No. 20-843

IN THE

Supreme Court of the United States

NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC., ROBERT NASH, BRANDON KOCH,

Petitioners,

v.

KEVIN BRUEN, in His Official Capacity as Acting Superintendent of New York State Police, RICHARD J. MCNALLY, JR., in His official Capacity as Justice of the New York Supreme Court, Third Judicial District, and Licensing Officer for Rensselaer County,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF SECOND AMENDMENT LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICI CURIAE[1]

Amici curiae are scholars who have devoted a substantial part of their research and writing to the history of weapons regulation in the United States and the legal standards governing application of the Second Amendment. Their scholarship has been published by a major university press and in leading law journals, and has been cited by members of this Court and the courts of appeals. *Amici* seek to explain why the framework that the courts of appeals have uniformly adopted is consistent with this Court's jurisprudence applying other constitutional rights. *Amici* further seek to explain that measuring firearms regulations' constitutionality under the Second Amendment solely by reference to history and tradition will leave courts adrift in many cases involving a wide diversity of weapons regulations among the several States. *Amici*'s expertise renders them particularly well-suited to assist the Court in these respects.

Joseph Blocher is the Lanty L. Smith '67 Professor of Law at Duke University School of Law. His scholarship on gun rights and regulation has been published in the Harvard Law Review Forum, the Yale Law Journal, the Stanford Law Review, and other leading academic

[1] All parties have consented to the filing of this brief. In accordance with Rule 37.6, 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 *amici curiae*, or their counsel, made such a monetary contribution.

journals. See, *e.g.*, *Good Cause Requirements for Carrying Guns in Public*, 127 Harv. L. Rev. Forum 218 (2014); *Firearm Localism*, 123 Yale L. J. 82 (2013); *The Right Not to Keep or Bear Arms*, 64 Stan. L. Rev. 1 (2012). His work has been cited by federal courts of appeal. *E.g.*, *Heller v Dist. of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011) ("*Heller II*"). Professor Blocher co-authored a book with amicus Professor Darrell Miller, *The Positive Second Amendment: Rights, Regulation, and the Future of Heller* (2018), which includes a comprehensive account of the history, theory, and law of the right to keep and bear arms.

Darrell Miller is the Melvin G. Shimm Professor of Law at Duke University School of Law. His Second Amendment scholarship has been published in the University of Chicago Law Review, the Harvard Law Review Forum, the Yale Law Journal, the Columbia Law Review, and other leading journals. See, *e.g.*, *What Is Gun Control? Direct Burdens, Incidental Burdens, and the Boundaries of the Second Amendment*, 83 U. Chi. L. Rev. 295 (2016) (with Joseph Blocher); *Peruta, the Home-Bound Second Amendment, and Fractal Originalism*, 127 Harv. L. Rev. Forum 238 (2014); *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 Yale L. J. 852 (2013). His work has been cited by federal courts of appeal. *E.g.*, *Heller II*, 670 F.3d 1244.

Eric Ruben is an Assistant Professor of Law at SMU Dedman School of Law. His scholarship on the Second Amendment has been published or is forthcoming in the California Law Review, Duke Law Journal, Georgetown Law Journal, Iowa Law Review, Yale Law Journal Forum, and other prominent publications. See, *e.g.*, *An Unstable Core: Self-Defense and the*

Second Amendment, 108 Cal. L. Rev. 63 (2020); *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller*, 67 Duke L. J. 1433 (2018) (with Joseph Blocher); *Firearm Regionalism and Public Carry: Placing Southern Antebellum Caselaw in Context*, 125 Yale L. J. Forum 121 (2015) (with Saul Cornell). His work has been cited in opinions of federal district and appellate courts addressing Second Amendment issues.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Amici urge the Court to hold that the courts of appeals are using the proper doctrinal framework to adjudicate Second Amendment claims. *Amici* take no position on how that framework should apply to the New York policy at issue.

In *Heller*, "this Court's first in-depth examination of the Second Amendment," the Court explicitly disclaimed any attempt "to clarify the entire field," leaving the Amendment's precise contours to future cases. *District of Columbia* v. *Heller*, 554 U.S. 570, 635 (2008). More than a decade and 1,500 cases later, the courts of appeals are in broad agreement that a conventional framework for adjudicating constitutional rights applies to the Second Amendment. At the threshold, courts "ask if the restricted activity is protected by the Second Amendment in the first place; and then, if necessary, [they] … apply the appropriate level of scrutiny." *United States* v. *Focia*, 869 F.3d 1269, 1285 (11th Cir. 2017), cert. denied, 139 S. Ct. 846 (2019). "A regulation that threatens a right at the core of the Second Amendment—for example, the right of a law-abiding, responsible adult to possess and use a handgun to defend his or her home and family—triggers strict scrutiny." *Nat'l Rifle Ass'n of Am., Inc.* v. *Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 195 (5th Cir. 2012) ("*NRA*") (citation omitted). Courts apply intermediate scrutiny "if a challenged law does not implicate a core Second Amendment right, or does not place a substantial burden on the Second Amendment right." *United*

States v. *Torres*, 911 F.3d 1253, 1262 (9th Cir. 2019) (internal quotation marks omitted).

This familiar constitutional framework is consistent with *Heller* and gives a privileged place to history and tradition while providing courts with tools to resolve cases challenging regulations with an ambiguous history or a recent vintage.

The consensus view of the lower courts is faithful to *Heller*'s command "that. . . courts must read [a] challenged statute in light of the historical background of the Second Amendment[,]" *GeorgiaCarry.Org, Inc.* v. *Georgia*, 687 F.3d 1244, 1261 (11th Cir. 2012). Indeed, "historical meaning enjoys a privileged interpretive role in the Second Amendment context." *United States* v. *Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011). Courts first "ask 'whether the challenged law burdens conduct protected by the Second Amendment,' based on a 'historical understanding of the scope of the … right.'" *Jackson* v. *City & Cty. of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014) (citation omitted). The regulation can be upheld without further analysis if "the record includes persuasive historical evidence establishing that the regulation at issue imposes prohibitions that fall outside the historical scope of the Second Amendment." *Id.* At the same time, courts after *Heller* also have not needed means-end scrutiny to condemn laws that violate rights deeply embedded in the history of our legal system.

However, there will be few Second Amendment cases involving "questions on which a clear answer already existed in 1791 and has been generally adhered to by the traditions of our society ever since." *Cty. of Riverside* v. *McLaughlin*, 500 U.S. 44, 60 (1991) (Scalia, J., dissenting). Both weapons and weapons regulations in this

country have taken a variety of forms, reflecting the diversity of our communities and safety concerns, and have changed over time. As such, the historical record will be ambiguous with respect to many laws regulating weapons. Moreover, as in other areas of the law, today's world involves technologies, practices and dangers associated with weapons that were unknown to Americans throughout most of their history. Grounding the Second Amendment entirely in history and tradition would leave the courts in many cases with little guidance.

Courts required to apply a purely historical test in cases with an equivocal or non-existent historical record could adopt a rule that a regulation is constitutional unless it prohibits individuals from doing what our legal tradition has always recognized they had a right to do, *i.e.*, a rule that every law that does not fit the *Heller* mold is constitutional. That rule maximizes deference to the democratically accountable branches of government. But such a test would uphold firearms laws that would fail even intermediate scrutiny under the courts of appeals' current framework because the government cannot show that they are reasonably necessary to advance a substantial interest.

Alternatively, courts could adopt a rule that any regulation must have been adopted and maintained by nearly all jurisdictions, or must have a precise historical analogue to comply with the Second Amendment. Such a rule would, however, render empty this Court's assurance that the Second Amendment does not foreclose the people from using "a variety of tools for combating" gun violence. *Heller*, 554 U.S. at 636. It also would misconstrue *Heller*. To be sure, the District of Columbia's prohibition on keeping firearms in the home lacked any historical precedent, but that alone was insufficient for

striking down the law without resort to means-end scrutiny. The Court in *Heller* invalidated the District's law because it nullified the core component of a right this Court found consistently and uniformly recognized throughout the history of our legal tradition. See *id.* at 629 ("A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional" (quoting *State* v. *Reid,* 1 Ala. 612, 616–617 (1840))).

What was decisive in *Heller* was not the District's inability to point to a history of all jurisdictions at all times having adopted a law like its own but rather that the District's law left no room for the exercise of a right that virtually all legal sources in our history had recognized. As such, under *Heller*, the touchstone of a Second Amendment violation that transcends means-end scrutiny is an unbroken tradition of recognizing a right to use weapons in a way that a law forbids. The lack of an unbroken tradition of laws like the one being challenged, without more, does not establish a Second Amendment violation. The Second Amendment permits the people to prohibit what they have sometimes permitted; it does not place every use of weapons the Founders or others have made at some times and in some places categorically beyond the police power at all times in all places.

Caught between under- and over-inclusive default rules for breaking historical ties, courts required to decide cases based solely on history and tradition would tend to either shroud their policy preferences in selective historiography or resort to abstruse analogies. This

Court has declined to ground constitutional jurisprudence in an "analogue test" that is difficult for courts to apply, unpredictable to government actors and opaque to the people. *Riley* v. *California*, 573 U.S. 373, 401 (2014).

Bereft of any administrable way to decide cases based on history and tradition where they provide no clear precedent or analogs, courts will tend to stray into covert, ad hoc interest balancing. The sounder and more transparent framework for applying the Second Amendment where history does not provide a clear answer is the means-end scrutiny that the courts of appeals have uniformly adopted and that this Court has long used to apply other constitutional rights. That approach would give the lower courts the guidance they need while still giving a privileged place to history and tradition. Indeed, the courts of appeals' framework gives effect to *Heller*'s reading of history that "individual self-defense is 'the *central component*' of the Second Amendment right," *McDonald* v. *City of Chicago*, 561 U.S. 742, 767 (2010) (quoting *Heller*, 544 U.S. at 599), by applying strict scrutiny to regulations that severely burden (but do not nullify) that historically recognized right. This rule is consistent with this Court's precedents applying strict scrutiny to laws that significantly burden activity at the traditional core of other constitutional protections, while applying intermediate scrutiny to laws in other circumstances.

The framework used by the courts of appeals protects the people's fundamental right to keep and bear arms while ensuring that the people also can protect themselves through legislation. This Court should recognize that framework as the correct approach to evaluating

claims that government has infringed the Second Amendment.

ARGUMENT

I. THE COURTS OF APPEALS HAVE UNIFORMLY AGREED ON A FRAMEWORK FOR APPLYING THE SECOND AMENDMENT.

This Court in *Heller* "declin[ed] to establish a level of scrutiny for evaluating Second Amendment restrictions." 554 U.S. at 634. The courts of appeals have since reached broad consensus on "a workable framework, consistent with *Heller*, for evaluating whether a challenged law infringes Second Amendment rights." *Gould* v. *Morgan*, 907 F.3d 659, 669 (1st Cir. 2018).

The First, Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and District of Columbia Circuits have explicitly adopted this framework. See *Worman* v. *Healey*, 922 F.3d 26, 33 (1st Cir. 2019), cert. denied, 141 S. Ct. 109 (2020); *Libertarian Party of Erie Cty.* v. *Cuomo*, 970 F.3d 106, 127 (2d Cir. 2020), cert. denied, 2021 WL 2519117 (U.S. June 21, 2021); *Ass'n of New Jersey Rifle & Pistol Clubs Inc.* v. *Att'y Gen. New Jersey*, 974 F.3d 237, 242 (3d Cir. 2020); *Harley* v. *Wilkinson*, 988 F.3d 766, 769 (4th Cir. 2021); *Nat'l Rifle Ass'n of Am., Inc.* v. *Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194, 206 (5th Cir. 2012) ("*NRA*"); *United States* v. *Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Kanter* v. *Barr*, 919 F.3d 437, 442 (7th Cir. 2019); *Young* v. *Hawaii*, 992 F.3d 765, 783 (9th Cir. 2021); *United States* v. *Reese*, 627 F.3d 792, 800–801 (10th Cir. 2010); *GeorgiaCarry.Org*, 687 F.3d at

1260, n. 34; *United States* v. *Class*, 930 F.3d 460, 463 (D.C. Cir. 2019). The Eighth Circuit also has acknowledged the framework, but has not yet specifically adopted it. See *United States* v. *Adams*, 914 F.3d 602 (8th Cir. 2019).[2]

The first step involves a "threshold question [of] whether the regulated activity falls within the scope of the Second Amendment." *Ezell* v. *City of Chi.*, 846 F.3d 888, 892 (7th Cir. 2017). This inquiry is based on a "historical understanding of the scope of the … right." *Jackson*, 746 F.3d at 960. "A law does *not* burden Second Amendment rights, if it either falls within one of the 'presumptively lawful regulatory measures' identified in *Heller*' or regulates conduct that historically has fallen outside the scope of the Second Amendment." *Torres*, 911 F.3d at 1258 (quoting *Heller*, 554 U.S. at 627, n. 26) (internal quotation marks omitted).

"[I]f the historical evidence is inconclusive or suggests that the regulated activity is not categorically unprotected[,] then there must be a second inquiry into the strength of the government's justification for restricting or regulating the exercise of Second Amendment rights." *Kanter*, 919 F.3d at 441. In such cases, courts "evaluate the regulatory means the government has chosen and the public-benefits end it seeks to achieve." *Id.* (internal quotation marks omitted).

To determine the appropriate level of scrutiny, courts evaluate "how close the law comes to the core of the Sec-

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[2] Given the Federal Circuit's subject-limited jurisdiction, it is unsurprising that it has not addressed the issue.

ond Amendment right and the severity of the law's burden on that right." *Id.* "If the core Second Amendment right is burdened, then strict scrutiny applies; otherwise, intermediate scrutiny applies." *Ass'n of N.J. Rifle & Pistol Clubs, Inc.* v. *Att'y Gen. N.J.*, 910 F.3d 106, 117 (3d Cir. 2018). At all events, "rational-basis review does not apply." *Kanter*, 919 F.3d at 442.

II. THIS COURT SHOULD ADOPT THE FRAMEWORK USED BY THE COURTS OF APPEALS FOR APPLYING THE SECOND AMENDMENT.

This Court should adopt the framework that the courts of appeals have been applying for adjudicating claims that weapons regulations violate the Second Amendment. That framework is consistent with *Heller*. It gives effect to history and tradition of both weapons regulation and the right to bear arms. And it provides courts with tools to resolve cases involving an unclear historical record or regulations addressing issues that have emerged only in recent history.

A. The Framework's Threshold Standard Is Faithful To *Heller* And Other Constitutional Jurisprudence

Under the courts of appeals' framework, the "threshold question" is "whether the regulated activity falls within the scope of the Second Amendment." *Ezell*, 846 F.3d at 892. This inquiry emanates directly from *Heller*, where this Court "acknowledged that the scope of the Second Amendment is subject to historical limitations." *United States* v. *Chester*, 628 F.3d 673, 679 (4th Cir. 2010).

This Court in *Heller* noted that "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." 554 U.S. at 626. It went on to state that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626–627. This Court also endorsed the "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" *Id.* at 627. *Heller* thus "recognized that history supported the constitutionality of some laws limiting the right to possess a firearm, such as laws banning firearms from certain sensitive locations and prohibiting possession by felons and other dangerous individuals." *New York State Rifle & Pistol Ass'n, Inc.* v. *City of New York*, 140 S. Ct. 1525, 1540–1541 (2020) ("*NYSRPA I*") (Alito, J., dissenting).

Consistent with this precedent, the courts of appeals have concluded that a law "does not burden conduct protected by the Second Amendment if the record contain[s] evidence that [the subjects of the law] have been the subject of longstanding, accepted regulation." *Fyock* v. *City of Sunnyvale*, 779 F.3d 991, 997 (9th Cir. 2015). "[A] longstanding, presumptively lawful regulatory measure … would likely fall outside the ambit of the Second Amendment" and "would likely be upheld at step one of [the prevailing] framework." *NRA*, 700 F.3d at 196. Thus, the framework's threshold requirement is "a textual and historical inquiry," *Kanter*, 919 F.3d at

441, in which courts "look to tradition and history." *Medina* v. *Whitaker*, 913 F.3d 152, 158 (D.C. Cir. 2019). An analysis whose "first step" requires courts "to explore the amendment's reach 'based on a historical understanding of the scope of the [Second Amendment] right,'" *Torres*, 911 F.3d at 1258 (internal quotation marks omitted), is faithful to *Heller*'s conclusion that "traditional restrictions go to show the scope of the right." *McDonald*, 561 U.S. at 802 (Scalia, J., concurring).

Reaffirming that there are "[c]ategorical limits on the possession of firearms would not be a constitutional anomaly. Think of the First Amendment, which has long had categorical limits: obscenity, defamation, incitement to crime, and others." *United States* v. *Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (citing *United States* v. *Stevens,* 559 U.S. 460, 468–469 (2010)). "The Second Amendment is no different." *Heller*, 554 U.S. at 635. As this Court explained, "we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for any purpose." *Id.* at 595 (citation omitted). Cf. *New York* v. *Ferber*, 458 U.S. 747, 764 (1982); *Garcetti* v. *Ceballos*, 547 U.S. 410 (2006).

B. Courts Applying The Framework Invalidate Firearms Regulations At Odds With A Uniform Tradition Affirmatively Recognizing A Right To Keep And Bear Arms

The courts of appeals' framework does not make history and tradition a one-way ratchet that serves only to

uphold firearms restrictions with a longstanding historical pedigree. Courts also find a Second Amendment violation where a law without any historical precedent would nullify a historically established right. Joseph Blocher, *Bans*, 129 Yale L. J. 308, 360–367 (2019) ("formalist" approach properly limited to such cases).

The law in *Heller* failed "any of the standards of scrutiny" the Court has "applied to enumerated constitutional rights," 554 U.S. at 628, because it satisfied all of those criteria. *Heller* was a rare case where "history provided *no support* for laws like the District's." *NYSRPA I*, 140 S. Ct. at 1541 (Alito, J., dissenting) (emphasis added). As the Court explained, "[f]ew laws in the history of our Nation have come close to the severe restriction of the District's handgun ban." *Heller*, 554 U.S. at 629. The Court found only "a single law, in effect in a single city, that contradicts the overwhelming weight of other evidence regarding the right to keep and bear arms for defense of the home." *Id.* at 632.

But that was not all. The law in *Heller* nullified a right that had been firmly recognized in our legal tradition: "an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home." *Id.* at 577. This Court pointed to numerous legal sources that left it with "no doubt … that the Second Amendment conferred an individual right to keep and bear arms." *Id.* at 595. Thus, *Heller*'s "archetype of an unconstitutional firearm regulation," *United States* v. *Cox*, 906 F.3d 1170, 1184 (10th Cir. 2018), was a law with virtually no precedent that also foreclosed the exercise of a right with uniform historical precedent.

Courts have invalidated laws that meet those criteria without specifying a level of scrutiny. The Seventh Circuit in *Moore* v. *Madigan*, 702 F.3d 933 (7th Cir. 2012), invalidated Illinois's "blanket prohibition on carrying [a] gun in public." *Id.* at 940. The court found the same lack of precedent for the Illinois law as this Court had found for the District of Columbia law in *Heller*: only the District had a law like the Illinois statute at issue and only "a few states did during the nineteenth century, but no longer." *Id.* at 940 (citation omitted). But the Seventh Circuit did not condemn the Illinois law for its lack of precedent alone. Applying *Heller*'s "historical analysis," the court found that "a right to keep and bear arms for personal self-defense in the eighteenth century could not rationally have been limited to the home." *Id.* at 936. Illinois's "flat ban on carrying ready-to-use guns outside the home" left no room for the exercise of that right. *Id.* at 940. Thus, as in *Heller*, the court did not need to decide on a level of scrutiny to condemn a law that "eliminate[d] *all possibility* of armed self-defense in public." *Id.* (emphasis added). Another court later invalidated the District of Columbia's similar law for similar reasons without using means-end scrutiny. *Palmer* v. *District of Columbia*, 59 F. Supp. 3d 173, 182 (D.D.C. 2014).

The fact that cases like these are not widespread suggests that, after *Heller*, few jurisdictions are adopting or defending laws that fit the mold of the law that the Court invalidated in that case: a law that lacks historical precedent *and* effectively nullifies a right uniformly recognized by legal authorities throughout history.

C. Courts Will Not Be Able To Rely On History And Tradition Alone To Resolve Many Second Amendment Cases

Heller's reliance on the exceptionally clear historical record before it in that case does not, however, compel or even support the conclusion that Second Amendment cases can be resolved by resort to history and tradition alone. Although some have asserted that "courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny," *Heller II*, 670 F.3d at 1271 (Kavanaugh, J., dissenting), no Circuit has adopted such an inadministrable test. Those courts of appeals' decisions are consistent with *Heller*, in which the Court disclaimed that its opinion was intended "to clarify the entire field" of Second Amendment jurisprudence. 554 U.S. at 635. Thus, applying *Heller* to require an exclusive focus on history and tradition will force lower courts into covert, unguided, ad hoc balancing, disguised as analogy.

The reality is that many cases will involve weapons regulations that fall somewhere in between the laws that the Court's *Heller* decision stated would be valid and the law that the Court invalidated in that case. In many cases, the litigants will not be able to point to a largely unbroken tradition of similar regulations or a largely unbroken tradition of recognizing a right to do what the regulations forbid—either because weapons restrictions have varied from time to time or place to place or because the regulation at issue addresses a problem that only presented itself in recent history.

This Court's statement in *Heller* that there was "no doubt" about the history of the individual right to bear arms for self-defense in the home was a conclusion about the scope of the Second Amendment right, not about the lawfulness of a particular firearms regulation. Courts faced with challenges to different regulations likely will not be able to draw as confident a conclusion from the historical record because "analyzing the history and tradition of gun laws in the United States does not always yield easy answers." *Heller II*, 670 F.3d at 1275 (Kavanaugh, J., dissenting).

Indeed, "conditions and problems differ from locality to locality" and "citizens in different jurisdictions have divergent views on the issue of gun control." *McDonald*, 561 U.S. at 783. Firearms are and always have been subject to regulation throughout the United States. See, *e.g.*, Joseph Blocher & Darrell A.H. Miller, *The Positive Second Amendment: Rights, Regulation, and the Future of Heller* 19–21 (2018) (describing history of firearms regulation); Robert Spitzer, *Guns Across America: Reconciling Gun Rules and Rights* 5 (2015) ("[W]hile gun possession is as old as America, so too are gun laws"). Historically, such laws "were not only ubiquitous, numbering in the thousands; they spanned every conceivable category of regulation, from gun acquisition, sale, possession, transport, and use, including deprivation of use through outright confiscation, to hunting and recreational regulations, to registration and express gun bans." Spitzer, *supra*, at 5. Cf. Duke Center for Firearms Law, *Repository of Historical Gun Laws*, online at https://firearmslaw.duke.edu/repository/search-the-repository/ (as visited July 18, 2021) (containing more than 1,500 historical gun laws from the Medieval Age through the 1930s).

From the very beginning, those laws varied across communities and regions, especially among urban and rural areas. See generally Joseph Blocher, *Firearm Localism*, 123 Yale L. J. 82 (2013); Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 Yale L. J. Forum 121 (2015). There consistently have been "significant differences between urban and rural areas with regard to the prevalence, regulation, perceived importance, use, and misuse of guns." Blocher, *supra*, 123 Yale. L. J. at 85. Moreover, some jurisdictions have taken different positions on the same restrictions over time. Compare An Act for the Better Security of the Inhabitants, by Obliging the Male White Persons to Carry Fire Arms to Places of Public Worship, 1770, § 1, in Robert Watkins & George Watkins, A Digest of the Laws of the State of Georgia 157 (Phila., R. Aitken 1800) (requiring the carrying of guns to church) with An Act to Preserve the Peace and Harmony of the People of this State, and for Other Purposes, 1870, § 1, in Public Laws, Passed by the General Assembly of the State of Georgia, at the Session of 1870, at 42 (Atlanta, New Era Printing Establishment 1870) (banning the carrying of guns to church).

For these reasons, courts are likely to face "institutional challenges in conducting a definitive review of the relevant historical record." *NRA*, 700 F.3d at 204. Indeed, lower courts deciding individual cases have noted that "[h]istory and tradition do not speak with one voice." *Kachalsky* v. *Cty. of Westchester*, 701 F.3d 81, 91 (2d Cir. 2012).

Another difficulty posed by a purely historical approach to the Second Amendment is that, for many regulations, there will be no history or tradition on which

to draw for answers. "[W]hen legislatures seek to address new weapons that have not traditionally existed or to impose new gun regulations because of conditions that have not traditionally existed, there obviously will not be a history or tradition of banning such weapons or imposing such regulations." *Heller II*, 670 F.3d at 1275 (Kavanaugh, J., dissenting).

The test of whether a law passes constitutional muster thus cannot always depend on how long a law like it has been on the books. It is clear, for example, that airplanes are the kind of "sensitive places" where legislatures should be able to prohibit weapons. *E.g.*, *United States* v. *Davis*, 304 F. App'x 473, 474 (9th Cir. 2008). However, Congress did not regulate firearms in airplanes until the 1960s, many years after airlines began commercial service. See Act of Sept. 5, 1961, Pub. L. No. 87-197, 75 Stat. 466. Thus, it is hard to see how a court applying a purely historical test could uphold restrictions on weapons in flight.

Nor would looking at history alone shed much light on the constitutionality of laws regulating the use of "[t]hree-dimensional ('3D') printing technology" that enables "a computer to 'print' a physical object" including, with the right files, a "single-shot plastic pistol" or "a fully functional plastic AR–15." *Def. Distributed* v. *U.S. Dep't of State*, 838 F.3d 451, 454–455 (5th Cir. 2016). That technology could enable anyone—including "felons and the mentally ill," *Heller*, 554 U.S. at 626, who cannot lawfully possess firearms—with commercially available equipment to produce so-called "ghost guns" that law enforcement cannot trace. See Andy Greenberg, *I Made an Untraceable AR-15 'Ghost Gun' in My Office—*

and It Was Easy, Wired (June 3, 2015, 7:00 AM).[3] See also H.R. REP. 116-88, 2 (stating that "[t]he emergence of functional 3D-printed guns are a homeland security threat" and are among the "rapidly evolving technologies" that "pose an ongoing, metastasizing challenge to law enforcement"). Indeed, 3D-printed firearms have already been used in mass assaults. Hoffman & Ware, *Is 3-D Printing the Future of Terrorism?*, Wall St. J. (Oct. 25, 2019) (reporting that "a gunman tried to massacre worshipers on Yom Kippur at a synagogue in Halle, Germany" with "homemade weapons using 3-D-printed components—including a 3-D-printed gun"), online at https://www.wsj.com/articles/is-3-d-printing-the-future-of-terrorism-11572019769 (as visited July 19, 2021).

Legislatures may have good reasons to regulate this technology, e.g., R.I. Gen. Laws section 11-47-8(e) (prohibiting possession of "any firearm produced by a 3D printing process"), but it is hard to see how a court could use history to assess the constitutionality of laws regulating technology that did not exist for most of the history of Anglo-American law. This is just one example of how demanding that courts travel back in time to decide all Second Amendment cases will often send them to a dead end.

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[3] Online at http://www.wired.com/2015/06/i-made-an-untraceable-ar-15-ghost-gun/ (as visited July 19, 2021).

D. Courts Required To Consider History And Tradition Alone Will Resort To Problematic Jurisprudential Tools

Because instructing lower courts to rely on history and tradition alone to apply the Second Amendment often will leave them without any meaningful guidance, doing so will risk the proliferation of default rules that dramatically over- or under-protect the Second Amendment or, worse, *ad hoc* judicial policymaking.

One option when history does not yield a clear answer would be for lower courts to adopt a default rule of deference to the democratically accountable branches. *E.g.*, *Lange* v. *California*, No. 20-18, 2021 WL 2557068, at *20 (U.S. June 23, 2021) (noting that the Court has declined to recognize a Fourth Amendment right where it found "disagreement, not unanimity, among both the common-law jurists and the text writers who sought to pull the cases together"' (quoting *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 332 (2001))). That rule respects the people's "freedom to govern themselves," *Obergefell* v. *Hodges*, 576 U.S. 644, 714 (2015) (Scalia, J., dissenting), but it would uphold a law with a mixed historical pedigree even if the law would fail intermediate scrutiny.

Another potential default rule where history does not yield a clear answer would be to invalidate every law that has not been uniformly adopted across time and jurisdictions in the history of the Republic. But that rule would dramatically invade the people's ability to protect themselves through legislation. Again, the example of laws prohibiting firearms on planes shows that eminently sensible laws designed to address problems that arose for the first time in the 20th century cannot trace

their lineage "[f]rom Blackstone through the 19th-century cases." *Heller II*, 670 F. 3d at 1272, n. 4. Thus, upholding only laws with that kind of historical tradition would mean that the people's ability to protect themselves from the dangers of weapons through legislation is limited to the regulations on the books more than a century ago. That result would fail to fulfill this Court's assurances that the Second Amendment does not disable the people's "variety of tools for combating" gun violence, *Heller*, 554 U.S. at 636, or foreclose their "ability to devise solutions to social problems that suit local needs and values," *McDonald*, 561 U.S. at 785. Moreover, condemning every law that is not as "longstanding" as the prohibitions on possession by felons and the mentally ill or carrying in schools or government buildings the Court identified as presumptively lawful in *Heller*, 554 U.S. at 626–627, would ignore the Court's express disclaimer that the decision did not set forth "an exhaustive historical analysis … of the *full scope* of the Second Amendment." *Id.* at 626 (emphasis added). To the contrary, the Court stated that it had "identif[ied] these presumptively lawful regulatory measures only as examples" and that its "list does not purport to be exhaustive." *Id.* at 627, n. 26.

In the absence of any workable default rule, exclusive reliance on history and tradition will likely generate intractable interpretive difficulties. In cases where there is history on both sides, lower courts will have to develop a set of rules for weighing historical sources. What result if eight original states restricted a particular use of arms but five recognized a right to that use? What if the count is nine and four? What if some of those states changed positions on the issue in the 19th Century? What if some of those states changed again after the

Civil War? What if some state courts have upheld the restriction but others struck it down? What if Blackstone and later commentators disagree on the matter?

Even professional historians have no method to provide definitive answers to such questions. It is difficult to see how this Court will be able to fashion interpretive principles that will equip reviewing courts to provide clear and principled answers to the many difficult issues they will face. And the problems go even deeper. The Court will be called upon to decide how the doctrine applies to regulations of weapon possession by certain categories of people (such as those with a felony conviction, the mentally ill, and minors), of specific weapons (like machine guns, stun guns, or chemical sprays), of possession in particular places (like court houses, polling places, police stations, and schools) and of possession at particular times (like pending trial or during a crime). See, *e.g.*, Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. 1443, 1475–1545 (2009) (discussing and categorizing a broad range of gun laws). It is hard to imagine a constitutional doctrine less transparent to the people, less predictable for legislatures and their constituents and less clear for lower courts.

Lower courts could try to analogize laws written in the twenty-first century to laws adopted centuries before. But that mode of interpretation can engender unpredictability and inscrutability. As this Court has explained, an "analogue test" can "launch courts on a difficult line-drawing expedition" to answer questions such as: "Is an e-mail equivalent to a letter? Is a voicemail equivalent to a phone message slip?" *Riley*, 573 U.S. at 401. Such a test would keep "judges guessing for years

to come." *Id.*; see also *United States* v. *Jones*, 565 U.S. 400, 420 (2012) (Alito, J., concurring) (noting that "it is almost impossible to think of late–18th-century situations that are analogous to" GPS searches). Similarly, analogizing modern causes of action to those that existed at common law in applying the Seventh Amendment "requir[es] extensive and possibly abstruse historical inquiry" that is "difficult to apply." *Ross* v. *Bernhard*, 396 U.S. 531, 538, n. 10 (1970).

Given the defects in these alternatives, courts attempting a history-only approach to the Second Amendment would be *more likely* to engage in *ad hoc*, values-based judging than if they were applying the transparent means-ends framework that the courts of appeals have developed. An opaque and uneven historical record creates an opportunity for "the selection of data favorable to the position being advanced without regard to or concern for contradictory data or proper evaluation of the relevance of the data proffered." Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 Sup. Ct. Rev. 119, 122, n. 13. In cases where there is little history at all, there would be little to cabin jurists' discretion to smuggle their policy views through gaps in the historical record. And if "courts would have to engage in wide-ranging analogies," then a test based on history alone "would most likely involve precisely the kind of judicial discretion that advocates of formalism typically seek to avoid." Blocher, *Bans*, 129 Yale L. J. at 363. As much as scholars like *amici* might benefit if the Second Amendment became a game of analogies, they respectfully submit that the law should rest on a foundation more accessible to the people whose lives and rights depend on its scope and more connected to the practical

realities that their elected representatives endeavor to confront.

E. The Courts Of Appeals' Means-End Scrutiny Is Consistent With *Heller* And Aligns The Second Amendment With Other Constitutional Rights

In other areas of constitutional law, "[w]hen history has not provided a conclusive answer," *Virginia* v. *Moore*, 553 U.S. 164, 171 (2008), this Court has turned to other jurisprudential methods. It should do the same in applying the Second Amendment by adopting the approach that the courts of appeals uniformly have adapted from other constitutional jurisprudence: absent a clear historical tradition of regulating conduct or recognizing a fundamental right to engage in that conduct, "a law impinging upon the Second Amendment right must be reviewed under a properly tuned level of scrutiny—i.e., a level that is proportionate to the severity of the burden that the law imposes on the right." *NRA*, 700 F.3d at 198.

Even in cases where courts apply this well-recognized framework, history remains relevant and the courts remain faithful to *Heller*. Courts have understood the "core Second Amendment right" to be "the right to keep a handgun in the home for self-defense." *NYSRPA I*, 140 S. Ct. at 1540–1541 (Alito, J., dissenting). Thus, in deciding which level of scrutiny applies to a firearm regulation, the courts of appeals have asked "whether the challenged regulation burdens the core Second Amendment right." *Ass'n of N.J. Rifle & Pistol Clubs, Inc.*, 910 F.3d at 117. "A regulation that threatens a right at the core of the Second Amendment—for example, the right of a law-abiding, responsible adult to

possess and use a handgun to defend his or her home and family—triggers strict scrutiny." *Gould*, 907 F.3d at 671.

Courts applying such means-end scrutiny therefore are not treating "the right recognized in *Heller* 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 opinion). Nor are they engaged in the "*freestanding* 'interest-balancing' approach" that this Court rejected in *Heller* as inconsistent with any "of the traditionally expressed levels" of scrutiny. 554 U.S. at 634 (emphasis added). Rather, they are using a jurisprudential tool that this Court has honed over many years for putting government officials to their paces in justifying regulations. Where means-end scrutiny is "crafted *so as to reflect*" our "constant and unbroken national traditions"—as the lower courts' Second Amendment framework is—even the most ardent originalist has "no problem" with means-end scrutiny because it is "essential to evaluating whether the new restrictions that a changing society constantly imposes upon private conduct comport with [the protections] our society has always accorded in the past." *United States* v. *Virginia*, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting).

That is why this Court uses means-ends scrutiny in testing burdens on activity implicating other constitutional rights. For example, "*Heller* itself repeatedly invokes the First Amendment in establishing principles governing the Second Amendment." *United States* v. *Marzzarella*, 614 F.3d 85, 89, n. 4 (3rd Cir. 2010). And "First Amendment doctrine demonstrates that, even with respect to a fundamental constitutional right, we can and should adjust the level of scrutiny according to

the severity of the challenged regulation." *NRA*, 700 F.3d at 198; see also *Marzzarella*, 614 F.3d at 96 ("Strict scrutiny does not apply automatically any time an enumerated right is involved. We do not treat First Amendment challenges that way").

This Court repeatedly has emphasized that "[p]olitical speech, of course, is at the *core* of what the First Amendment is designed to protect." *Morse* v. *Frederick*, 551 U.S. 393, 403 (2007) (internal quotation marks omitted) (emphasis added). Cf. *Citizens United* v. *Fed. Election Comm'n,* 558 U.S. 310, 393 (2010) (Scalia, J., concurring) ("A documentary film critical of a potential Presidential candidate is core political speech"). "When a law burdens *core* political speech, we apply exacting scrutiny." *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) (internal quotation marks omitted) (emphasis added). Similarly, "the First Amendment protects public employee speech only when it falls within the *core* of First Amendment protection—speech on matters of public concern." *Engquist* v. *Or. Dep't of Agric.*, 553 U.S. 591, 600 (2008) (emphasis added).

"At [the Fourth Amendment's] very *core* stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman* v. *United States*, 365 U.S. 505, 511 (1961) (emphasis added); see also *Kentucky* v. *King*, 563 U.S. 452, 474 (2011) ("In no quarter does the Fourth Amendment apply with greater force than in our homes, our most private space which, for centuries, has been regarded as entitled to special protection." (internal quotation marks omitted)). Similarly, the Seventh "Amendment was designed to preserve the basic institution of jury trial in only its *most fundamental elements*." *Galloway* v. *United States*, 319 U.S. 372, 392 (1943) (emphasis

added). And the level of scrutiny that the Equal Protection Clause requires depends on the nature of the government classification. Compare *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 235 (1995); with *Craig* v. *Boren*, 429 U.S. 190, 197 (1976); with *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432 (1985).

Even setting aside the notion of "core" rights, gradations of scrutiny are a feature rather than a bug for constitutional adjudication. Again, "[t]he right to free speech, an undeniably enumerated fundamental right, is susceptible to several standards of scrutiny, depending upon the type of law challenged and the type of speech at issue." *Marzzarella*, 614 F.3d at 96–97 (citation omitted). Thus, "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings," and "must be applied in light of the special characteristics of the school environment." *Morse*, 551 U.S. at 396–397 (internal quotation marks and citations omitted). In particular, "due to the special features of the school environment, school officials must have greater authority to intervene before speech leads to violence." *Id.* at 425 (Alito, J., concurring).

Further, "the extent to which the Government can control access" to a place for exercising fundamental speech rights "depends on the nature of the relevant forum." *Cornelius* v. *NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985). "In a traditional public forum—parks, streets, sidewalks, and the like—the government may impose reasonable time, place, and manner restrictions on private speech, but restrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited." *Minn. Voters All.* v. *Mansky*, 138 S. Ct. 1876, 1885 (2018). "As with the First

Amendment, the level of scrutiny applicable under the Second Amendment surely depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right." *Heller II*, 670 F.3d at 1257 (internal quotation marks omitted).

Likewise, under the Taking Clause of the Fifth Amendment, a "different standard applies" depending on whether the government is "appropriating private property for itself or a third party" or "imposes regulations that restrict an owner's ability to use his own property." *Cedar Point Nursery* v. *Hassid*, 141 S. Ct. 2063, 2071 (2021). Moreover, the level of scrutiny of government action alleged to work a taking depends on the "character of the government action": "physical appropriation" is "a *per se* taking," while other regulations are subject to a more "flexible test." *Id.* at 2072.

Thus, only by rejecting means-end scrutiny or imposing strict scrutiny in every case would the Court make the Second Amendment "subject to an entirely different body of rules than the other Bill of Rights." *McDonald*, 561 U.S. at 780 (plurality opinion). See *Gould*, 907 F.3d at 670 ("Strict scrutiny does not automatically attach to every right enumerated in the Constitution"); *Chester*, 628 F.3d at 682 ("We do not apply strict scrutiny whenever a law impinges upon a right specifically enumerated in the Bill of Rights"). Applying strict scrutiny to every weapons regulation would require courts to give the people's representatives more leeway to discriminate against women than, for example, to limit minors' access to guns. See *United States* v. *Virginia*, 518 U.S. at 568, 576–579 (Scalia, J., dissenting) (intermediate scrutiny applies to gender classifications).

There is no justification for supercharging the right to bear arms with a test based entirely on history and tradition or an invariable requirement to apply strict scrutiny when the Second Amendment is not "be[ing] singled out for special—and specially unfavorable—treatment." *McDonald*, 561 U.S. at 778–779. Courts have invalidated laws regulating firearms even under intermediate scrutiny. *E.g.*, *Binderup* v. *Att'y Gen.*, 836 F.3d 336 (3d Cir. 2016), cert. denied, 137 S. Ct. 2323 (2017) (holding a prohibition on possession by individuals convicted of a misdemeanor punishable by imprisonment for more than two years to be unconstitutional as-applied); *Heller* v. *District of Columbia*, 801 F.3d 264 (D.C. Cir. 2015) (invalidating police inspection requirement, requirement to re-register every three years, limitation on registering more than one gun per month, and requirement that registrant pass a test); *N.Y. State Rifle & Pistol Ass'n, Inc.* v. *Cuomo*, 804 F.3d 242 (2d Cir. 2015) (invalidating prohibition on possessing magazines loaded with more than seven rounds of ammunition).

More generally, some 40% of civil plaintiffs asserting Second Amendment claims prevail in the federal courts of appeals under the framework *amici* have argued this Court should adopt. Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After* Heller, 67 Duke L. J. 1433, 1478–1479, tbls. 4–5 (2018). Those rates are well within the range of success rates for other constitutional claims. Compare James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 Wm. & Mary L. Rev. 35, 64 (2016) (noting that "aggrieved landowners prevail in fewer than 10 percent" of cases surveyed involving taking claims based on regulatory activity); Nancy Leong, *Making Rights*, 92 B. U. L. Rev. 405,

428 (2012) (finding that "the plaintiff prevailed on 48% of all Fourth Amendment claims raised in the civil context"); John P. Forren, *Revisiting Four Popular Myths About the Peyote Case*, 8 U. Pa. J. Const. L. 209, 222, n. 52 (2006) (collecting sources and noting studies finding that claims under the Free Exercise clause prevail at rates of 12.4%, 12.1%, and 16%).

III. CONCLUSION

This Court should hold that the courts of appeals have identified the correct framework for adjudicating claims that the Second Amendment prohibits a law restricting the right to bear arms.

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