No. 18-280

IN THE

Supreme Court of the United States

NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC., ROMOLO COLANTONE, EFRAIN ALVAREZ AND JOSE ANTHONY IRIZARRY,

Petitioners,

v.

THE CITY OF NEW YORK AND THE NEW YORK CITY POLICE DEPARTMENT-LICENSE DIVISION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF CALIFORNIA RIFLE & PISTOL ASSOCIATION, INCORPORATED AND GUN OWNERS OF CALIFORNIA, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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AMICUS CURIAE STATEMENT OF INTEREST[1]

Founded in 1875, California Rifle and Pistol Association, Incorporated ("CRPA") is a non-profit organization that seeks to defend the Second Amendment and advance laws that protect the rights of individual citizens. CRPA regularly participates as a party or amicus in firearms-related litigation. CRPA works to preserve the constitutional and statutory rights of gun ownership, including the right to self-defense, the right to hunt, and the right to keep and bear arms. CRPA is also dedicated to promoting the shooting sports, providing education, training, and organized competition for adult and junior shooters. CRPA's members include law enforcement officers, prosecutors, professionals, firearm experts, the general public, and loving parents.

Gun Owners of California, Inc. ("GOC") is a California non-profit organization formed in 1974. It is a leading voice in California supporting the rights to self-defense and to keep and bear arms. GOC supports crime control, not gun control. Its founder, Senator H.L. Richardson, during his tenure in the Legislature was the author of some of the toughest anti-crime legislation and honored by many law enforcement groups as one of the top leaders in the fight against crime. GOC has filed *amicus curiae* briefs in federal courts, including briefs in this Court supporting respondents in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and petitioners in *Friedman v. Highland Park*, 784 F.3d 406 (7th Cir. 2015).

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Petitioners have left little, if any, doubt in their brief that New York City's handgun licensing regime violates the Second Amendment. They have also correctly identified the source of the Second Circuit's error in upholding that regime: application of scrutiny beneath the dignity of a fundamental constitutional right. And their proposed solution to remedy that error and avoid similar ones in the future—for this Court to "establish a comprehensive test for analyzing Second Amendment claims" or at least "admonish lower courts that when *Heller* ruled out rational-basis scrutiny, it likewise ruled out watered-down forms of scrutiny"—is spot on.

Amici do not reiterate those arguments here. Instead, they wish to illustrate that Petitioners do not exaggerate when they say the Second Circuit's (mis)treatment of the Second Amendment is common among lower courts. Indeed, it is the norm. As plaintiff or amicus in countless Second Amendment lawsuits, primarily in the Ninth Circuit—perhaps the worst offender of peddling in counterfeit Second Amendment analyses—Amici speak from first-hand experience. Over the last decade, theirs have been among the consistent flood of petitions to this Court seeking review of rejected Second Amendment claims.

Left unguided by this Court, lower courts, including the Ninth Circuit, will continue to run roughshod over Second Amendment rights with impunity and those petitions will not abate. Amici do not, of course, expect this Court to resolve once and for all every dispute that might arise over what is a constitutionally permissible firearm

regulation—an impossible feat to be sure. But continuing the status quo will only result in more such disputes, not fewer. Strikingly, the post-*Heller* era has seen an increase of strict gun laws being adopted in places like California. It is safe to assume those too will be challenged and that, under the current trend, petitioned to this Court.

ARGUMENT

I. Lower Courts Have Filled the Manufactured Analytical Vacuum for Second Amendment Claims Post-*Heller* with Weak Tests Spawning the Sorts of Errors the Second Circuit Committed Below

Lower courts routinely apply subjective tests to Second Amendment claims that lack grounding in *Heller* or any other Supreme Court precedent, resulting in essentially every iteration of Second Amendment challenge failing. This phenomenon is no secret to the bench. One circuit judge described the Second Amendment as "the Rodney Dangerfield of the Bill of Rights." *Mance v. Sessions*, 896 F.3d 390, 396 (5th Cir. 2018) (Willett, J., dissenting). Another warned that "[o]ur cases continue to slowly carve away the fundamental right to keep and bear arms," noting how a particular "decision further lacerates the Second Amendment, deepens the wound, and resembles the Death by a Thousand Cuts." *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 694 (9th Cir. 2017), *cert. denied sub nom.*, 138 S. Ct. 1988 (2018); *see also Duncan v. Becerra*, No. 17-cv-1017, 2019 WL 1434588 at *53 (S.D. Cal. Mar. 31, 2019) (opining that courts purport to give respect to the Second Amendment, but then give the right "*Emeritus* status, all while its strength is being sapped from a lack of exercise").

It is undeniable that "*Heller* has left in its wake a morass of conflicting lower court opinions regarding the proper analysis to apply to challenged firearms regulations." *United States v. Chester*, 628 F.3d 673, 688-89 (4th Cir. 2010) (Davis, J., concurring in the judgment). Amici believe this phenomenon has resulted from lower courts intentionally exaggerating *Heller*'s perceived lack of guidance as a pretext for employing tactics to reduce that landmark opinion's effect. For it can hardly be a coincidence that of the likely hundreds of Second Amendment cases filed since the Court decided *Heller*, only a few lower courts have struck a firearm restriction as unconstitutional—despite such laws increasing both in number and scope in many jurisdictions during that time.

But whether this development is the result of courts' genuine confusion or their deliberate sabotage of *Heller* is ultimately irrelevant. In either case, this Court can put an end to the problem by expressly articulating the analytical framework under which Second Amendment challenges are to be reviewed. Or, as Petitioners alternatively suggest, unequivocally clarifying that the sort of watered-down scrutiny courts have been applying is unacceptable.

A. The analyses lower courts employ are susceptible to abuse in favor of the government

The trend among lower courts has been, as Petitioners noted, to adopt a "two-step" analysis for laws challenged under the Second Amendment. Under this approach, the court first asks whether the restriction burdens conduct protected by the Second Amendment. If it does, the court proceeds to determine what level of scrutiny to apply by examining how close the burdened conduct is to the Second

Amendment's "core" right and the severity of the burden on that right. *See e.g.*, *Gould v. Morgan*, 907 F.3d 659 (1st Cir. 2018); *United States v. Focia*, 869 F.3d 1269 (11th Cir. 2017); *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013); *Nat. Rifle Ass'n of Am., Inc. v. McCraw*, 719 F.3d 338 (5th Cir. 2013); *Schrader v. Holder*, 704 F.3d 980 (D.C. Cir. 2013); *United States v. Greeno*, 679 F.3d 510 (6th Cir. 2012); *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *United States v. Reese*, 627 F.3d 792 (10th Cir. 2010); *United States v. Marzzarella,* 614 F.3d 85 (3rd Cir. 2010). Despite virtual consensus among the circuits, the Court should not sanction this approach.

On its face, this approach may seem reasonable, even practical. But its application affords courts multiple opportunities to tilt things in the government's favor. And courts regularly seize those opportunities. Indeed, some courts have forged creative interpretations of *Heller*'s passages—rather than looking to the Second Amendment's text and history—to exclude some restrictions from Second Amendment scrutiny altogether. While other courts simply assume Second Amendment protection without deciding the question, allowing them to unceremoniously find that the restriction passes muster under an extremely weak version of what they incorrectly call "intermediate scrutiny."

1. Excuses lower courts have used to altogether avoid Second Amendment scrutiny

Although the two-step approach begins with the proper question—whether the Second Amendment

protects the restricted conduct—the lengths to which courts have reached to answer that question in the negative confirms Amici's suspicion of bias in employing this test. For example, despite recognizing that "the Second Amendment's individual right to bear arms *may* have some application beyond the home," the Third Circuit concluded that a requirement that handgun carry license applicants demonstrate a "justifiable need" for one—a standard almost no applicant can meet—"qualifies as a 'presumptively lawful,' 'longstanding' regulation and therefore does not burden conduct within the scope of the Second Amendment's guarantee." *Drake v. Filko*, 724 F.3d 426, 429 (3d Cir. 2013). The court never specified which of the "longstanding prohibitions" listed in *Heller* it was relying on. Instead it merely pointed out that the list is not "exhaustive" and that being 90-years-old qualified the requirement for inclusion. *Id*. at 446.

In *United States v. White*, 593 F.3d 1199, 1205-06 (11th Cir. 2010), the Eleventh Circuit likewise arbitrarily added to *Heller*'s list of "presumptively lawful" measures to avoid Second Amendment scrutiny. There, the court upheld a conviction under 18 U.S.C. § 922(g)(9), which prohibits possession of firearms by those who have been convicted of a "*misdemeanor* crime of domestic violence." *Id.* at 1206. The court held that there is "no reason to exclude § 922(g)(9) from the list of longstanding prohibitions on which *Heller* does not cast doubt." *Id.* at 1205-06. Noting that *Heller* views restrictions on felons as "presumptively lawful," the court essentially declared that *misdemeanor* domestic violence is close enough to a felony and reasoned it should be treated the same without anchoring its decision to any historical justification. *Id.*

The Fourth Circuit rejected a challenge to a ban on possibly the most popular rifles in the country simply by declaring them to be "like" the M-16 machine gun, "most useful in military service," and thus "among those arms that the Second Amendment does not shield." *Kolbe v. Hogan*, 849 F.3d 114, 135 (4th Cir.) (en banc), *cert. denied*, 138 S. Ct. 469 (2017) (citing *Heller*, 554 U.S. at 627). Yet, the court did not identify a single military that actually uses the rifles. *Id*. at 159 (Traxler, W., dissenting). And it seemingly ignored the record evidence showing that the rifles are lawfully owned by millions of civilians in this country. *Id.*

According to the Fifth Circuit, anyone under the age of 21 is likely "unworthy of the Second Amendment guarantee" and thus has no constitutional complaint against a federal law prohibiting individuals between 18-21 years of age from acquiring a handgun. *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives* ("*BATF*"), 700 F.3d 185, 202 (5th Cir. 2012). But "the properly relevant historical materials … couldn't be clearer: the right to keep and bear arms belonged to citizens 18 to 20 years old at the crucial period in our nation's history." *Nat'l Rifle Ass'n, Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 714 F.3d 334, 339 (5th Cir. 2012) (Jones, J., dissenting from denial of rehearing en banc).[2]

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2. While it did not say possession of a handgun at one's summer home is outside the Second Amendment's protection, the Second Circuit tellingly described the notion as "a serious constitutional question." *Osterweil v. Bartlett*, 706 F.3d 139, 142 (2d Cir. 2013). As if there is any doubt that one's fundamental right to "use arms in defense of home and hearth" is not merely a good-for-only-one coupon. *Heller* 554 U.S. at 635.

Rather than doctrinally stretch to avoid Second Amendment protection, in one case, an en banc panel of the Ninth Circuit decided to instead refashion the plaintiffs' claim as seeking relief that was undisputedly unavailable—and clearly not what they were asking for. *Peruta v. San Diego*, 824 F.3d 919 (9th Cir. 2016), *cert. denied*, 137 S.Ct. 1995 (2017). In *Peruta*, the plaintiffs challenged denials of their licenses to carry a concealed handgun, arguing that the licensing authority's "good cause" policy offended the Second Amendment by not recognizing one's desire for general self-defense. *Id.* at 924. Correctly applying this Court's textual and historical analysis, a panel of the Ninth Circuit agreed with the plaintiffs. *Peruta v. San Diego*, 742 F.3d 1144 (9th Cir. 2014), *rev'd en banc*, 824 F.3d 919. The en banc panel, however, overturned that decision, disingenuously reasoning that the licenses plaintiffs sought were to carry *concealed* and that no right to concealed carry exists. *Peruta*, 824 F.3d at 939. In doing so, the en banc panel ignored the facts that (1) there was no other way for the plaintiffs to lawfully carry in California because open carry is generally prohibited, (2) no open carry licenses are available under the law, and (3) that the plaintiffs expressly stated their willingness to carry in whatever manner the state would allow them to, which happened to be concealed pursuant to a license. *Peruta*, 824 F.3d at 952-55 (Callahan, C., dissenting).

In *Teixeira v. Cty. of Alameda*, 873 F.3d 670 (9th Cir. 2017), *cert. denied sub nom.*, 138 S. Ct. 1988 (2018), the Ninth Circuit again employed a sleight of hand when holding that a county zoning ordinance restricting the locations of stores selling firearms "does not burden conduct falling within the Amendment's scope . . .." *Id.*

at 690. The challenged ordinance prohibited any store selling firearms from being located within 500 feet of any residential district, school, other store that sells firearms, or establishment that sells liquor. *Id.* Despite the plaintiffs alleging that the ordinance resulted in a ban on new gun stores, the court artificially cabined the question as to whether there is "an independent, freestanding right to sell firearms under the Second Amendment." *Id.* at 682. Finding that there is not, the court reasoned that "the right of gun users to acquire firearms legally is not coextensive with the right of a particular proprietor to sell them." *Id.* This not only mischaracterized the plaintiffs' claim, it ignored the broader implications. *Id.* at 673. Logically, the court's ruling means the government has the power to practically nullify the Second Amendment by prohibiting gun stores altogether and the Second Amendment would have no say. The court unconvincingly resisted that position, claiming its ruling did not significantly impair the right to acquire arms but was merely holding "the Second Amendment does not independently protect a proprietor's right to sell firearms." *Id.* at 690.

As an aside, Amici believe it is important to point out that the *Teixeira* matter was reheard en banc after the original panel merely ruled that the matter should be remanded and reviewed under heightened scrutiny. *Teixeira v. Cty. of Alameda*, 822 F.3d 1047, 1060, 1064 (9th Cir. 2016), *reh'g en banc*, 873 F.3d 670 (9th Cir. 2017). There had not even been a merits ruling yet. This is not an isolated incident. Years before the Ninth Circuit convened en banc panels to overturn favorable Second Amendment decisions in *Teixeira* and *Peruta*, it ordered en banc review of a panel decision holding that the Fourteenth Amendment incorporates the Second Amendment as

applying against the states and local government. *Nordyke v. King*, 563 F.3d 439, 144 (9th Cir. 2009), *reh'g en banc granted*, 575 F.3d 890 (9th Cir. 2009). Before that en banc panel could rule, however, this Court mooted that issue with its decision in *McDonald* [and vindicated the original panel]. *McDonald v. City of Chicago*, 561 U.S. 742 (2010). A three-judge panel in *Nordyke* subsequently affirmed the county's motion to dismiss the plaintiff's Second Amendment claim but granted the plaintiff leave to amend the complaint in light of this Court's rulings in *Heller* and *McDonald*. *Nordyke v. King*, 664 F.3d 776,788-789 (9th Cir. 2011). The Ninth Circuit, however, *again* ordered the matter to en banc review, not wanting to even first see the amended complaint or how the district court would handle it. *Nordyke v. King*, 665 F.3d 774 (9th Cir. 2011).[3] That trend continues as the most recent decision out of the Ninth Circuit striking down a law under the Second Amendment has also been taken en banc. *Young v. Hawaii*, 896 F.3d 1044 (9th Cir. 2018), *reh'g en banc ordered*, 915 F.3d 681 (9th Cir. 2019).

In fact, every merits decision that is remotely positive for the Second Amendment to come from a Ninth Circuit panel has been ordered to en banc review. The only semi-exception is a matter affirming a preliminary injunction. *Duncan v. Becerra*, 742 F. Appx. 218 (9th Cir. 2018). But, even that case—involving a memorandum opinion upholding a preliminary injunction under an abuse of discretion standard where the merits briefing had

3. In this particular matter, the Ninth Circuit at least had a plausible excuse that en banc review was necessary because the *Nordyke* panel had enunciated a standard of review for Second Amendment claims. *Nordyke v. King*, 664 F. 3d. 776, 789 (9th Cir. 2011) (adopting a "substantial burden" test).

already been completed in the lower court—drew a sua sponte call for an en banc vote. Order Calling Vote Re En Banc, *Duncan v. Becerra,* no. 17-56081 (9th Cir. Aug. 22, 2018*).* Only after the state of California made clear that even it did not think the matter warranted en banc review at that stage did the court relent. Order Denying Rehearing En Banc, *Duncan v. Becerra*, no. 17-56081 (9th Cir. Oct. 31, 2018). Any claim that this is merely a product of Second Amendment jurisprudence being in its infancy is belied by the fact that the Ninth Circuit has not taken a single *un*favorable Second Amendment decision en banc, though there have been plenty. En banc review it seems is only "not favored" when the Second Amendment is not either—at least in the Ninth Circuit. *But see* Fed. R. App. P. 35 (a).

In all events, the above cases are mere examples of the myriad ways courts have found to avoid Second Amendment scrutiny. It is not exhaustive, but it clearly shows how far astray many lower courts have gone in their treatment of the Second Amendment.

2. Lower courts have altered traditional means-end scrutiny to create Second Amendment specific scrutiny that is more subjective and much less rigorous on the government

Often, courts skip the first step of the two-step approach and simply assume the Second Amendment protects the burdened conduct. *See, e.g.*, *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2019); *Jackson v. City and Cty. of San Diego*, 746 F.3d 953 (9th Cir. 2014); *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011) (*Heller II*). This

is not the courts being magnanimous. To the contrary, doing so relieves them from having to confront the actual text and history of the Second Amendment and instead teleports them directly to the next part of the two-step approach, where the real opportunities to manipulate the analysis reside. At that juncture, as explained above, a court is supposed to determine whether strict or intermediate scrutiny applies and evaluate the restriction under the selected standard. The result, however, is usually a foregone conclusion: intermediate scrutiny will apply, and it will be satisfied.

a. With few exceptions, lower courts always choose intermediate scrutiny when evaluating Second Amendment claims

While a few district courts have applied strict scrutiny to Second Amendment challenges in the years since *Heller*, Amici are not aware of a single circuit court that has. As Petitioners allude to in their brief, this is a striking divergence from the default that strict scrutiny applies to restrictions on fundamental rights. *See, e.g.*, *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 54 (1983); *see also Heller II*, 670 F.3d at 1284-85 (Kavanaugh, J., dissenting). But, more to Amici's point, it reveals the lower courts' bias against the Second Amendment and their ability to manipulate the analysis in favor of upholding almost any gun control measure. That virtually every Second Amendment claim brought to date has only warranted intermediate scrutiny is patently suspect. But when considering the specific decisions, there remains little doubt something odd is afoot.

Generally, courts avoid strict scrutiny by narrowly construing "core" Second Amendment conduct as to only the precise conduct at issue in *Heller*—handgun possession in one's home. This is one of the errors the Second Circuit made below, marginalizing the conduct burdened by the city's licensing regime as mere training, not the "core" of home-defense. But even if a law does burden conduct falling within whatever a court might consider the Second Amendment's core, courts typically consider anything less than a complete ban to be a minimal burden on the right, even though *Heller* nowhere suggests "that a law must rise to the level of the absolute prohibition at issue in that case to constitute a 'substantial burden.' " *Jackson v. City and Cty. of San Francisco*, 135 S. Ct. 2799 (2015) (Thomas, J., dissenting from denial certiorari).

In *Jackson*, for instance, the Ninth Circuit had before it an ordinance requiring handguns possessed in the home to remain either disabled or in a locked container at all times, unless physically on one's person—meaning one's choice at bedtime is to wear a handgun to bed or lock it up. 746 F.3d at 958. While acknowledging that the ordinance "burdens the core of the Second Amendment right," the court nevertheless found intermediate scrutiny appropriate because the court perceived that the burden of such a restriction is not substantial. *Id.* at 964-65. In fact, the court described the burden imposed as "minimal" despite acknowledging that removing a handgun from a locked container would cause a delay of "a few seconds"—ignoring evidence that in self-defense situations those precious seconds "could easily be the difference between life and death." *Id.* at 966; *Jackson*, 135 S.Ct. at 2801 (Thomas, J., dissenting from denial of certiorari). The *Jackson* court also selected intermediate

scrutiny to review an ordinance wholly banning the sale of "hollow point" ammunition in the city. *Id.* at 967. The court reasoned that the burden was not substantial because there was "no evidence in the record indicating that ordinary bullets are ineffective for self-defense"—as if that were relevant—and that the plaintiffs could always buy alternative ammunition or hollow point ammunition outside of it—failing to explain what happens when other cities likewise decide to ban its sale or the alternatives also become restricted. *Id.* at 968.

The Ninth Circuit went a step further in *United States v. Chovan*. There, the court applied intermediate scrutiny to a *complete* ban on firearm possession—indisputably a severe burden—by an individual convicted of *misdemeanor* domestic violence. *Chovan*, 735 at 1138. Though the disqualifying conviction occurred fifteen years prior, the court held that he was not "law-abiding" and thus his situation "does not implicate th[e] core Second Amendment right." *Id.* The dangerous potential of choosing lesser scrutiny for complete bans on people arbitrarily deemed not "law-abiding" should be obvious. Yet, it was either lost on the *Chovan* court or had the judicially empowering effect the court intended.

Circuit courts have also applied intermediate scrutiny to categorical bans—not mere regulations—on publicly carrying firearms. These courts have done so even when assuming the Second Amendment protects a right to do so, merely because it is not within what those courts perceived as the "core" of the right. *See*, *e.g.*, *Gould v. Morgan*, 907 F.3d 659 (1st Cir. 2018); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013); *Kachalsky v. Cnty. of Westchester*,

701 F.3d 81 (2d Cir. 2012).[4] They have done the same in evaluating categorical *bans* on some of the most popular arms in the country. *See Worman v. Healey*, No. 18-1545, __ F.3d __, 2019 WL 1872902 (1st Cir. Apr. 26, 2019); *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 262-64 (2d Cir. 2015); *Heller II*, 670 F.3d at 1264.

Circuit courts have even found mere intermediate scrutiny appropriate when reviewing fees that states require be paid as a precondition to the exercise of one's right to acquire and keep a handgun in the home for self-defense. *Bauer v. Becerra*, 858 F.3d 1216 (9th Cir. 2017); *Kwong v. Bloomberg*, 723 F.3d 160 (2nd Cir. 2013). Such fees are generally invalidated per se in the context of other rights. *See, e.g.*, *Murdock v. Pennsylvania*, 319 U.S. 105 (1943). But fees imposed on the right to keep and bear arms are apparently less obnoxious according to these courts.

In sum, lower courts have gone out of their way to find dubious excuses to avoid subjecting restrictions on Second Amendment protected conduct to meaningful scrutiny. Whereas in the context of other rights, courts find "penumbras, formed by emanations from those guarantees that help give them life and substance." *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965). The Second Amendment, according to these courts, is not only hollow but casts no shadows either.

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4. Most of these cases involve laws that are not bans on their face, rather, the laws usually prohibit carry without a license and then require carry license applicants to demonstrate some form of "good cause" or special need for a license—a standard that few, if any, applicants can meet.

b. Almost invariably courts uphold firearm restrictions under a watered-down version of intermediate scrutiny more akin to rational basis review

While lower courts routinely stray from this Court's teachings about fundamental rights when faced with gun control measures they intend to uphold by choosing to apply intermediate scrutiny, that is not the worst departure they take from this Court's rights jurisprudence. After all, that standard still requires a strong showing by the government. Instead, it is the misapplication of intermediate scrutiny that results in the real problems. Indeed, almost every court purporting to apply "intermediate scrutiny" has instead applied a toothless form of review more like rational basis. But this Court has expressly rejected that standard as inappropriate for evaluating government restrictions on enumerated rights, including the right to keep and bear arms. *Heller*, 554 U.S. at 628, n.27.

Under heightened review, a challenged law is presumed unconstitutional, and the state bears the burden of justifying the law's validity. *See, e.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). Under true intermediate scrutiny, as articulated by this Court, the burden is on the government to prove a "substantial relationship" between the law and an important government objective. *Clark v. Jeter*, 486 U.S. 456, 461 (1988). What's more, the "law must be 'narrowly tailored to serve a significant governmental interest.' " *Packingham v. North Carolina*, --U.S.--, 137 S. Ct. 1730, 1736 (quoting *McCullen v. Coakley*, --U.S.--, 134 S. Ct. 2518, 2534 (2014)). This test ensures that the encroachment on liberty does not "burden substantially

more [protected conduct] than is necessary to further the government's legitimate interests." *McCullen*, 134 U.S. at 2535.

In contrast, circuit courts have described intermediate scrutiny when applying it in the Second Amendment context in starkly weaker terms. Indeed, in the wake of courts' reticence to expand *Heller* beyond its narrow facts and their eagerness to sustain nearly any sort of gun control short of a flat ban on firearms, a consistent theme has emerged—"substantial deference" to the will of legislative majorities. *See, e.g.*, *Pena v. Lindley*, 898 F.3d at 969, 979 (9th Cir. 2018) ("We do not substitute our own policy judgment for that of the legislature," "we 'owe [the legislature's] findings deference."); *Kolbe*, 849 F.3d at 140 ("The judgment made by the General Assembly of Maryland [...]is precisely the type of judgment that legislatures are allowed to make without second-guessing by a court."); *Drake*, 724 F.3d at 440 ("[w]e refuse . . . to intrude upon the sound judgment and discretion of the State of New Jersey" that only "those citizens who can demonstrate a 'justifiable need' to do so" may carry handguns outside the home); *Woollard*, 712 F.3d at 881 (deferring to "the considered judgment of the General Assembly that the good-and-substantial reason requirement strikes an appropriate balance between granting handgun permits to those persons known to be in need of self-protection and precluding a dangerous proliferation of handguns on the streets of Maryland"); *Kachalsky*, 701 F.3d at 100 (deferring to New York's "determin[ation] that limiting handgun possession to persons who have an articulable basis for believing they will need the weapon for self-defense is in the best interest of public safety and outweighs the need to have

a handgun for an unexpected confrontation"). Ultimately, this extreme deference has resulted in courts singling out the right to bear arms for especially unfavorable treatment in conflict with this Court's admonishment against treating the Second Amendment "as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *McDonald*, 561 U.S. at 780 (plurality op.).

The claim is that courts lack the authority to disturb the "predictive judgments" of the legislature. It is that the separation of powers mandates a level of deference that essentially forecloses meaningful judicial review, so long as the government can produce some evidence that passes the straight-face test supporting its gun-control laws. But the legislature is not entitled to trample on the constitutionally protected rights of the People under the cover of "substantial deference." *Kolbe*, 849 F.3d at 140. A legislature's laws are not edicts. They must pass constitutional muster under the applicable standard of review. As the Court explained in *Obergefell v. Hodges*, --U.S.--,135 S. Ct. 2584 (2015), "when the rights of persons are violated, the Constitution *requires* redress by the courts, [despite] the more general value of democratic decision-making." *Id.* at 2605 (internal quotation marks and citation omitted). While it is not the role of a court to replace the considered judgment of the legislature with its own, that does not mean that it must (or even should) rubber stamp whatever the legislature decrees. *See Heller II*, 670 F.3d 1244, 1259 (D.C. Cir. 2011) (quoting *Turner Broad. Sys., Inc. v. FCC* (*Turner II*), 520 U.S. 180, 195 (1997); *Turner Broad. Sys. v. FCC* (*Turner I*), 512 U.S. 622, 666 (1994) (plurality opinion)) (internal quotations omitted)) (recognizing that, even with "substantial

deference," the government "is not thereby insulated from meaningful judicial review").

It is ultimately the courts' role to "assure that, in formulating its judgments, [the legislature] has drawn reasonable inferences based on substantial evidence." *Turner I*, 512 U.S. at 666; *see also Kachalsky*, 701 F.3d at 97. This necessarily requires courts to consider carefully the government's evidence and make an independent judgment about the reasonableness of the inferences drawn from it. *See Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989); *see also Turner I*, 512 U.S. at 666-68 (granting legislative deference but reversing judgment because Congress had not presented substantial evidence supporting its claims). But, unfortunately, this sort of searching review of the governments' evidence and justifications has *not* been characteristic of the vast majority of decisions upholding government restrictions on the right to keep and bear arms.

To the contrary, as some astute courts and commentators have observed, the exceedingly deferential form of scrutiny that has been the hallmark of most circuits' post-*Heller* Second Amendment decisions "is near-identical to the freestanding 'interest-balancing inquiry' that Justice Breyer proposed—*and that the majority explicitly rejected*—in *Heller*." *Peruta*, 742 F.3d at 1176 (emphasis added); *see also, e.g.*, *Heller II*, 670 F.3d 1244, 1276-80 (2011) (Kavanaugh, J., dissenting); Order Granting Pls.' Mot. Summ. J. at 54:10-16, *Duncan v. Becerra*, No. 17-1017 (Mar. 29, 2019); Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 Geo. Wash. L. Rev. 703, 752 (2012) ("An intermediate scrutiny analysis applied in a way that is

very deferential to legislative determinations and requires merely some logical and plausible showing of the basis for the law's reasonably expected benefits, is the heart of the emerging standard approach."). "Yet, *Turner* deference arguments live on like legal zombies lurching through Second Amendment jurisprudence." Order Granting Pls.' Mot. Summ. J. at 54:15-16, *Duncan*, No. 17-1017.

This has resulted in courts accepting the flimsiest of evidence as satisfying the government's burden, much like the Second Circuit's reliance in this case on little more than a single affidavit from one officer speculating without any evidence that allowing people to take firearms out of the city *might* result in public safety issues like "road rage." *New York State Rifle & Pistol Ass'n, Inc. v. City of New York*, 883 F.3d 45, 63 (2d Cir. 2018). But, sometimes court do not even need evidence at all to defer to the government. One of the worst examples of insufficient respect applied to a Second Amendment claim did not involve application of the two-step approach—or any recognizable constitutional test, for that matter. *See Friedman v. Highland Park*, 784 F.3d 406 (7th Cir. 2015). Instead, that court merely complained that the challenged law concerned rifles that were not "common at the time of ratification" and lacked any "reasonable relationship to the preservation or efficiency of a well-regulated militia"—both irrelevant questions under this Court's precedent. *Compare Friedman*, 784 F.3d at 410-12, *with Heller* 554 U.S. at 582. Then the court suggested rifles in general may not be protected under the Second Amendment, and ultimately determined that the rifles could be banned because doing so "makes the public *feel* safer." *Friedman*, 784 F.3d at 410-12 (emphasis added). Such a feelings-based test would not even be entertained by courts in the context of other rights.

In short, in the years since the Court decided *Heller*, a Second Amendment analytical framework has emerged that all but guarantees not only that intermediate scrutiny will apply, *but also that nearly every gun-control measure will survive it*. And they will survive it because, as in the cases above, lower courts routinely accept the presentation of any evidence that plausibly suggests that a restriction could achieve the government's stated goals. But this is in no sense a heightened standard of review—no matter what they call it. It is in effect rational basis review, a level of scrutiny that *Heller* undeniably forecloses. 554 U.S. at 628, n.27. There would almost certainly be different results in at least some of these cases had the courts applied real heightened scrutiny or, better yet, decided to "undertake a complete historical analysis of the scope and nature of the Second Amendment right …" *Peruta*, 742 F.3d at 1173.

B. The weak analyses lower courts have employed result in legislatures disrespecting the Second Amendment

Following watershed decisions from this Court like those in *Heller* and *McDonald*, one would expect legislatures to revisit their existing laws and amend them in deference to the Second Amendment. Not only have few, if any, jurisdictions undertaken such an effort, but several have instead substantially increased those burdens. As explained above, courts have not only mostly upheld laws challenged under the Second Amendment, but have done so in a manner that telegraphs to legislatures hostile to the Second Amendment that there will be no repercussions for infringing the Peoples' right to keep and bear arms.

Take Amici's home state of California, for instance. Since 2008, California has enacted over 36 bills and

one voter initiative sponsored by its current Governor further restricting firearms. Under these new laws, California residents must pass a written test to be eligible to acquire a firearm for which they must pay a $25 fee, register all firearm transactions with the state, and obtain permission from the state before making any home-built firearm, to name a few. Those laws also expanded (again) the definition of "assault weapon" to apply to commonly owned rifles, requiring owners to register them and pay a fee as a condition of continued possession. Californians must now also conduct any ammunition transaction in-person, through a licensed vendor and, beginning July 1, 2019, undergo a background check for any ammunition purchase—just to name a few more. See California Department of Justice, Division of Law Enforcement, *New and Amendment Firearms/Weapons Laws* (Nos. 2008-BOF-03, 2009-BOF-05, 2010-BOF-04, 2010-BOF-05, 2012-BOF-01, 2013-BOF-01, 2014-BOF-01, 2015-BOF-01, 2016-BOF-02, 2018-BOF-01, 2019-BOF-01) available online at https://oag.ca.gov/firearms/infobuls. This does not account for the hundreds of firearm-related bills proposed each year in the California legislature.

California is not alone in its crusade against the Second Amendment. In 2013, New York enacted a series of laws requiring background checks for ammunition transactions and prohibiting various popular firearms it classifies as "assault weapons" or any magazine loaded with more than seven rounds of ammunition. Sess. Law News of N.Y. Ch. 1 (S. 2230). That same year, Colorado enacted its own ban against selling, transferring, or possessing any magazine capable of holding more than 15 rounds. Colo. Legis. Serv. Ch. 48 (H.B. 13-1224). And in 2016, Massachusetts Attorney General Maura Healey

issued an "Enforcement Notice" that further expanded state laws prohibiting certain common types of firearms the legislature arbitrarily classified as "assault weapons." Office of the Attorney General, *Enforcement Notice: Prohibited Assault Weapons*, https://www.mass.gov/files/documents/2018/11/13/assault-weapons-enforcement-notice.pdf (July 20, 2016).

In sum, lower courts' perceived lack of clarity from this Court in analyzing Second Amendment claims almost certainly results in more strict gun laws, which in turn will almost certainly result in additional litigation seeking this Court's guidance.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below and, in doing so, give guidance to lower courts to avoid similar issues in the future.

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Respectfully Submitted,

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