/](http://www.cdc.gov/ncipc/wisqars/). Calculations by Brady Center to Prevent Gun Violence, May 5, 2009.

arena. Legislatures are better situated than courts to make empirical judgments about the need for and efficacy of regulation, even when that regulation affects the exercise of constitutional rights. *See, e.g., Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 402 (2000). Governments “must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.” *Young v. American Mini Theatres, Inc.* 427 U.S. 50, 71 (1976).

In fulfilling their responsibility to protect the public, states have enacted laws to ensure that guns are used responsibly and possessed by responsible, law-abiding persons. These laws have helped reduce the use of guns in crime and saved lives.<sup>29</sup> And solid majorities of Americans support even stronger gun laws.<sup>30</sup>

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<sup>29</sup> *See, e.g.,* D.W. Webster et al., *Relationship Between Licensing, Registration, and Other State Gun Sales Laws and the Source State of Crime Guns*, 7 INJURY PREVENTION 184 (2001); Lisa Hepburn et al., *The Effect of Child Access Prevention Laws on Unintentional Child Firearm Fatalities, 1979-2000*, 61 J. TRAUMA, 423 (2006); D.W. Webster et al., *Effects of State-Level Firearm Seller Accountability Policies on Firearm Trafficking*, 86 J. URBAN HEALTH: BULLETIN OF THE N.Y. ACAD. OF MED. 525 (2009); Douglas Weil & Rebecca Knox, *Effects of Limiting Handgun Purchases on Interstate Transfer of Firearms*, 275 J. AM. MED. ASS'N 1759 (1996).

<sup>30</sup> For example, 87% of Americans support background checks on private sales of guns; 65% support limiting handgun purchases to one per person per month. *See* Greenberg Quinlan Rosner Research & The Tarrance Group, *Americans Support Common Sense Measures to Cut Down on Illegal Guns*, April 10, 2008, App. A. Seventy-nine percent of Americans support requiring a police permit before the purchase of a gun. Tom W. Smith, *Public Attitudes Towards the Regulation of Firearms*, Chicago, IL, National Opinion Research Center, University of Chicago, Mar. 2007, at 1.

The risks posed by invalidating or unduly restricting legislative judgments on firearms regulations is severe. On such life and death issues, courts should assess challenges to firearm regulations under a deferential standard.

**V. ANGLO-AMERICAN JURISPRUDENCE HAS ALWAYS DEFERRED TO STATES' BROAD POWERS TO PROTECT THE PUBLIC BY REGULATING FIREARMS**

The right to bear arms has always been subject to regulation, and courts have consistently deferred to legislative judgments on the propriety of gun laws. This history suggests that the Second Amendment should be understood as allowing for reasonable firearms restrictions.

The antecedent to the Second Amendment, the 1689 English Declaration of Rights, was limited to “subjects which are Protestants,” and then only for “arms for their defense suitable to their conditions and as allowed by law.” *Heller*, 128 S. Ct. at 2798 (quoting 1 *W. & M.*, c. 2, § 7, in 3 Eng. Stat. at Large 441 (1689)). Parliament reserved the power to regulate that right “as allowed by law.”<sup>31</sup> Blackstone confirms similar restrictions.<sup>32</sup>

“[C]olonial and early state governments routinely exercised their police powers to restrict the time, place, and manner in which Americans used their

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<sup>31</sup> See Carl T. Bogus, *The Hidden History of the Second Amendment* 31 U.C. DAVIS L. REV. 309, 383-384 (1998).

<sup>32</sup> 1 *Blackstone's Commentaries on the Laws of England* 140 (the right to possess arms was subject to “due restrictions” and “necessary restraints,” arms had to be “suitable to the [possessor’s] condition and degree” and had to be “allowed by law.”).

guns,”<sup>33</sup> including total bans on the firing of weapons in Boston, Philadelphia, and New York City.<sup>34</sup> Pennsylvania — whose right-to-bear-arms provision was relied upon by the *Heller* Court for “confirm[ation]” of its construction of the Second Amendment, 128 S. Ct. at 2802 — disarmed individuals unwilling to swear a loyalty oath, and other states followed.<sup>35</sup> During the Founding era, the right to bear arms “was limited to those members of the polity who were deemed capable of exercising it in a virtuous manner.”<sup>36</sup> Arms could be regulated if “aimed at a legitimate public purpose and [\*\*\*]consistent with reason.”<sup>37</sup>

During the nineteenth century, legislatures prohibited the carrying of handguns and other concealed weapons,<sup>38</sup> which “the majority of the 19th-century courts to consider the question held ... were lawful under the Second Amendment or state analogues,” *Heller*, 128 S. Ct. at 2816. Time, place, and manner restrictions and bans on selected categories of weapons were enforced as well.<sup>39</sup>

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<sup>33</sup> Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 L. & HIST. REV. 139, 162 (2007). See also *Heller*, 128 S. Ct. at 2819-2821; *id.* at 2848-2850 (Breyer, J., dissenting)

<sup>34</sup> Churchill, 25 L. & HIST. REV. at 162.

<sup>35</sup> *Id.* at 160.

<sup>36</sup> Saul Cornell, *Don't Know Much About History: The Current Crisis in Second Amendment Scholarship*, 29 N. KY. L. REV. 657, 679 (2002).

<sup>37</sup> Saul Cornell, *Early American Gun Regulation and the Second Amendment: A Closer Look at the Evidence*, 25 L. & HIST. REV. 197, 198 (2007).

<sup>38</sup> Cornell, 25 L. & HIST. REV. at 199. See also Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 512-513 (2004).

<sup>39</sup> See Cornell & DeDino, 73 FORDHAM L. REV. at 516.

The tradition of gun regulation has carried into the modern era, at the state and federal level.<sup>40</sup> These regulations fall well within the Anglo-American tradition that has broadly tolerated regulation of firearms.

# **VI. THIS COURT SHOULD ADOPT THE REASONABLE REGULATION TEST FOR ASSESSING SECOND AMENDMENT CHALLENGES**

Over forty states have constitutional right-to-keep-and-bear-arms provisions,<sup>41</sup> and “[g]enerally, when [they] have evaluated challenges to the validity of gun control statutes under state constitutional provisions, the test has been whether the statute constitutes a ‘reasonable regulation’ in light of the state’s police powers.” *State v. Cole*, 665 N.W.2d 328, 336-337 (Wis. 2003) (“If this court were to utilize a strict scrutiny standard, [for application of the Wisconsin right to keep and bear arms provision] Wisconsin would be the only state to do so.”).

Under the reasonable-regulation test, the state “may regulate the exercise of [the] right [to bear arms] under its inherent police power so long as the exercise of that power is reasonable.” *Robertson v. City & County of Denver*, 874 P.2d 325, 328, 333 n.10 (Colo. 1994); *see also Jackson v. State*, 37 Ala. App. 335, 338

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<sup>40</sup> Congress has enacted bans on types of weapons, limitations on who can possess firearms, restrictions on where firearms can be carried, *see* 18 U.S.C. § 922, as well as on their manufacture, sale, and importation, *see id.* § 923. States have enacted a wide array of firearms regulations. *See* Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 719-720 (2007).

<sup>41</sup> *See* Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POLITICS 191, 205 (2006).



(1953) (“It is uniformly recognized that the constitutional guarantee of the right of a citizen to bear arms, in defense of himself and the State, ... is subject to reasonable regulation by the State under its police power”); *Bleiler v. Chief, Dover Police Dep’t*, 927 A2d 1216, 1223 (2007) (question is “whether the statute at issue is a ‘reasonable’ limitation upon the right to bear arms”). This test recognizes “the state’s right, indeed its duty under its inherent police power, to make reasonable regulations for the purpose of protecting the health, safety, and welfare of the people.” *Comeau*, 448 N.W.2d at 599; *see also Mosher v. City of Dayton*, 358 N.E.2d 540, 543 (Ohio 1976) (“interest of the governmental unit is, on balance, manifestly paramount”).<sup>42</sup>

This test is more demanding than rational basis (or the form of “interest balancing” suggested by Justice Breyer in *Heller*), for it does not permit the state to prohibit all firearm ownership.<sup>43</sup> The Supreme Court of Wisconsin distinguished reasonable regulation review from rational basis by explaining:

the reasonableness test focuses on the balance of the interests at stake, rather than merely on whether any conceivable rationale exists under which the legislature may have concluded the law could promote the public welfare.

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<sup>42</sup> *Amicus Curiae* is not suggesting that all cases applying this test were rightly decided or that the state-right-to-bear-arms provisions have the same scope as the Second Amendment. Many are far broader.

<sup>43</sup> *See, e.g., State v. Reid*, 1 Ala. 612, \*3 (1840). *See also Volokh, supra* n.42 at 1458 (test is applied so as to “set the unconstitutionality threshold very high—allowing anything short of a prohibition”).



*Cole*, 665 N.W.2d at 338. On the other hand, intermediate scrutiny, at least as applied by some courts, may be significantly more demanding. *See Klein v. Leis*, 795 N.E.2d 633, 639 (Ohio 2003) (dissenting judges would apply intermediate scrutiny to strike down law that majority upheld under reasonable regulation).

Under this test, courts have deferred broadly to legislative gun regulations for over 150 years. In a case cited twice with approval by the *Heller* Court,<sup>44</sup> the Supreme Court of Alabama upheld a ban on concealed weapons, construing the state's constitution "to leave with the Legislature the authority to adopt such regulations of police, as may be dictated by the safety of the people and the advancement of public morals," so long as they did not "amount[] to a destruction of the right" to bear arms. *State v. Reid*, 1 Ala. 612, \*3 (1840). *See also English v. State*, 35 Tex. 473, \*4 (1871) ("legislature may regulate [the right to bear arms] without taking it away"). Such deference to reasonable gun restrictions continues to the present.

## VII. CONCLUSION

The "reasonable-regulation" standard properly protects the newly-articulated right of the individual to keep and bear arms while respecting the strong regulatory interest of the government in protecting citizens from the risks posed by weapons. This Court therefore should apply the "reasonable-regulation" standard to Second Amendment challenges.

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<sup>44</sup> *See* 128 S. Ct. at 2794 n.9, 2818.

DATED this 18th day of August, 2010.

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### **CERTIFICATE OF COMPLIANCE**

Pursuant to FRAP Rule 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached amicus brief is proportionately spaced, has a typeface of 14 points, and contains 4,124 words.

DATED this 18th day of August, 2010.

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### **CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 18, 2010.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First Class Mail, postage prepaid, to the following non-CM/ECF participants:

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