No. 20-1507

IN THE

Supreme Court of the United States

ASSOCIATION OF NEW JERSEY RIFLE & PISTOL CLUBS, INC. AND BLAKE ELLMAN,

Petitioners,

v.

GURBIR S. GREWAL, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF NEW JERSEY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF CALIFORNIA RIFLE & PISTOL ASSOCIATION, INCORPORATED, GUN OWNERS OF CALIFORNIA AND SECOND AMENDMENT LAW CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

C.D. MICHEL
ANNA M. BARVIR
Counsel of Record
KONSTADINOS T. MOROS
MICHEL & ASSOCIATES, P.C.
180 East Ocean Boulevard, Suite 200
Long Beach, CA 90802
(562) 216-4444
abarvir@michellawyers.com

Counsel for Amicus Curiae

May 28, 2021

304915

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Page

Page

STATUTES AND OTHER AUTHORITIES

AMICUS CURIAE STATEMENT OF INTEREST

Founded in 1875, California Rifle and Pistol Association, Incorporated is a nonprofit 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 firearm-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 a plaintiff in *Duncan v. Becerra*, 970 F.3d 1133 (9th Cir. 2020), a related case pending before an en banc panel of the Ninth Circuit.[1]

Gun Owners of California, Inc. was incorporated in California in 1982 and is one of the oldest pro-gun political action committees in the United States. GOC is a nonprofit organization, exempt from federal taxation under §§ 501(c)(3) or 501(c)(4) of the Internal Revenue Code. It is dedicated to the correct interpretation and application of the constitutional guarantees related to firearm ownership and use. Affiliated with Gun Owners of America, GOC lobbies on firearms legislation in Sacramento and was active in the successful battle to overturn the San Francisco handgun ban. GOC has filed amicus briefs in other Second Amendment cases, including *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

---

1. No counsel for a party authored this brief in whole or in part, nor did such counsel or any party make a monetary contribution to fund this brief. Preparation and filing of this brief were completely funded by CRPA. Amici missed the deadline to provide 10-day notice of their intention to file, but all parties individually consented to this filing.

The Second Amendment Law Center is a nonprofit corporation organized under § 501(c)(3) of the Internal Revenue Code. 2ALC is dedicated to promoting and defending the individual rights to keep and bear arms for hunting, sport, self-defense, and other lawful purposes envisioned by the Founding Fathers. The purpose of 2ALC is to defend these rights in courts across the country. 2ALC also seeks to educate the public about the social utility of private firearms ownership and to provide accurate and truthful historical, criminological, and technical information about firearms to policy makers, judges, attorneys, police, and the public.

SUMMARY OF ARGUMENT

Mistreatment of the Second Amendment is now all too common among lower courts. Indeed, it is the norm. As plaintiff or amicus in countless Second Amendment lawsuits in the Ninth Circuit—one of the worst offenders 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 Third and Ninth Circuits, will continue to trample Second Amendment rights with impunity and those petitions will not abate.

Petitioners' case concerns the constitutionality of banning large capacity magazines, the same question at issue in *Duncan v. Becerra*, 970 F.3d 1133 (9th Cir. 2020), *reh'g en banc ordered*, 988 F.3d 1209 (9th Cir. 2021). That these courts reached opposite conclusions while employing such widely divergent analyses highlights why this Court must grant certiorari.

ARGUMENT

I. The Circuits' Disrespect of *Heller* Begs for the Court's Intervention to Clarify Several Second Amendment Issues

In circuit courts across the country, the precedent established by *District of Columbia v. Heller*, 554 U.S. 570 (2008), has atrophied from neglect. In the years since that landmark case, many circuits have so severely contorted *Heller* that nearly any type of firearm restriction is upheld under what amounts to a glorified rational basis test. Such subjective tests lack grounding in *Heller* (or any other Supreme Court precedent), and they essentially doom every iteration of Second Amendment challenge. 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). It "don't get no respect!" Rodney Dangerfield, *I Don't Get No Respect!* (Bell 1970). Another judge 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. Cnty. of Alameda*, 873 F.3d 670, 694 (9th Cir. 2017), *cert. denied sub nom.*, 138 S. Ct. 1988 (2018).

To be sure, in *Heller*, the Court reassured readers that it did not intend to cast doubt on certain longstanding restrictions. 554 U.S. at 573. But since then, state and local governments have passed a torrent of restrictive gun laws, while exceedingly few such laws have been struck down. *Heller* is thus far from being treated as the transformative

case it was written to be. Instead, the circuits lean on a few limiting sentences from *Heller* to rubberstamp whatever infringement on the Second Amendment that anti-gun politicians and lobbyists dream up.

These infringements even include laws resembling those that *Heller* itself struck down. For example, California effectively banned the commercial sale of any new semiautomatic handgun released after 2013 by requiring "microstamping," a technology that is not even available at this time—and may never be. *Peña v. Lindley*, 898 F.3d 969, 996 (9th Cir. 2018) (Bybee, J., dissenting), *cert. denied*, 141 S. Ct. 108 (2020). The restriction at issue in *Peña* thus differs from the handgun ban overturned by *Heller* only by degrees. For grandfathered pistols without microstamping technology will eventually stop being made or otherwise fall off of California's approved handgun roster. At which point, unless microstamping someday becomes a reality, semiautomatic handguns will have been effectively banned in California. Yet in *Peña*, the Ninth Circuit upheld the state's de facto handgun ban in defiance of *Heller*, and this Court denied review.

Just a few years earlier, the Ninth Circuit upheld a San Francisco ordinance requiring handguns in the home to be kept in a locked container or disabled with a trigger lock. *Jackson v. City & Cnty. of S.F.*, 746 F.3d 953, 970 (9th Cir. 2014), *cert denied*, 576 U.S. 1013 (2015). The law differed from the D.C. storage requirement invalidated in *Heller* only in that it expressly allowed residents to unlock their firearms when carried by a person over 18—ostensibly so the firearms could be used in self-defense. *Id.* But it is a distinction is without consequence. In *Heller*, the District conceded that its storage law had an implied self-

defense exception, but the Court *still* held that it violated the Second Amendment under any level of scrutiny. 554 U.S. at 628.[2] There is no principled reason for treating San Francisco's storage law any differently. The Court denied certiorari in *Jackson* even though the decision was "in serious tension with *Heller*." *Jackson v. City & Cnty. of S.F.*, 576 U.S. 1013, 1015 (2015) (Thomas, J., dissenting from denial of certiorari).

Magazine-capacity limits, which in their worst forms include the taking of magazines with capacities over some arbitrary limit, are yet another example of this torrent of infringements. At minimum, *Heller* was intended to protect weapons in common use for lawful purposes, 554 U.S. at 627, which magazines over ten rounds clearly are. Indeed, in most states, they are not only extremely popular, they come *standard* with some of the best-selling firearms in the country. Pet. Writ Cert. at 1. Yet California, New Jersey, and other jurisdictions have disregarded the popularity of magazines over ten rounds in favor of unconstitutional bans on their sale, possession, and use. In all, nine states and the District of Columbia have banned so-called "large capacity magazines" ("LCMs"). For people in these jurisdictions, it doesn't matter how common LCMs are—their legislatures have decided that they can only be trusted with limited-capacity rights.

This Court is now on track to decide a Second Amendment issue for the first time since 2010 after

2. *See also* Oral Arg. Tr. at 82-84, *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008) (for a humorous exchange between Chief Justice Roberts, Justice Scalia, and counsel for the District, about the burden of preparing a locked up or disabled firearm for defensive use).

granting certiorari in *New York State Rifle & Pistol Association v. Corlett*, No. 20-843 (Apr. 26, 2021). That case is likely to decide the important question of whether New York's denial of concealed carry licenses for self-defense violates the Second Amendment. Amici are relieved that the Court will hear a Second Amendment question that may revitalize *Heller*. That said, the Court should not stop at deciding a single question after years of silence. When a house has not been cleaned in years, it is not enough to clean one room and leave the accumulated filth in every other room undisturbed. Similarly, it is not enough for the Court to decide only questions related to carry and allow circuits like the Ninth to keep undermining *Heller* on all other Second Amendment questions.

New York State Rifle & Pistol Association and *Association of New Jersey Rifle & Pistol Clubs Inc.* raise fundamentally different questions about the scope of the Second Amendment and, potentially, what form the analysis should take. As the Court anticipated in *Heller*, more lawsuits are necessary to clarify the field. Indeed, recognizing that *Heller* was its "first in-depth examination of the Second Amendment," the Court warned:

> One should not expect [*Heller*] to clarify the entire field, any more than *Reynolds v. United States*, 98 U.S. 145 (1879), our first in-depth Free Exercise Clause case, left that area in a state of utter certainty.... [T]here will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.

554 U.S. at 635. The time to address some of the Second Amendment questions *Heller* left unanswered has come.

II. The Erosion of the Second Amendment in the Ninth Circuit Illustrates How Courts Have Disrespected *Heller*

Amici are better positioned than most to empathize with Petitioners' struggles with New Jersey's unconstitutional gun laws and the Third Circuit's refusal to strike them down. Much like Petitioners, Amici have watched as the Ninth Circuit has aggressively eroded *Heller*, and with it, the Second Amendment rights of millions of Americans. Indeed, examples of the Ninth Circuit's thinly veiled contempt for the Second Amendment are legion.

In one case, rather than doctrinally stretch to avoid Second Amendment protection altogether, the Ninth Circuit, en banc, refashioned the plaintiffs' claim as seeking relief that was undisputedly unavailable—and not what they were asking for. *Peruta v. San Diego*, 824 F.3d 919 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 1995 (2017). There, the plaintiffs challenged denials of their licenses to carry a concealed firearm, arguing that the licensing authority's policy offended the Second Amendment because it did not recognize the right to self-defense as "good cause" to carry a firearm. *Id.* at 924. Correctly applying this Court's textual and historical analysis, a three-judge panel agreed and declared the policy unconstitutional. *Peruta v. San Diego*, 742 F.3d 1144 (9th Cir. 2014), *rev'd en banc*, 824 F.3d 919.

As has become the norm in the Ninth Circuit whenever a panel invalidates an unconstitutional gun control law, the court reheard *Peruta* en banc and reversed the decision,[3]

3. Since *Heller*, nearly every pro-Second Amendment panel decision in the Ninth has been reviewed en banc and overturned.

holding that the plaintiffs demanded licenses to carry *concealed* and that no right to concealed carry exists. 824 F.3d at 939. But the court ignored the fact that the plaintiffs expressly sought to carry in whatever manner the state preferred (which happened to be concealed under a license). *Id.* at 952-55 (Callahan, C., dissenting). They were arguing for a right to carry, not a right to carry *concealed*. *Id.* Suggesting otherwise, the en banc decision is disingenuous at best. What's more, because open carry is generally unlawful in California, the only way to lawfully carry is licensed and concealed. *Id.* at 950. So even though the court did not then address the legality of an open carry ban, the *Peruta* decision set precedent supporting a ban on all public carry within the Ninth Circuit.

Years later, the Ninth Circuit (again sitting en banc) would use that precedent to obliterate the right "to *bear* arms" altogether. *See Young v. Hawaii,* 992 F.3d 765 (9th Cir. 2021). There, the court upheld the county of Hawaii's policies effectively barring open carry, reasoning that "[t]here is no right to carry arms openly in public; nor is any such right within the scope of the Second Amendment." *Id.* at 821. Under *Heller*, it seems a flat ban on "bearing" arms would be unconstitutional under any test. *See* 554 U.S. at 628. But, through its decisions in *Peruta* and *Young*, the Ninth Circuit has placed itself at odds with *Heller*.

The only exception of which Amici are aware is *Duncan v. Becerra*, 742 F. App'x 218 (9th Cir. 2018), the state's unsuccessful appeal of an order preliminarily enjoining California's LCM possession ban. And even then, the court expressed interest in rehearing the case en banc, relenting only after the state opposed review.

Similarly, in *Teixeira v. County of Alameda*, 873 F.3d 670, 690 (9th Cir. 2017), *cert. denied sub nom.*, 138 S. Ct. 1988 (2018), the Ninth Circuit held that a restriction on the location of firearm retailers "does not burden conduct falling within the [Second] Amendment's scope...." The ordinance prohibited gun stores within 500 feet of any residential district, school, gun store, or establishment that sells liquor. *Id.* Even though the ordinance effectively banned new gun stores, the court artificially limited the question in *Teixeira*, asking whether there is "an independent, freestanding right to sell firearms…." *Id.* at 682. Holding that there is not, the Ninth Circuit 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.*

The *Teixeira* court's reasoning gives the government unfettered power to prohibit gun stores and, effectively, nullify the Second Amendment. For without the ability to buy and sell firearms, the right to own them means nothing. The court unconvincingly resisted this logical implication, claiming that 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.

This Court famously declared that "it is not the role of this Court to pronounce the Second Amendment extinct." *Heller*, 554 U.S. at 636. That may be so, but the Ninth Circuit seems to think *its* role is to do so. By granting certiorari here, the Court can disabuse the Ninth Circuit of that notion on at least one more critical Second Amendment issue.

III. Comparing the Different Decisions of the Third and Ninth Circuits Regarding the Constitutionality of LCM Bans

Recently, a Ninth Circuit panel ruled that California's LCM ban violated the Second Amendment because it imposed a substantial burden on the right to self-defense and it severely burdened the core of the constitutional right of law-abiding citizens to keep and bear arms. *Duncan*, 970 F.3d at 1162. To the surprise of nobody, the Ninth Circuit has yet again decided that a win for the Second Amendment will be reheard en banc. Amici despair that without this Court acting, the result is a foregone conclusion.

Regardless of the fate of *Duncan* though, the Ninth Circuit panel decision in that case still presents an excellent analytical comparison to the Third Circuit's analysis in *Association of New Jersey Rifle & Pistol Clubs v. Attorney General of New Jersey*, 910 F.3d 106 (3d Cir. 2018) ("*ANJRPC*"). The similarities and contrasts between these two rulings function as an excellent case study into why the Circuits need this Court's guidance to resolve these issues.

A. Both *ANJRPC* and *Duncan* Hold That LCMs Are in Common Use

This Court confirmed that the Second Amendment protects a fundamental, individual right to keep and bear arms that, under the Fourteenth Amendment, state and local governments are bound to respect. *Heller*, 554 U.S. at 581; *McDonald*, 561 U.S. at 750, 766. It follows that there are certain "instruments that constitute bearable

arms," *Heller*, 554 U.S at 582, that law-abiding citizens have an inviolable right to possess and use. Indeed, the constitution protects firearms "of the kind in common use ... for lawful purposes like self-defense." *Id.* at 624. But it "does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes." *Id.* at 625. Put another way, the Second Amendment does not protect arms "that are highly unusual in society at large," *id.* at 627, but it definitively protects those in common use for lawful purposes, *id.* at 624. This distinction is fairly supported by the historical prohibition on carrying "dangerous and unusual weapons." *Id.* at 627.

As Petitioners correctly explain, the banned magazines are far from unusual. Pet. Writ Cert. at 4-5, 10, 18, 19, 22. Millions of Americans possess them for lawful purposes, including the core lawful purpose of self-defense. *Id.* at 4. This point is not disputed by either *Duncan* or *ANJRPC*. Indeed, the *Duncan* panel wrote that "[f]irearms with greater than ten round capacities existed even before our nation's founding, and the common use of LCMs for self-defense is apparent in our shared national history," 970 F.3d at 1147. The *ANJRPC* panel, for its part, did everything but concede that the banned magazines are in common use. It noted that "[m]illions of LCMs have been sold since 1994," that "LCMs often come factory standard with semi-automatic weapons," and that "[g]un owners use LCMs for hunting and pest control." *ANJRPC*, 910 F.3d at 112. Constitutional protection is thus clear, and both California's and New Jersey's bans are necessarily incompatible with the Second Amendment.

Heller confirms this implication of the constitutional text. There, the Court held that the Second Amendment

"*elevates above all other interests* the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635 (emphasis added). After finding that handguns are protected "arms," the Court held without pause that D.C.'s ban violated the Second Amendment. While *Heller* recognizes that the handgun ban would fail "any of the standards of scrutiny," *id.* at 628, it made a point of not applying any of them. That the Court did so is unsurprising—for the Second Amendment would mean little if the application of a particular test might permit the government to ban the very firearms the right protects. That said, even though both *Duncan* and *ANJRPC* deal with magazine *bans* and such laws lack any tailoring, both panels continued their analyses, and so the comparison between the two continues.

B. Both *ANJRPC* and *Duncan* Also Hold That LCMs Are Protected by the Second Amendment, But Only *Duncan* Engages in a Text, History, and Tradition Analysis

Many circuits employ a two-step approach to Second Amendment claims, asking first whether a given restriction burdens conduct within the the Amendment's scope and, if it does, applying the appropriate level of heightened scrutiny. Often, courts skip the first step and assume, without deciding, that the Second Amendment applies. *See, e.g.*, *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2019); *Jackson*, 746 F.3d 953; *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 ensures they need not confront the Second Amendment's text and history, teleporting them directly to the second step, where the real opportunities to manipulate the analysis reside.

This is exactly what happened in *ANJRPC*. Right after conceding that the record proved that millions of LCMs are "typically possessed by law-abiding citizens" for lawful purposes, *ANJRPC*, 910 F.3d at 116, the panel "assume[d] without deciding that LCMs are typically possessed by law-abiding citizens for lawful purposes and that they are entitled to Second Amendment protection." *Id.* at 117.

In contrast, while the *Duncan* panel also recognized that LCMs are protected, it did so only after first examining the history of firearms and magazines able to hold over 10 rounds. 970 F.3d at 1146-1149. For example, the *Duncan* panel explained that "the first firearm that could fire more than ten rounds without reloading was invented around 1580." *Id.* at 1147. The panel then traced the history of such arms from before the Founding through the period just after the Revolution, highlighting well-known inventions like the Giradoni air rifle which "had a 22-round capacity and was famously carried on the Lewis and Clark expedition." *Id*. The panel also discussed the rise of self-contained magazines in handguns, including the Browning 13-round Hi-Power pistol, which achieved mass-market success in the mid-1900s. Since then, the *Duncan* panel observed, "new semi-automatic pistol designs have replaced the revolver as the common, quintessential, self-defense weapon." *Id.*

After discussing the use of LCMs in rifles as well, the panel wrote:

> The point of our long march through the history of firearms is this: The record shows that firearms … [over] ten rounds … have been

> available in the United States for well over two centuries. While the Supreme Court has ruled that arms need not have been common during the founding era to receive protection under the Second Amendment, the historical prevalence of firearms capable of holding more than ten bullets underscores the heritage of LCMs in our country's history.

Id. at 1149. The panel concluded its historical analysis by holding that LCMs are not "unusual" arms, and because they are not unusual, the panel declined to opine whether they are "dangerous." *Id.*

The difference in how the Third and Ninth circuits approached this first step of the analyses is yet another reason the Court should grant certiorari. The Court should clarify that it is not enough for courts to "assume without deciding" that Second Amendment protections apply. There appears a clear explanation for why courts avoid examining the history of the conduct at issue before deciding whether it can be restricted. It allows them to avoid the discomfort of upholding restrictions on protected activity just after explaining that the conduct has historically been accepted. This Court should force them to confront that discomfort head-on.

C. *ANJRPC* Upheld New Jersey's LCM Ban Under a Watered-down Form of Intermediate Scrutiny Favored by Most Circuits, While *Duncan* Stands Out for Its Correct Application of Strict Scrutiny

1. The So-Called "Intermediate Scrutiny" Applied to Second Amendment Cases Is a Glorified Rational Basis Test

In the years since this Court decided *Heller*, very few Second Amendment challenges have ever been analyzed under strict scrutiny. This is a striking departure 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). It also reveals the lower courts' bias against the Second Amendment and their ability to sway the analysis in favor of upholding almost any gun-control measure. That virtually every Second Amendment claim brought to date has warranted only intermediate scrutiny is itself suspicious. 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 only the precise conduct at issue in *Heller*—handgun possession in one's home. This error is the same one the Third Circuit made below; mischaracterizing LCM bans as not imposing a severe burden on the core of the Second Amendment. *ANJRPC*, 910 F.3d at n.21. But even if a law *is* found to burden conduct falling within the Second Amendment's core, courts typically consider anything less than a

complete ban on that conduct to be an insignificant 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 Cnty. of S.F.*, 576 U.S. 1013, 1016 (2015) (Thomas, J., dissenting from denial certiorari). Yet *ANJRPC* shows us that even when a full ban is at issue, too often courts will do whatever necessary to uphold the restriction.

Worse than treating intermediate scrutiny as the default standard for analyzing restrictions on the fundamental right to keep and bear arms, however, is the way lower courts contort the intermediate scrutiny standard, ensuring that almost no gun-control measure could fail it. 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 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 explained 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 (2017)(internal quotations omitted). 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 v. Coakley*, 573 U.S. 464, 486 (2014).

In the Second Amendment context, however, circuit courts have described intermediate scrutiny in starkly weaker terms. Indeed, in the wake of the 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.*, *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."); *Peña*, 898 F.3d at 969, 979 ("We do not substitute our own policy judgment for that of the legislature," "we 'owe [the legislature's] findings deference."); *Drake v. Filko*, 724 F.3d 436, 440 (3d Cir. 2013) ("We refuse ... to intrude upon the sound judgment and discretion of the State of New Jersey."). Ultimately, this extreme deference has led to courts singling out the right to keep and bear arms for especially unfavorable treatment in defiance of the Court's admonishment against treating the Second Amendment "as a second-class right,..." *McDonald*, 561 U.S. at 780 (plurality op.).

In short, since *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*. This analysis is in no sense a heightened standard of review. 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.

2. The *ANJRPC* Panel Upheld New Jersey's LCM Ban Under This Faux Intermediate Scrutiny Standard

After concluding that LCM bans do not severely burden the core Second Amendment right, in part based on the nonsensical assertion that LCMs are not well-suited for self-defense, *ANJRPC*, 910 F.3d at 118, the Third Circuit moved on to its analysis of intermediate scrutiny. As discussed above, true intermediate scrutiny requires the government prove a substantial relationship between the law and its important objective, and the law must be narrowly tailored to serve a significant government interest. Far from applying this test, the majority never once uttered the phrase "narrowly tailored." The dissent rightfully objected to this, arguing that the "majority does not even demand evidence of tailoring. But tailoring is not limited to the First Amendment, as our precedent makes clear. Tailoring is fundamental to intermediate scrutiny, wherever applied." *ANJRPC*, 910 F.3d at 132 (citing *United States v. Marzzarella*, 614 F.3d 85, 98 (3d Cir. 2010) (Bibas, C.J., dissenting).

Nevertheless, claiming that "the risk inherent to firearms and other weapons distinguishes the Second Amendment from other fundamental rights" *ANJRPC*, 910 F.3d at n.28, the majority in *ANJRPC* applied a breed of "intermediate scrutiny" devoid of the tailoring

required in other rights contexts. To pass intermediate scrutiny, the court held, "the government must assert a significant, substantial, or important interest; there must also be a *reasonable* fit between that asserted interest and the challenged law, such that the law does not burden more conduct than is *reasonably* necessary." *Id.* at 106 (emphases added). In other words, the majority downgraded the exacting requirement of "narrow tailoring" to a mere "reasonable fit," a standard that sounds suspiciously like rational basis. After all, in Second Amendment case law, there seems to be no substantive difference between being rationally related to a legitimate state interest, and "reasonably fitting" an important government interest. And because firearms are inherently dangerous, every gun law arguably serves the important government interest in public safety.

ANJRPC highlights this exceedingly well. The panel held that New Jersey's LCM ban reasonably fits New Jersey's interest in promoting public safety because LCMs have been used in some mass shootings. *Id.* at 119. *ANJRPC* thus suggests that statistically rare crimes justify banning LCMs, even though the panel also held that such LCMs are commonly owned by millions of law-abiding citizens. It is no wonder then that *ANJRPC* dispensed with tailoring altogether because this wholesale ban would never survive the narrow tailoring that true intermediate scrutiny requires. As the dissent notes, "This reasoning would be enough for rational-basis review. And it could be enough for intermediate scrutiny too. But the government has produced no substantial evidence of this link." *Id.* at 132 (Bibas, C.J., dissenting).

To conclude its faux intermediate scrutiny analysis, the majority held that New Jersey's LCM ban does not burden more conduct than reasonably necessary because it does not disarm the individual. *Id.* at 121. By that standard, any gun law would be acceptable so long as a law-abiding citizen can still purchase *a* gun of some kind. It's hard to imagine such a standard being applied to any other fundamental right.

In the end, the Third Circuit (like other circuits before it) applied what is effectively a rational basis test to restrictions on a fundamental right. This practice must not stand any longer. Fortunately, *Duncan* provides a compelling alternative.

3. The *Duncan* Panel Held That Strict Scrutiny Should Apply, But Even if it Does Not, LCM Bans Cannot Survive True Intermediate Scrutiny

Once again turning to history and tradition, *Duncan* held that California's LCM ban substantially burdens core Second Amendment conduct, and thus strict scrutiny applies. 970 F.3d at 1152. "[T]he right of armed self-defense sits atop our constitutional order and remains rooted in our country's history. Any law that limits this right of self-defense must be evaluated under this constitutional and historical backdrop." *Id.* at 1153.

Next, the *Duncan* panel rejected the argument (embraced by the *ANJRPC* majority) that LCM bans impose no substantial burden on the Second Amendment because citizens still have access to capacity-limited guns. *Id.* at 1156. Noting that D.C. had argued in *Heller* that

their handgun ban passed muster because citizens could still use a shotgun or other arms for self-defense, the *Duncan* panel rightly observed that the Supreme Court had rejected this very argument in that case. *Id.*

> Because the law banned an "entire class of 'arms' that is overwhelmingly chosen by American[s]" for self-defense—a handgun, in that case—the restriction was "severe" and ran afoul of the Second Amendment. California's law, too, bans an "entire class of 'arms'" commonly used for self-defense and thus infringes on the Second Amendment.

Id.

As to whether LCM bans substantially burden "core" Second Amendment rights, the *Duncan* panel wisely avoided the State's bait of engaging in a policy decision that "weighs the pros and cons of an LCM ban to determine substantial burden." *Id.* at 1157. Instead, the panel concluded that the burden was "plainly obvious." *Id.* at 1158-59. For "when the government bans tens of millions of protected arms that are staples of self-defense and threatens to confiscate them from the homes of law-abiding citizens, that imposes a substantial burden on core Second Amendment rights." *Id.* at 1159.

And unlike *ANJRPC*, the *Duncan* panel rejected the premise that the inherent dangers of firearms distinguished the Second Amendment from any other fundamental right. Indeed, the panel held, "[t]he right to keep and bear arms … is not the only constitutional right that has controversial public safety implications. All

of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes fall into the same category." *Id.* at 1160 (citing *McDonald*, 561 U.S. at 783).

Having concluded that California's LCM ban must pass strict scrutiny to survive, *Duncan* then held that the ban could not meet this standard. While agreeing that California's interests were compelling, the panel held that "a statewide blanket ban on LCM possession everywhere and for nearly everyone" was not at all tailored and was not the least restrictive means of achieving the state's interests. *Duncan*, 970 F.3d at 1164.

Even so, *Duncan* also held that even under intermediate scrutiny, California's LCM ban would *still* not survive. At the outset, the panel rejected the sort of weakened intermediate scrutiny that *ANJRPC* used to uphold New Jersey's ban. For "[w]hatever its precise contours might be, intermediate scrutiny cannot approximate the deference of rational basis review. *Heller* forecloses any such notion." *Id.* at 1166. Examining California's ban under real intermediate scrutiny, then, the panel held that California's ban lacked any tailoring at all and, as such, could not survive intermediate scrutiny. The panel observed:

> The statute operates as a blanket ban on all types of LCMs everywhere in California for almost everyone. It applies to rural and urban areas, in places with low crime rates and high crime rates, areas where law enforcement response times may be significant, to those who may have high degrees of proficiency in their

> use for self-defense, and to vulnerable groups who are in the greatest need of self-defense.

Id. at 1167.

Finally, the *Duncan* panel rejected California's argument that a complete ban was necessary to keep LCMs from falling into the wrong hands. But "[t]he state could ban virtually anything if the test is merely whether something causes social ills when someone other than its lawful owner misuses it. Adopting such a radical position would give the government carte blanche to restrict the people's liberties under the guise of protecting them." *Id.* at 1168. The panel refused to write that check.

Duncan, then, presents a good alternative to the disrespect thrown at the Second Amendment by other circuits, and reaches its conclusion through extensive historical analysis of the kind other circuits routinely avoid. This is likely why the Ninth Circuit has ordered a rehearing of the case en banc, hoping for the opportunity to reverse yet *another* pro-Second Amendment victory. The Court should grant certiorari here and stop that from happening.

CONCLUSION

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). Resolving only one Second Amendment issue would leave most of this morass undisturbed and allow the abuse of *Heller* to continue. This Court should grant the petition for a writ of certiorari.

May 28, 2021

Respectfully Submitted,

C.D. Michel
Anna M. Barvir
Counsel of Record
Konstadinos T. Moros
Michel & Associates, P.C.
180 East Ocean Boulevard, Suite 200
Long Beach, CA 90802
(562) 216-4444
abarvir@michellawyers.com

Counsel for Amicus Curiae