No. 21-1194

IN THE
Supreme Court of the United States

VIRGINIA DUNCAN, *ET AL.*, *Petitioners*,
v.
ROB BONTA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA, *Respondent*.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Brief *Amicus Curiae* of Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, Heller Foundation, Virginia Citizens Defense League, Montana Shooting Sports Association, Oregon Firearms Federation, Tennessee Firearms Association, California Constitutional Rights Foundation, America's Future, Conservative Legal Defense and Education Fund, and Restoring Liberty Action Committee in Support of Petitioners

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April 1, 2022

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MISCELLANEOUS

INTEREST OF THE *AMICI CURIAE*[1]

Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, Heller Foundation, Virginia Citizens Defense League, Oregon Firearms Federation, Tennessee Firearms Association, California Constitutional Rights Foundation, America's Future, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal taxation under sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code. Montana Shooting Sports Association and Restoring Liberty Action Committee are educational organizations. Each is dedicated, *inter alia*, to the correct construction, interpretation, and application of law. Many of these *amici* filed an *amicus* brief in this case when it was before a panel on September 23, 2019, as well as a second *amicus* brief during rehearing *en banc* on May 21, 2021.

STATEMENT OF THE CASE

In 2000, California prohibited the manufacture, importation, sale, and transfer of so-called large-capacity magazines, which it defines as "any ammunition feeding device with the capacity to accept more than 10 rounds." California Penal Code § 16740.

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[1] It is hereby certified that counsel for Petitioners and for Respondent have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to its filing; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Then, in July 2016, California banned the possession of large-capacity magazines, and in November 2016, California approved Proposition 63, with the same effect.

The individual petitioners are law-abiding Californians who would like to possess for lawful purposes magazines that hold more than 10 rounds. The associational petitioner is an organization which supports Californians who would like to lawfully possess magazines that hold more than 10 rounds.

Petitioners filed suit before the ban was to take effect and filed a motion for a preliminary injunction. Two days before the ban was to become effective on July 1, 2017, the district court issued a preliminary injunction pending a full hearing on the merits. The Ninth Circuit affirmed that preliminary injunction. *Duncan v. Becerra*, 742 F. App'x 218 (9th Cir. 2018). Then, on March 29, 2019, the district court granted petitioners' motion for summary judgment.

The district court conducted two tests. First, it applied the test used in *District of Columbia v. Heller*, 554 U.S. 570 (2008), which asks whether the banned arms are "'in common use'" "'for lawful purposes like self-defense.'" *Duncan v. Becerra*, 366 F. Supp. 3d 1131, 1142 (S.D. Cal. 2019). Second, the district court applied the Ninth Circuit's two-pronged *Chovan* test, which it described as "a tripartite binary test with a sliding scale and a reasonable fit." *Id.* at 1155.

On appeal, the Ninth Circuit three-judge panel applied that circuit's precedent under *United States v.*

Chovan, 735 F.3d 1127 (2013). *See Duncan v. Becerra*, 970 F.3d 1133 (9th Cir. 2020). Similar to the district court, the panel majority found that the high-capacity ban failed even that test.

California petitioned for rehearing *en banc*, which the Ninth Circuit granted, vacating the panel's opinion. The *en banc* majority easily upheld the large-capacity magazine ban using the two-pronged test. Judge Bumatay explained in dissent: "In reality, this tiers-of-scrutiny approach functions as nothing more than a black box used by judges to uphold favored laws and strike down disfavored ones." *Duncan v. Bonta*, 19 F.4th 1087, 1140 (9th Cir. 2021) (hereinafter "*Duncan*") (Bumatay, J., dissenting).

SUMMARY OF ARGUMENT

Whatever corners of debate may remain regarding the Second Amendment, there should be no serious argument about the basic holdings of this Court in *Heller* and *McDonald v. Chicago*, 561 U.S. 742 (2010) that laws implicating the right to keep and bear arms must be reviewed against the text, history, and tradition of the Amendment. When that approach is taken, any categorical ban upon arms which are commonly owned for lawful purposes must — without **any** further analysis needed — be struck down. Yet lower courts, including the Ninth Circuit in this case, have consistently refused to apply this simple test, instead concocting multi-step "sliding scale" standards of review which inevitably result in firearm bans being upheld, in defiance of the plain holdings in *Heller* and

McDonald, and the plain text of the Second Amendment.

Worse yet, a number of circuit courts (including the Ninth Circuit in this case) have decided to reach even further and deeper in defiance of this Court's plain holdings by characterizing certain arms as "military-style" ones, and then using those characterizations to further support upholding laws prohibiting their possession. Such jurisprudence stands in direct contrast to the plain meaning and purposes of the Second Amendment as protecting — perhaps more prominently than all else — arms of military utility. That reasoning further defies this Court's direct holdings in *United States v. Miller*, 307 U.S. 174 (1939) and *Heller*, and cases relied upon therein, which express an unequivocal understanding that military-grade arms are central to the Second Amendment's protections and purpose.

Five sitting Justices of this Court, and numerous lower court judges, have pointed out the problem of using interesting balancing in the Second Amendment cases. These *amici* urge the Court to grant certiorari in order to address and correct these numerous and widespread misapplications of its prior holdings regarding the Second Amendment in which lower courts continue to apply "two-step" balancing tests and ignore the fundamental purpose of the Second Amendment in allowing the people to own arms of military utility.

ARGUMENT

I. THE TWO-STEP TEST USED BY THE NINTH CIRCUIT IS AN ATEXTUAL INTEREST BALANCING TEST OF THE SORT REJECTED BY THIS COURT IN *HELLER* AND *MCDONALD*.

In the view of these *amici*, the threshold issue in this case is whether the Ninth Circuit's decision comports with *Heller* and *McDonald*, rejecting subjective "interest balancing" tests. The "two-step" test employed by the Ninth Circuit — and, lamentably, other circuits since and despite the plain language of *Heller* — employs precisely what Justice Scalia warned against — the use of "judge-empowering 'interest- balancing inquir[ies].'" *Heller* at 634. This atextual two-step test gives judges every possible opportunity to uphold the constitutionality of an infringement of the right to keep and bear arms. It also violates *Heller*'s additional warning against any approach which allows judges to decide for themselves whether the Second Amendment right "is *really worth* insisting upon." *Id*.

Instead of simply asking whether the item being banned is an "arm" (including firearms magazines, as in this case) in the hands of "the People," the lower courts have made the analysis highly complicated. *Heller* asked if the arm was used by law-abiding citizens for lawful purposes, which would seem to be a simple test to apply. However, the Ninth Circuit has created an indeterminate and value-laden "black box" into which judges can insert a gun-related law and

produce at the other side whatever result is desired — nearly always upholding even onerous restrictions. *See McDonald* at 804 (Scalia, J., concurring) (a historically-based test "is less subjective because it depends upon a body of evidence susceptible of reasoned analysis rather than a variety of vague ethicopolitical First Principles whose combined conclusion can be found to point in any direction the judges favor"). *See also Duncan* at 1140 (Bumatay, J., dissenting) ("In reality, this tiers-of-scrutiny approach functions as nothing more than a black box used by judges to uphold favored laws and strike down disfavored ones.")

Despite its unconvincing attempt to deny having done so,[2] the Ninth Circuit effectively adopting Justice Breyer's dissent in *Heller*, in which he argued that the Court should adopt an "interest-balancing inquiry" that "asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests." *Heller* at 689-90. Just two years later, in *McDonald*, Justice Breyer, again in dissent, questioned the propriety of incorporating the Second Amendment against the states when doing so would require judges to make

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[2] The Ninth Circuit's *en banc* decision states that "[t]he Court clearly rejected Justice Breyer's 'judge empowering "interest balancing inquiry"' that, rather than corresponding to any of 'the traditionally expressed levels (strict scrutiny, intermediate scrutiny, rational basis),' asked instead "whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests." *Duncan* at 1101 (citations omitted).

difficult empirical judgments. *McDonald* at 922-25. Justice Alito's opinion for the Court rejected Justice Breyer's suggestion that a balancing test would apply: "As we have noted, while [Justice Breyer's] opinion in *Heller* recommended an interest-balancing test, the Court specifically rejected that suggestion." *Id.* at 791. Yet the Ninth Circuit and several other circuits, as it points out in its opinion below, have created, and at every of numerous opportunities applied, just such an interest-balancing test in cases implicating Second Amendment rights — regardless of any attempts to cloak such interest-balancing tests with the appearance of value-free "levels of scrutiny," and irrespective of the fact that "levels of scrutiny" seen in First Amendment and other contexts are conspicuously absent from all of this Court's Second Amendment jurisprudence.

More recently, in *Caetano v. Massachusetts*, 577 U.S. 411 (2016), this Court, without employing a balancing test, rejected a decision from the Supreme Judicial Court of Massachusetts upholding a ban on the possession of stun guns. *See id.* 418 (Alito, J., concurring) ("[T]he relative dangerousness of a weapon is irrelevant when the weapon belongs to a class of arms commonly used for lawful purposes."). The Second Amendment protected "arms" certainly include those "arms" that are "typically possessed by law-abiding citizens" (*Heller* at 625) — including "large capacity magazines."

As the district court in this case recognized, with this formulation, the Supreme Court provided an easily understood test. *See Duncan v. Becerra*, 366 F.

Supp. 3d at 1142. Under the simple text provided by this Court in *Heller*, any court examining a law prohibiting "arms" need ask only whether the banned item is (1) commonly used, (2) by law-abiding citizens, (3) for lawful purposes, including for self-defense or defense of "hearth and home." *See Heller* at 625, 635. If so, then the banned item is categorically protected under the Second Amendment and no further analysis is needed. *Id.* at 634-35. Yet somehow, the Ninth Circuit in this case and several other circuits have inexplicably departed from this straightforward approach, meticulously fabricating from whole cloth entirely new layers of analysis, multi-step tests, and value-laden "sliding scales" which exist nowhere in this Court's Second Amendment jurisprudence.

These *amici* urge the Court to grant certiorari in this case to address and reject any "severity of burden" and "interest balancing test" in Second Amendment cases, including cases where, as here, government has imposed a categorical ban on clearly protected arms. Such a subjective test should not apply to any ban on arms, and is inconsistent with the decisions of this Court in *Heller*, *McDonald*, and *Caetano*.

II. THE NINTH CIRCUIT ERRONEOUSLY ASSUMED THAT THE PROTECTIONS OF THE SECOND AMENDMENT DO NOT APPLY TO ARMS USED BY THE MILITARY.

The Ninth Circuit and, regrettably, other courts have misconstrued the *Heller* decision to have determined that arms and accessories which are deemed "military-style" almost automatically lose

Second Amendment protection. This was the express assumption underlying the California statute under review.[3] The *en banc* court asserted that: "large-capacity magazines have limited lawful, civilian benefits, whereas they provide significant benefits in a military setting. Accordingly, the magazines likely are 'most useful in military service….'" *Duncan* at 1102 (citations omitted). The Ninth Circuit acknowledges that it does not know how to interpret "the passage in *Heller* pertaining to weapons 'most useful in military service'." Nonetheless, the decision treats this passage as a reason to ban the possession of military-style weapons by civilians.

There is a certain irony that many of the courts which now embrace the notion that Second Amendment "arms" do **not** include those of a military nature are often the same courts which, before *Heller*, had taken the position that the Second Amendment only protected arms in the hands of those serving in state guard units — who presumably would possess and carry "military-style" weapons. Once this Court ruled that the Second Amendment protects individual rights, these courts demonstrated both their flexibility and antipathy to firearms by reversing their understanding of permissible "arms" 180 degrees.

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[3] *See Duncan* at 1087 ("The law's stated purpose is '[t]o make it illegal in California to possess … military-style ammunition magazines….'"); *id*. at 1102 (California "asks us to … hold that large-capacity magazines lack Second Amendment protection because they are similar to "M-16 rifles and the like" *i.e.,* "weapons that are most useful in military service.'" (citations omitted).

The notion that civilians may not own military-style weapons is utterly belied by this Court's prior decisions as well as the fundamental history, tradition, and purpose of the Second Amendment. The Second Amendment protects *first and foremost* the right to self-defense — not just against petty criminals, but against governments, both foreign and domestic.[4] In order to resist not just common criminals but also foreign aggression or domestic tyranny, military-style arms are, as the framers made clear, "necessary to the security of a free State." In fact, such arms would — by the plain text and historical understanding of the Second Amendment — be at the very heart of the "arms" that the people may keep and bear without infringement.

In *United States v. Miller*, this Court decided that — based on the limited record before the Court and without counsel arguing for Mr. Miller — it was impossible to conclude that a short-barrel shotgun "has some reasonable relationship to the preservation or efficiency of a well regulated militia.... Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense." *Miller* at 178. Implicit in this Court's ruling in *Miller* is that

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[4] *See Heller* at 667 ("The importance of [the Second Amendment] will scarcely be doubted by any persons who have duly reflected upon the subject. The militia is the natural defence of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers..." (quoting 2 J. Story, Commentaries on the Constitution of the United States § 1897, pp. 620–621 (4th ed. 1873)).

those weapons that **are** "part of the ordinary military equipment" and **can** "contribute to the common defense" *are* protected by the Second Amendment. *See also Heller* at 621-22. The Court in *Miller* all but stated that if an arm is part of "ordinary military equipment," then its possession is fully protected by the Second Amendment. That decision has never been overruled by this Court.

Those who now believe that the Second Amendment exists only to protect hunting and target shooting, and *perhaps* a limited right of self-defense against lightly-armed criminals, cannot seem to bring themselves to believe that "the People" have the pre-existing, God-given, constitutionally recognized and enumerated right to possess real, meaningful firearms. The *Miller* Court had no misunderstanding of the purpose of the Second Amendment, and cited an 1840 case which explains **why** military-grade weapons are critical in the hands of civilians: "To protect the public liberty, to keep in awe those who are in power, and to maintain the supremacy of the laws and the constitution." *Aymette v. State*, 21 Tenn. 154, 158. Break-barrel shotguns and bolt action hunting rifles do not "keep in awe those who are in power." Thus, according to the Tennessee court, weapons that were useful in military combat and weapons that would provide for the "common defense" were one and the same. *Id.* at 159 ("[t]he legislature, therefore, have a right to prohibit the wearing, or keeping weapons dangerous to the peace and safety of the citizens, and which are *not* usual in civilized warfare, or would not contribute to the common defence.").

The Ninth Circuit's majority opinion sanctions the California Assembly's magazine ban, standing this longstanding principle on its head, upholding the magazine ban **because of** its stated purpose "[t]o make it illegal in California to possess … military-style ammunition magazines …" *Duncan* at 1097 quoting Proposition 63 § 3(8). The Ninth Circuit majority dedicates considerable space in its opinion to supporting the proposition that magazines holding more than 10 rounds are militarily useful and increase the effectiveness of firearms for their intended purpose as implements of fighting. *Duncan* at 1105-06. Yet from this seemingly undisputed fact, it reaches the conclusion that magazines suitable for military use and for making firearms effective as weapons are somehow **more** susceptible to government regulation and even outright bans, **because** they are used by and useful to the military.

Far from imposing merely a "small burden," "slight burden," or "minimal burden"[5] on Second Amendment rights as the Ninth and other circuits have casually concluded, upholding such complete bans on magazines, undermining the foundational concept of the Second Amendment as securing the right to keep and bear arms of military utility. Due to the California legislature's frontal assault on the principle set out in *Miller*, this case would provide this Court with an excellent vehicle to reaffirm its holding in *Miller* that arms of military utility are precisely what the Second Amendment protects.

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[5] *Duncan* at 1104-07, 1115.

Quite unlike the court below, *Miller* paid respect to the constitutional text, making it clear that the Second Amendment, first and foremost, protects military-grade weapons because they are most useful in fulfilling the preamble of the Second Amendment — to preserve a "free State." The *Heller* Court made clear, first and foremost, the Second Amendment exists to protect the God-ordained and pre-existing right to self-defense — not only from private violence, but also from public violence perpetrated by governments. Thus, the Court noted three public purposes of the right:

> First ... in repelling invasions and suppressing insurrections. Second, it renders large standing armies unnecessary.... Third, when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny. [*Heller* at 597-98.]

The *Heller* Court then explained its understanding of *Miller*:

> Read in isolation, *Miller*'s phrase "part of ordinary military equipment" could mean that **only those weapons useful in warfare** are protected. That would be a startling reading of the opinion, since it would mean that the National Firearms Act's restrictions on machineguns (not challenged in *Miller*) might be unconstitutional, machineguns being useful in warfare in 1939. We think that *Miller*'s "ordinary military equipment" language must be read in tandem with what comes after: "[O]rdinarily when called for [militia] service

> [able-bodied] men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time." ... The traditional militia was formed from a pool of men bringing arms "in common use at the time" for lawful purposes like self-defense.[6] "**In the colonial and revolutionary war era, [small-arms] weapons used by militiamen and weapons used in defense of person and home were one and the same**...." Indeed, that is precisely the way in which the Second Amendment's operative clause furthers the purpose announced in its preface. [*Heller* at 624-25 (emphasis added).]

Heller noted that, during the founding era, the rifle of the battlefield was the same rifle used for hunting and for self-defense from petty criminals. *Id.* at 625. Yet despite whatever differences may exist today, *Heller* explained that the protections of the Amendment remain fixed, and thus "the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were

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[6] One of the concurrences demonstrated complete unfamiliarity with the meaning of the word "militia" used in the Second Amendment, erroneously asserting it to be the forerunner of state national guard units. *Duncan* at 1139 (Hurwitz, J., concurring) ("Members of this Court ... have volunteered for service in the ... National Guard (the modern 'well regulated Militia')...."). *Heller* reiterated the Court's holding in *Miller* that the militia is comprised of all males physically able to act in concert for the common defense, and expressly rejected the more narrow definition of "militia" as embodying only government-organized militias. *See Heller* at 595-96.

not in existence at the time of the founding." *Id.* at 582. The Court should send a clear message that all bearable arms, including and **especially** those suitable for military use, are entitled to the protection of the Second Amendment because of and not despite their usefulness in military contexts.

III. FIVE SITTING JUSTICES, AND NUMEROUS LOWER COURT JUDGES, HAVE ROUNDLY REJECTED THE INTEREST BALANCING TEST EMPLOYED BELOW.

A. Criticism of the Two-Step Test by Supreme Court Justices.

In *Heller* and again in *McDonald*, this Court refused to treat the Second Amendment "as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees...." *McDonald* at 780. However, that is exactly what the Ninth Circuit's two-step test does. *See* Section I, *supra*.

A majority of Ninth Circuit judges have not just violated their duty to act in concert with this Court's clear last word on the subject — its decisions in *Heller*, *McDonald* and *Caetano* — those judges have thrown down the gauntlet. They have unabashedly asserted that they have used, and will continue to use, an atextual two-step test, "unless and until" stopped by this Court. *See Duncan* at 1101. Although this Court has thus far postponed a major Second Amendment challenge to the ever-expanding list of state abridgments of gun rights, the problem has not gone

unnoticed. The deeply flawed two-step test has been roundly criticized by four sitting Justices for its infidelity to this Court's *Heller* and *McDonald* decisions. The time is past for this Court to restore order to the lower courts.

In 2015, this Court declined to review San Francisco's highly restrictive requirement that a handgun in a home must be stored in a gun safe when it is not physically on the person. Justices Thomas and Scalia dissented from this Court's denial of certiorari, explaining that "Second Amendment rights are no less protected by our Constitution than other rights enumerated in that document" and that, "[d]espite the clarity with which we described the Second Amendment's core protection for the right of self-defense, lower courts ... have failed to protect it." *Jackson v. City & Cnty. of San Francisco*, 576 U.S. 1013, 1014 (2015) (Thomas, J., dissenting from the denial of certiorari). Disagreeing with the Ninth Circuit's "tiers-of-scrutiny analysis," the dissenters noted that the Court should have granted the petition "to reiterate that courts may not engage in this sort of judicial assessment as to the severity of a burden imposed on core Second Amendment rights." *Id.* at 1016-17.

Later in 2015, Justices Thomas and Scalia once again dissented from a denial of certiorari from a Seventh Circuit decision upholding an Illinois city's ban on so-called "assault weapons." Justice Thomas criticized the Seventh Circuit's "crabbed reading of *Heller*," which left the Circuit "free to adopt a test for assessing firearm bans that eviscerates many of the

protections recognized in *Heller* and *McDonald*." *Friedman v. City of Highland Park*, 577 U.S. 1039, 1041 (2015) (Thomas, J., dissenting from the denial of certiorari). The dissent reiterated that "*Heller* ... forbids subjecting the Second Amendment's 'core protection ... to a freestanding "interest-balancing" approach.'" *Id.* at 1042 (quoting *Heller* at 634). And the dissent pointed out the disparity of treatment that the Second Amendment has received: "The Court's refusal to review a decision that flouts two of our Second Amendment precedents stands in marked contrast to the Court's willingness to summarily reverse courts that disregard our other constitutional decisions." *Id.* at 1043 (citing several summary reversals).

In 2016, this Court vacated and remanded a decision of the Supreme Judicial Court of Massachusetts upholding a state ban on stun guns, albeit with a "grudging *per curiam*" opinion. *Caetano* at 422 (Alito, J., concurring). The Massachusetts court did not apply the two-step analysis, but "[a]lthough the Supreme Judicial Court professed to apply *Heller*, each step of its analysis defied *Heller*'s reasoning." *Id.* at 415.

In 2017, Justices Thomas and Gorsuch dissented from denial of certiorari of an *en banc* decision from the Ninth Circuit which had *sua sponte* granted rehearing *en banc* after a panel of that court faithfully applied the text, history, and tradition of the Second Amendment to find California's "good cause" requirement for concealed carry permits to be unconstitutional. *Peruta v. California*, 137 S. Ct. 1995,

1996-97 (2017) (Thomas, J., dissenting from the denial of certiorari). The *en banc* court reversed, finding that the Second Amendment does not protect carrying firearms concealed in public. *Id*. Justice Thomas's dissent addressed "a distressing trend: the treatment of the Second Amendment as a disfavored right." *Id*. at 1999. Justice Thomas observed that, from the *McDonald* decision to the denial of certiorari in *Peruta*, the Court had granted review in about 35 cases involving the First Amendment and 25 cases involving the Fourth Amendment, but none involving the Second Amendment. *Id*.

In 2018, Justice Thomas once again dissented from a denial of certiorari to review another decision of the Ninth Circuit. *See Silvester v. Becerra*, 138 S. Ct. 945 (2018) (Thomas, J., dissenting from the denial of certiorari). His dissent found the Ninth Circuit's decision upholding a 10-day waiting period for firearm purchases to be "symptomatic of the lower courts' general failure to afford the Second Amendment the respect due an enumerated constitutional right," and that "[i]f a lower court treated another right so cavalierly, I have little doubt that this Court would intervene." *Id*. at 945. The dissent again stressed that "the lower courts are resisting this Court's decisions in *Heller* and *McDonald* and are failing to protect the Second Amendment to the same extent that they protect other constitutional rights," and added that the Court's "continued refusal to hear Second Amendment cases only enables this kind of defiance." *Id*. at 950-51. Justice Thomas noted the curiosity that "rights that have no basis in the Constitution receive greater protection than the Second Amendment, which is

enumerated in the text." *Id*. at 951. "The right to keep and bear arms is apparently this Court's constitutional orphan. And the lower courts seem to have gotten the message." *Id*. at 952.

In 2020, Justices Thomas and Kavanaugh dissented from the denial of a petition for certiorari, observing: "[i]n the years since [*Heller* and *McDonald*], lower courts have struggled to determine the proper approach for analyzing Second Amendment challenges...." and "many courts have resisted our decisions...." *Rogers v. Grewal*, 140 S. Ct. 1865, 1866 (2020) (Thomas, J., dissenting from the denial of certiorari). Not the least of the "numerous concerns" raised by the "two-step inquiry" is that the test "appears to be entirely made up. The Second Amendment provides no hierarchy of 'core' and peripheral rights." *Id*. at 1867.

In 2020, when this Court dismissed *New York State Rifle & Pistol Association v. New York*, 140 S. Ct. 1525 (2020) based on mootness, Justice Kavanaugh concurred, but noted: "I share Justice Alito's concern that some federal and state courts may not be properly applying *Heller* and *McDonald*. The Court should address that issue soon." *Id*. at 1527 (Kavanaugh, J., concurring). Justice Alito, dissenting from the dismissal and joined by Justices Thomas and Gorsuch, concluded, "I believe we should" rule in the case, and "hold, as petitioners request ... that [the challenged statute] violated petitioners' Second Amendment right.... We are told that the mode of review in this case is representative of the way *Heller* has been treated in the lower courts. If that is true, there is

cause for concern." *Id*. at 1535, 1544 (Alito, J., dissenting).

Although Chief Justice Roberts has not joined any of the dissents from the denials of certiorari of Second Amendment interest balancing cases, he did express concern with applying the interest-balancing jurisprudence that has developed around the First Amendment rights to Second Amendment rights. During the oral argument in the *Heller* case, he asked if that was the only avenue:

> [T]hese various phrases under the **different standards** that are proposed, "compelling interest," "significant interest," "narrowly tailored," **none of them appear in the Constitution**.... Isn't it enough to determine the scope of the existing right that the amendment refers to ... and determine ... how this restriction and the scope of this right looks in relation to [it].... I'm not sure why we have to articulate some very intricate standard. I mean, these standards that apply in the First Amendment just kind of developed over the years as sort of **baggage that the First Amendment picked up**. [Transcript of Oral Argument, p. 44, *District of Columbia v. Heller*, No. 07-290 (Mar. 18, 2008) (emphasis added).]

Chief Justice Roberts joined Justice Scalia's opinion in *Heller* which expressly rejected judicial interest balancing.

While still on the D.C. Circuit, Justice Kavanaugh carefully explained that he would have struck down the District of Columbia's modified gun regulation scheme in a case decided one year after *McDonald*. He correctly asserted: "*Heller* and *McDonald* leave little doubt 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 v. District of Columbia*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). While Justice Kavanaugh's reliance on "text, history, and tradition" faithfully followed Justice Scalia's approach in *Heller*, the two-step test used by the Ninth Circuit embodies the interest-balancing test proposed by Justice Breyer's dissent in *Heller*.[7]

Every year that this Court allows the lower courts to uphold state infringements on the Second Amendment only exacerbates the problem, as state legislatures and lower court judges are allowed to rebalance the interests that Justice Scalia asserted was "the very *product* of an interest balancing by the people" in the ratification of the Second Amendment. *Heller* at 635.

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[7] *See* Allen Rostron, "Justice Breyer's Triumph in the Third Battle over the Second Amendment," 80 GEO. WASH. L. REV. 703, 707 (2012) ("[T]he lower courts' decisions strongly reflect the pragmatic spirit of the dissenting opinions that Justice Stephen Breyer wrote in Heller and McDonald.").

B. Criticism of the Two-Step Test by Lower Court Judges.

Robust criticism of the two-step test has come from some lower court judges who are not blinded by claims of public safety, combined with personal inexperience with or hostility to firearms. When the Ninth Circuit upheld the ban[8] on firearms possession by an individual who had been convicted of a misdemeanor crime of domestic violence in *Fisher v. Kealoha*, 855 F.3d 1067 (9th Cir. 2017), Judge Kozinski concurred in the *per curiam* decision, but issued a separate "ruminating" opinion to encourage equal treatment of the Second Amendment among the Bill of Rights:

> In other contexts, we don't let constitutional rights hinge on unbounded discretion [of a governor's pardon]; the Supreme Court has told us, for example, that "[t]he First Amendment prohibits the vesting of such unbridled discretion in a government official." Despite what some may continue to hope, the Supreme Court seems unlikely to reconsider *Heller*. **The time has come to treat the Second Amendment as a real constitutional right. It's here to stay**. [*Fisher* at 1072 (Kozinski, J., ruminating) (emphasis added) (citation omitted).]

Although the Fifth Circuit also uses the two-step test, many judges on that court disagree with interest

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[8] *See* 18 U.S.C. § 922(g)(9).

balancing in the Second Amendment context. *See Houston v. City of New Orleans*, 675 F.3d 441, 448 (5th Cir. 2012) (Elrod, J., dissenting), opinion withdrawn and superseded on reh'g, 682 F.3d 361 (5th Cir. 2012) (*per curiam*); *NRA v. BATFE*, 714 F.3d 334 (5th Cir. 2013) (six judges dissenting from a denial of rehearing *en banc*). When the Fifth Circuit once again denied rehearing *en banc* in a Second Amendment case involving a challenge to the residency requirement for firearms purchases from federally licensed firearms dealers,[9] seven judges vigorously dissented from the denial of rehearing, explaining that, "[s]imply put, unless the Supreme Court instructs us otherwise, we should apply a test rooted in the Second Amendment's text and history — as required under *Heller* and *McDonald* — rather than a balancing test like strict or intermediate scrutiny." *Mance v. Sessions*, 896 F.3d 390, 394 (5th Cir. 2018) (Elrod, J., dissenting). Also, Judge Willett commented on the judicial hostility to the Second Amendment:

> Constitutional scholars have dubbed the Second Amendment "the Rodney Dangerfield of the Bill of Rights...."
>
> The Second Amendment is neither second class, nor second rate, nor second tier. The "right of the people to keep and bear Arms" has no need of penumbras or emanations. It's right there, 27 words enshrined for 227 years. [*Id.* at 396 (Willett, J., dissenting).]

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[9] *See* 18 U.S.C. §§ 922(a)(3) and 922(b)(3).

Judge Bumatay reviewed some of these criticisms by justices and judges *see Duncan* at 1146-47 (Bumatay, J., dissenting)), correctly describing most federal court judges as dismissive, and explaining exactly where the Ninth Circuit's two-step inquiry leads — a balancing test that the government never loses:

> [d]espite these warnings, [the Ninth Circuit] charges ahead in applying the two-step-to-intermediate-scrutiny approach. [*Id*. at 1147.]

When the two-step inquiry is used to rationalize the use of "intermediate-scrutiny," as Judge Bumatay warned, the results have been 50 out of 50 victories for anti-gun laws as if the pre-existing, clearly enumerated right set out in the Second Amendment did not even exist. *See id*. at 1165.

Most recently, a Ninth Circuit panel held that Ventura County's closure of gun and ammunition stores and firing ranges in response to the COVID-19 pandemic did not pass any level of scrutiny. In a concurring opinion (to the majority opinion which he also wrote), Judge VanDyke predicted how the panel's decision would be treated by the Ninth Circuit:

> [S]ince this panel just enforced the Second Amendment, and this is the Ninth Circuit, this ruling will almost certainly face an en banc challenge. This prediction follows from the fact that this is *always* what happens when a three-judge panel upholds the Second Amendment in this circuit. [*McDougall v.*

> *County of Ventura*, 2022 U.S. App. LEXIS 1634, *51 (9th Cir. 2022).]

As predicted, on March 8, 2022, the Ninth Circuit granted rehearing *en banc* and vacated the panel opinion upholding the Second Amendment. *See McDougall v. County of Ventura*, 2022 U.S. App. LEXIS 5972 (9th Cir. 2022).

Judge VanDyke then conducted a hypothetical analysis based on the two-step test, reaching a conclusion opposite to that the panel actually reached, in order to "demonstrate just how easy it is to reach any desired conclusion under our current framework, and the majority of our court can get a jump-start on calling this case en banc." *McDougall*, 2022 U.S. App. LEXIS 1634, *53. As Judge VanDyke explained, "our circuit can uphold any and every gun regulation because our current Second Amendment framework is exceptionally malleable and essentially equates to rational basis review." *Id*. at *52.

The Ninth Circuit's Second Amendment jurisprudence in no way can be reconciled with *Heller* or *McDonald*, requiring this Court's review.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be granted.

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April 1, 2022