No. 18-280

IN THE

Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

On Writ of Certiorari
To The United States Court of Appeals
For The Second Circuit

BRIEF FOR GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

Whether the City's ban on transporting a licensed, locked, and unloaded handgun to a home or shooting range outside city limits is consistent with the Second Amendment, the Commerce Clause, and the constitutional right to travel.

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INTEREST OF AMICUS CURIAE[1]

Giffords Law Center to Prevent Gun Violence is a non-profit policy organization dedicated to researching, writing, enacting, and defending laws and programs proven to reduce gun violence and save lives. Founded in 1993 after a gun massacre at a San Francisco law firm, the organization was renamed Giffords Law Center in October 2017 after joining forces with the gun-safety organization founded by former Congresswoman Gabrielle Giffords.

Today, Giffords Law Center provides free assistance and expertise to lawmakers, advocates, legal professionals, law-enforcement officials, and citizens seeking to make their communities safer from gun violence. Its attorneys track and analyze firearm legislation, evaluate policy proposals regarding gun-violence prevention, and participate in Second Amendment litigation nationwide. The organization has provided courts with *amicus* assistance in many important cases implicating guns and gun violence.

Giffords Law Center is participating in this case because it is institutionally invested in ensuring an appropriate methodology for evaluating the constitutionality of gun-safety regulations. The Court's adoption of such a methodology will treat the Second

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[1] In accordance with Supreme Court Rule 37.6, Giffords Law Center states that no counsel for a party authored this brief in any part, and that no person or entity, other than Giffords Law Center and its counsel, made a monetary contribution to fund its preparation and submission. In addition, all parties have filed blanket consents to the filing of amicus briefs.

Amendment as subject to the same reasonable regulation as other constitutional rights, safeguarding the progress many States have made toward preventing gun violence and saving lives.

Giffords Law Center is filing in support of neither party because it takes no position regarding the application of that methodology to the challenged licensing provision. Indeed, the Court itself may not have occasion to address that issue, given that New York City has proposed a rule change that would remove the very restrictions Petitioners challenge—restrictions that exist in no other city or state. Giffords Law Center also takes no position on the Commerce Clause or right-to-travel questions presented in this case.

SUMMARY OF ARGUMENT

This Court held in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that the Second Amendment guarantees an individual constitutional right. It also made clear, however, that "the right [is] not unlimited"—any more than is "the First Amendment's right of free speech." *Id.* at 595. To the contrary, *Heller* recognized that the Second Amendment does not enshrine "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 626. And even in areas where Second Amendment protections are at their apex, regulators retain "a variety of tools" to limit access to and use of guns in order to promote public safety. *Id.* at 636.

The *Heller* Court had no occasion to decide how courts should determine whether any such tool comports with the Second Amendment. This Court may find itself in the same position, consistent with its obligation to avoid constitutional questions to the extent

possible. But if the Court must address the methodological question *Heller* left open, it should adopt the consensus, bifurcated approach embraced by the Courts of Appeals, under which either intermediate or strict scrutiny is applied depending on "on the relative severity of the burden and its proximity to the core" of the Second Amendment right. *Ezell v. City of Chi.*, 846 F.3d 888, 899 (7th Cir. 2017) (quoting *Ezell v. City of Chi.*, 651 F.3d 684, 708 (7th Cir. 2011)). That approach treats Second Amendment rights like other constitutional rights; it allows regulators to protect the public from the risks of gun violence if they satisfy the applicable level of scrutiny; and it comports with *Heller*'s enumeration of longstanding gun regulations that pose no serious constitutional concern.

The leading alternative—a purely historical approach—does none of those things, and suffers from other flaws besides. It is no wonder, then, that no Court of Appeals has adopted it. To the contrary, all Courts of Appeals that have announced a methodological test for Second Amendment cases apply heightened scrutiny. They have nearly unanimously concluded that intermediate scrutiny applies to regulations that do not burden or only tangentially burden the core Second Amendment right. And some have said that strict scrutiny applies to regulations that more directly and substantially implicate that core.

This Court should heed that consensus. Reconciling the need to protect gun rights with the need to prevent gun violence is no easy task. Legislators across the country, with input from well-funded organizations on both sides of the issue, are hard at work trying to get it right for the particular communities and diverse populations they represent. That work is far

from finished. And debates about how best to accomplish it are hotly contested at the ballot box. The "communal processes of democracy," in other words, are working. *Kolbe v. Hogan*, 849 F.3d 114, 150 (4th Cir. 2017) (en banc) (Wilkinson, J., concurring).

The equilibrium reached by the Courts of Appeals post-*Heller* gives space for those processes to continue while fully respecting Second Amendment rights. This Court ought not disturb that balance and "[d]isenfranchis[e] the American people on this life and death subject" by adopting a standard that would preclude sensible regulation and save lives. *Id.*

ARGUMENT

In the wake of *Heller*, the Courts of Appeals have coalesced around a two-step inquiry for determining whether a regulation violates the Second Amendment. *See, e.g.*, *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012) ("A two-step inquiry has emerged as the prevailing approach . . . ."); *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 254 (2d Cir. 2015) (noting that the Second Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits have adopted a two-part test); *Gould v. Morgan*, 907 F.3d 659, 662 (1st Cir. 2018) (adopting the same test). These courts first ask whether the regulation burdens conduct falling within the scope of the Second Amendment. If it does, they then apply traditional principles of heightened scrutiny to determine whether the regulation nevertheless passes constitutional muster. Consistent with those principles, courts generally reserve strict scrutiny for severe burdens on core rights, and apply intermediate scrutiny where a regulation

imposes only tangential burdens on core Second Amendment rights.

The settled two-step inquiry is the right one. *Heller* effectively compelled it when it instructed courts to treat Second Amendment rights neither worse nor better than other constitutional rights. And the inquiry gives regulators sufficient latitude to address the important public-safety concerns attendant to the use of firearms—including by adopting the kinds of common-sense gun laws *Heller* specifically called out as constitutional.

The same cannot be said of the purely historical approach some jurists and commentators have endorsed. Far from dictating such an approach, *Heller* assumed that *one* of the tiers of constitutional scrutiny would apply to regulations that burden conduct falling within the scope of the Second Amendment right, even as it declined to determine which one applied in which cases. Moreover, a purely historical approach would offer few clear answers—particularly with respect to new technologies that facilitate violence of a magnitude that would have been inconceivable to the Founding generation. A purely historical approach would also jeopardize regulations of dangerous conduct, like gun possession by domestic violence offenders, not recognized as criminal at the time of the Founding. Finally, such an approach would turn our federalist system of government on its head, preventing States—the "laboratories of democracy," *Evenwel v. Abbott*, 136 S. Ct. 1120, 1141 (2016) (internal quotation marks omitted)—from exercising creative measures to solve intractable policy problems and from tailoring legislation to serve the particular needs of their diverse populations.

I. IF THE COURT REACHES THE SECOND AMENDMENT QUESTION, IT SHOULD ENDORSE THE TWO-STEP TEST AROUND WHICH THE COURTS OF APPEALS HAVE COALESCED.

A. A Regulation Burdens the Core Second Amendment Right When It Impedes an Individual's Ability to Possess Firearms for Self-Defense in the Home.

"Like most rights, the right secured by the Second Amendment is not unlimited," and does not afford "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 626. Its scope is narrower—and its "core" is narrower still. *Id.* at 630. Consistent with *Heller*, the "core" Second Amendment right is the responsible citizen's ability to use arms for self-defense in the home. *Id.* at 635 (recognizing "the right of law-abiding, responsible citizens to use arms in defense of hearth and home").

That conclusion follows from the textual and historical inquiry this Court has undertaken to determine the Amendment's "scope." *McDonald v. City of Chicago*, Ill., 561 U.S. 742, 785 (2010); *see also Ezell*, 651 F.3d at 702 ("'[T]he scope of the Second Amendment right' is determined by textual and historical inquiry." (quoting *McDonald*, 561 U.S. at 785)). The right to keep and bear arms has historically been defined along four primary axes, all of which are reflected in *Heller* and in the text of the Amendment itself: (1) the individual exercising the right; (2) the kind of "arms" at issue; (3) the location at which such arms are "kept"; and (4) the purpose for which they are "borne." As to the first, *Heller* made clear that the

Second Amendment right extends to "law-abiding, responsible citizens," and not dangerous persons like "felons [or] the mentally ill." 554 U.S. at 635; *see id.* at 626. Regarding the second, *Heller* explained that the Second Amendment protects arms typically used for civilian self-defense (like the handgun, America's "quintessential self-defense weapon," *id.* at 629), rather than the sorts of devastating weaponry developed for use by modern militaries. *Id.* at 624–25, 627–28. With respect to the third, *Heller* held that "the home . . . [is] where the need for defense of self, family, and property is most acute." *Id.* at 628. And as to the fourth, *Heller* emphasized that "self-defense" is the right's "core lawful purpose." *Id.* at 630. The heart of the Second Amendment right lies at the intersection of those four principles—exactly where the law at issue in *Heller* attempted to strike.[2]

By contrast, laws that impose a lesser burden on the core right or do not implicate it at all have long been held (or presumed) constitutional. Those include "longstanding prohibitions on the possession of firearms by felons and the mentally ill." *Id.* at 626; *see*

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[2] The Court need not decide in this case whether the core Second Amendment right might theoretically extend outside the home or to purposes other than self-defense. Plaintiffs sought only a "premises license," not a "carry license." *New York State Rifle & Pistol Ass'n, Inc. v. City of New York*, 883 F.3d 45, 52–53 (2d Cir. 2018). And although they advocate before this Court for a broader right, the actual interests they asserted below and retain here relate exclusively to the right to transport guns to shooting ranges to maintain arms proficiency so that they can competently use their licensed arms inside the home (and in one case, a second home) for the purpose of self-defense.

also, e.g., *Binderup v. Attorney Gen. United States of Am.*, 836 F.3d 336, 354 (3d Cir. 2016) (en banc) (noting that felons presumptively lack Second Amendment rights). They include "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." *Heller*, 545 U.S. at 626; *see also, e.g.*, *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011) ("[A]s we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense."). They include laws restricting concealed carry. *See Heller*, 554 U.S. at 626 (noting 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"); *see also, e.g.*, *Peruta v. Cty. of San Diego*, 824 F.3d 919, 933–39 (9th Cir. 2016) (en banc) (describing the long history of concealed-carry restrictions in the United States). And they include bans on machine guns and other military-grade weapons not widely or appropriately used for self-defense. *See Heller*, 554 U.S. at 627–28 (weapons "most useful in military service . . . may be banned" because "modern developments" have differentiated small-arms used for individual self-defense from arms useful in combat); *Kolbe*, 849 F.3d at 134-39 (holding that weapons most useful in military service are unprotected by the Second Amendment).

B. Regulations that Burden the Second Amendment Right Are Subject to Heightened Scrutiny That Reflects the Severity of the Burden and Its Proximity to the Core.

Although *Heller* clarified the contours of the Second Amendment right by mapping out its core, it declined to decide what level of scrutiny applies to laws that burden the Second Amendment generally or its core specifically. The Courts of Appeals, however, have since answered that question. And they have been more or less unanimous, applying either intermediate or strict scrutiny depending on "on the relative severity of the burden and its proximity to the core" of the Second Amendment right. *Ezell*, 846 F.3d at 899 (quoting *Ezell*, 651 F.3d at 708). Courts reserve strict scrutiny for regulations that substantially burden the core Second Amendment right, while applying intermediate scrutiny to tangential burdens or burdens on a more peripheral right. *See, e.g.*, *Worman v. Healey*, No. 18-1545, --- F.3d ---, 2019 WL 1872902, at *7 (1st Cir. Apr. 26, 2019) ("In our view, intermediate scrutiny is appropriate as long as a challenged regulation either fails to implicate the core Second Amendment right or fails to impose a substantial burden on that right.").

That consensus rule follows from *Heller*, and from this Court's broader constitutional jurisprudence, for at least three reasons: It brings the Second Amendment in line with other constitutional rights; it affords regulators necessary leeway to protect the public from gun violence; and it comports with *Heller*'s enumeration of the kinds of gun laws that clearly withstand Second Amendment scrutiny.

1. *Heller* taught that the Second Amendment should be treated like other constitutional rights. *See, e.g.*, 554 U.S. at 603 (rejecting suggestion that the Amendment be treated "as an odd outlier"); *id.* at 626 (asserting that the Second Amendment should be treated "[l]ike most rights"); *id.* at 628 (looking to "the standards of scrutiny that [the Court has] applied to enumerated constitutional rights"); *id.* at 634–35 (similar). Indeed, in holding that the Second Amendment confers an individual right, the *Heller* Court relied on repeated analogies between the Second Amendment and the First Amendment. *See id.* at 579, 582, 591, 592, 595, 606, 626, 635. *McDonald* did the same thing, looking to First Amendment precedents and emphasizing that the Second Amendment cannot be "singled out for special . . . treatment." 561 U.S. at 778–779 (majority op.); *see also id.* at 780 (plurality op.) (explaining that the Second Amendment is not a "second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees").

Consistent with these principles, courts select and apply a level of heightened scrutiny in Second Amendment cases much the way they do in First Amendment cases: by looking to the severity of the burden imposed and its proximity to the core right. *See, e.g.*, *Jackson v. City & Cty. of S.F.*, 746 F.3d 953, 960–61 (9th Cir. 2014) ("[J]ust as in the First Amendment context, we consider: (1) how close the law comes to the core of the Second Amendment right and (2) the severity of the law's burden on the right." (internal quotation marks omitted)); *United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010). For the vast majority of modern gun-

safety regulations—which fall well short of the restrictive ban invalidated in *Heller*—this framework means that courts will apply intermediate scrutiny to determine whether the regulation at issue is "substantially related to an important governmental objective," *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *see, e.g.*, *Silvester v. Becerra*, 138 S. Ct. 945, 947, (2018) (Thomas, J., dissenting from denial of certiorari) ("After *Heller*, the Courts of Appeals generally evaluate Second Amendment claims under intermediate scrutiny.").

The regular use of intermediate scrutiny to assess the constitutionality of gun regulations puts the Second Amendment on par with other constitutional rights. Intermediate scrutiny has traditionally been applied to regulations burdening all manner of constitutional rights—including "discriminatory classifications based on sex or illegitimacy," *Clark*, 486 U.S. at 461 (citing cases), and content-neutral restrictions that incidentally burden speech, *see, e.g.*, *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662 (1994). The use of intermediate scrutiny in the First Amendment context is particularly illuminating, given the Court's repeated reliance on the First Amendment to answer threshold methodological questions related to the Second—and insistence that the Second Amendment "right [is] not unlimited, just as the First Amendment's right of free speech [is] not." *Heller*, 554 U.S. at 595.

Particularly given the danger inherent in the use of firearms, there is no reason to privilege the right to bear arms over the rights to be free from discrimination on the basis of sex or to speak freely. *See Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir.

2015). The Second Amendment is no more a supercharged right than it is a second-class one. The bifurcated approach most Courts of Appeals have adopted, including the use of intermediate scrutiny that most often results from its application, strikes that balance.

2. The consensus, bifurcated approach also allows legislatures—and the courts in which their legislation may be challenged—appropriate latitude to address the personal and public risks of firearms. *Heller* itself recognized the importance of that result. Indeed, the Court was well "aware of the problem of handgun violence in this country," 554 U.S. at 636—a problem that has regrettably not diminished in the eleven years since that decision was issued. And it took care to emphasize that "[t]he Constitution leaves [regulators] a variety of tools for combating that problem." *Id.*

The settled heightened-scrutiny approach—which subjects to intermediate scrutiny many reasonable regulations that restrict, rather than prohibit, the use of firearms—ensures that those tools will remain at policy-makers' disposal. That is because preventing gun violence qualifies as an "important governmental objective" for purposes of an intermediate-scrutiny analysis. *Clark*, 486 U.S. at 461. This Court has effectively already held as much, saying, for instance, that "concern for the safety and indeed the lives of . . . citizens" is "a primary concern of every government." *United States v. Salerno*, 481 U.S. 739, 755 (1987). And it has "found such public-safety concerns sufficiently forceful to justify restrictions on individual liberties" in "a wide variety of constitutional contexts"—even including those in which strict scrutiny applies. *Heller*, 554 U.S. at 689 (Breyer, J., dissenting) (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (*per*

curiam) (First Amendment free speech rights); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (First Amendment religious rights); *Brigham City v. Stuart*, 547 U.S. 398, 403–04 (2006) (Fourth Amendment rights); *New York v. Quarles*, 467 U.S. 649, 655 (1984) (Fifth Amendment *Miranda* rights); *Salerno*, 481 U.S. at 755 (Eighth Amendment bail rights)).

Although this means that regulators will often have little trouble establishing an "important government objective," traditional heightened scrutiny is still far from a free pass for gun regulation. Again, regulations that impose significant burdens on the core right may be subject to strict scrutiny. And even for tangentially burdensome regulations, intermediate scrutiny requires a "reasonable fit" between a law's ends and the means chosen to redress them. *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416 (1993). To be sure, regulators can establish such fit in any number of ways—including (but certainly not limited to) by relying on the kind of historical pedigree *Heller* emphasized. That is, "[a] long history, a substantial consensus, and simple common sense" are all available means for showing that a particular regulatory mechanism is reasonably related to the important government interest of preventing gun violence. *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (plurality op.). But regulators will still have to show that their chosen mechanism is "sufficiently tailored," *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490 (1995), and courts may still evaluate "less-burdensome alternatives," *Discovery Network*, 507 U.S. at 417 n.13. That process works, and laws are regularly struck down under intermediate scrutiny—including in the Second Amendment context. *See, e.g.*, 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, 1508 (2018) (reviewing empirical data and concluding that "intermediate scrutiny challenges [in Second Amendment cases] actually succeed at a higher rate than" cases in which a purely historical approach was applied).

3. Finally, *Heller* made clear that well-established, common-sense gun regulations are constitutional. *See Heller*, 554 U.S. at 626–27 ("[N]othing 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."). Some of the regulations *Heller* blessed (like laws banning machine guns, *id.* at 624, 627) fall outside the scope of the Second Amendment entirely. Others (like "laws regulating the storage of firearms to prevent accidents," *id.* at 632), may burden the core right, but only modestly, and would survive intermediate scrutiny. And still others might survive even strict scrutiny. The point is that *Heller*'s list of acceptable regulations makes sense only if the applicable constitutional standard would accommodate them.

The consensus, bifurcated approach to Second Amendment analysis fits that bill. Applying strict scrutiny across the board would not. Laws subject to strict scrutiny "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226 (2015). And importing that standard

wholesale into Second Amendment jurisprudence—without considering the limited scope of the core right and allowing for intermediate scrutiny where the burden on that right is limited—would "cast doubt on longstanding" and uniformly accepted gun laws, including those specifically deemed constitutional in *Heller*. 554 U.S. at 626–27.

II. IF THE COURT REACHES THE SECOND AMENDMENT QUESTION, IT SHOULD ESCHEW A PURELY HISTORICAL TEST.

A minority of commentators and judges have argued that the typical method for determining whether a regulation unconstitutionally burdens an enumerated right—analyzing that regulation under some form of heightened scrutiny—does not apply to the Second Amendment. They argue that courts hearing Second Amendment cases should instead ask only whether a challenged regulation comports with historical tradition; if there is no sufficiently close and longstanding historical analogue, they would deem the regulation unconstitutional, regardless of any technological or societal developments or impact on public safety. *See, e.g.*, *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

This Court should not accept that invitation. A purely historical approach would treat the Second Amendment differently from most other constitutional rights—including the First Amendment, to which *Heller* consistently analogized. *See supra* Part I.A.1. Such an indeterminate approach—which *Heller* in no way dictates—would be difficult to administer. Worse, using history as the sole constitutional metric

would be profoundly anti-federalist, stripping States of the ability to effectively tailor regulations to local needs and changing circumstances based on the policy choices other States made centuries ago.

A. *Heller* Does Not Dictate that the Constitutionality of Gun Regulations Be Judged Only According to Their Historical Pedigree.

Heller is not short on historical analysis. Both the majority opinion and the dissents are laden with it. That history, however, was all in service of resolving whether and to what extent the Second Amendment protects an individual right to use guns for self-defense. In other words, the Court used history as a guide in answering the "'scope' question" that constitutes the first step of the bifurcated approach: "Is the restricted activity protected by the Second Amendment in the first place?" *Ezell*, 651 F.3d at 701; *see also McDonald*, 130 S.Ct. at 3047 (explaining that "the scope of the Second Amendment right" is governed by a historical inquiry); *Heller II*, 670 F.3d at 1253 (holding that conduct regulated by longstanding prohibitions, such as those on the possession of firearms by felons or the carrying of firearms in sensitive places, is outside the scope of the Second Amendment).

The *Heller* Court did not need to decide what level of scrutiny applied to the District of Columbia regulation at issue because the prohibition could not pass muster "[u]nder any of the standards of scrutiny that [courts] have applied to enumerated constitutional rights." 554 U.S. at 628. The Court therefore expressly declined to determine a level of scrutiny broadly appropriate for regulations of conduct falling

within the historically defined scope of the Second Amendment right. *Id.* But that non-answer itself is illuminating: The Court assumed that one of the tiers of scrutiny would apply, and simply had no occasion to specify which one.

The approach *Heller* signaled—whereby history informs the scope of the right but does not dictate whether a regulation is permissible—accords, most notably, with this Court's First Amendment jurisprudence. In that context, "some categories of speech are unprotected"—and thus fall outside the Amendment's scope—purely "as a matter of history and legal tradition." *Ezell*, 651 F.3d at 702 (citing *United States v. Stevens*, 559 U.S. 460 (2010)); *cf. Heller*, 554 U.S. at 635 (noting that obscenity, libel, and the disclosure of state secrets, are excluded altogether from the First Amendment's protections). But where a regulation burdens protected speech, the Court applies a heightened tier of scrutiny to assess its constitutionality.

History of course has a role to play even in a traditional heightened-scrutiny analysis. For example, "[a] long history, a substantial consensus, and simple common sense" are all ways the government might show that a particular regulatory mechanism is reasonably related to an important government interest. *Burson*, 504 U.S. at 211 (plurality op.); *see supra* Part I.A.2. But nothing in *Heller* prevents legislatures from relying on other kinds of evidence and arguments to establish a reasonable relationship between their desired end and their chosen means—just as they can in the context of other rights, including the First Amendment. Nor does it require courts to jettison all other analytical tools in favor of a purely historical approach.

B. History is an Indeterminate Metric, and a Purely Historical Test Would be Difficult to Administer.

A Second Amendment test grounded exclusively in historical analysis, even if jurisprudentially justifiable, would be nearly impossible to predictably administer. As even originalism's staunchest defenders admit, "it is often exceedingly difficult to plumb the original understanding of an ancient text." Antonin Scalia, Essay, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856 (1989). History rarely speaks with a unified voice—particularly as to firearm technologies and regulatory techniques unheard of at the time of the Founding. After all, the most pressing gun-related issues today, from school shootings carried out with assault weapons to cyclical urban gun violence, are recent public-safety concerns. In the face of continuing change and uncertainty, a purely historical approach forces courts to invent answers where there are none—and ignore the very considerations that birthed the Second Amendment right in the first place.

1. Historical evidence often conflicts, not only regarding issues such as the contemporaneous subjective understandings of constitutional provisions, but also regarding "simple" factual assertions such as the extent to which and in what manner laws were enforced. *See, e.g.*, *Wrenn v. District of Columbia*, 864 F.3d 650, 659–60 (D.C. Cir. 2017) (discussing disagreement among scholars regarding whether the Statute of Northampton—a 14th century statute that provided the foundation for firearms regulation in England—generally banned the carrying of weapons in crowded areas).

With respect to "the scope of the right to bear arms," what history generally "demonstrates is that states often disagreed." *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 91 (2d Cir. 2012) (comparing *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90, 90 (1822), which found a prohibition on concealed carry to be unconstitutional, with *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 160 (1840), which reached the opposite result). For example, courts have found the historical evidence "inconclusive" as to such basic questions such as whether felons could be categorically barred from possessing firearms, *United States v. Chester*, 628 F.3d 673, 680–81 (4th Cir. 2010), or whether the Second Amendment protects public carry, *Kachalsky*, 701 F.3d at 91. Requiring courts to sort through this conflicting evidence every time a firearm regulation is challenged would impose a significant burden for little reward, as most judges have no specialized training in determining the accuracy and relevance of primary sources—or in placing these sources appropriately in their historical context.

Indeed, often the very same evidence can be marshaled to support contrary propositions. In *Heller* itself, the majority pointed to state constitutional provisions that explicitly protected a personal right to bear arms for self-defense as confirming the understanding that the federal right to "keep and bear" arms was not limited to the military. *Heller*, 554 U.S. at 600–03. But Justice Stevens countered that these state provisions demonstrated that the Framers knew how to enumerate a personal right if they wanted to do so. *Id.* at 642–43 (Stevens, J., dissenting). "For every persuasive thrust by one side, the other has an equally convincing parry." J. Harvie Wilkinson III, *Of*

Guns, Abortions, and the Unraveling Rule of Law, 95 VA. L. REV. 253, 267–69, 271 (2009) (comparing Justice Scalia's and Justice Stevens's historical analysis in *Heller* and concluding that "[i]t is hard to look at all this evidence and come away thinking that one side is clearly right on the law").

Because of its indeterminacy, historical evidence is vulnerable to cherry-picking and obfuscation. It "can be readily spun in various directions, depending on what conclusion a court ultimately wants to reach." Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 743 (2012). That such motivated reasoning can be dressed in historical clothing is all the more problematic because it will be difficult for the lay person with no easy access to 200-year-old evidence to detect.

2. A purely historical test is especially difficult to administer in the Second Amendment context for three additional reasons.

First, it is far from clear what historical time period courts should consider. *Heller* itself looked to authorities from almost 100 years after ratification of the Second Amendment to determine the "public understanding" of the Second Amendment right. 554 U.S. at 605, 616 (emphasis omitted). And it deemed regulations dating back to that period to be "longstanding" ones. But *Heller* also deemed regulations prohibiting gun possession by felons and the mentally ill, which are "of 20th Century vintage," to be "longstanding." *United States v. Skoien*, 614 F.3d 638, 640–41 (7th Cir. 2010) (Easterbrook, J.). *Heller*

suggested no way of determining whether a regulatory mechanism of relatively more recent vintage might nevertheless be sufficiently "longstanding" to merit constitutional respect.

Second, firearm technology has changed dramatically since 1791, and many of the salient issues in firearm regulation today have no historical analogs. Perhaps most notably, modern firearms are much deadlier than their historical counterparts. Today, an individual can purchase a weapon that will enable her to fire many rounds at a high rate, while even military-grade "[f]raming-era firearms were capable of nothing" of the sort. Lawrence Rosenthal, *The Limits of Second Amendment Originalism and the Constitutional Case for Gun Control*, 92 WASH. U. L. REV. 1187, 1216 (2015). Or an individual may download a gun from the Internet and print it on a commercially available 3D-printer. *See, e.g.*, James B. Jacobs & Alex Haberman, *3D-Printed Firearms, Do-It-Yourself Guns, & the Second Amendment*, 80 LAW & CONTEMP. PROBS. 129, 137–42 (2017). Because the regulated technology itself has no historical analog, the lack of a historical analog for the regulation of that technology "indicate[s] no more than the fact that no fairly analogous regulatory issue arose in the framing era." Rosenthal, *supra*, at 1215. The absence of "precedent for [a particular form of] state control" does not "establish that [there] is a constitutional right" to be free of such control. *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 835 n.2 (2011) (Thomas, J., dissenting) (internal quotation marks omitted).

Third, some behavior that contemporary society now views as dangerous and criminal was not always acknowledged as such at the Founding. For example,

many modern laws recognize that domestic violence offenders pose a grave risk to their intimate partners, and accordingly disarm convicted domestic abusers or those subject to protective orders. These laws might not find close historical analogs, however, because domestic violence was not previously classified either as criminal or as warranting disarmament. *E.g.*, *Stimmel v. Sessions*, 879 F.3d 198, 205 (6th Cir. 2018); *see also* Brief for Appellant at 8, *Stimmel*, 879 F.3d 198 (No. 15-4196), 2016 WL 7474670 (arguing "domestic violence was not illegal at the time the Bill of Rights or Fourteenth Amendment were enacted"). A purely historical framework for deciding Second Amendment cases would be difficult to apply to evolving understandings of threatening or dangerous criminal conduct.

C. A Purely Historical Test Would Be Fundamentally Anti-federalist.

Finally, a test grounded solely in historical tradition would undermine our federalist system of government by stripping States and local governments of the ability to devise new solutions to difficult problems and to respond to uniquely local challenges.

Justice Brandeis's famous observation regarding the laboratories of democracy—that "denial of the right to experiment may be fraught with serious consequences to the nation," *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)—rings particularly true with respect to the regulation of firearms, because the technology itself, and social expectations regarding its use, are constantly evolving. "Experimentation among states and cities" has been and will continue to be "critical to producing

effective gun regulations." Wilkinson, *supra*, at 318; *see also McDonald*, 561 U.S. at 785 (2010) (making clear that "[s]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment" (internal quotation marks omitted)).

Moreover, effective regulation of firearms depends on inherently local factors. Firearms might, for instance, be put to different uses in rural communities than in urban ones, and the risks inherent in their use likewise varies. "[S]tate and local governments need the freedom to . . . adapt their solutions to the unique circumstances in their own community." Wilkinson, *supra*, at 318.

Throughout history, States and localities have tailored their firearm regulations to best serve their constituents. For example, Southern States were more likely to propound a right to carry guns in public than Northern States. *See* Saul Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities*, 39 FORDHAM URB. L.J. 1695, 1716–23 (2012). And more crowded locales, where negligent handling of firearms posed increased risks, have historically regulated gun use accordingly. Rhode Island, for instance, saw the need to prohibit the firing of firearms in streets and taverns. *See Heller*, 554 U.S. at 631–33. And Massachusetts prohibited Boston residents from taking loaded firearms into dwellings or other buildings. *See id.* Rural populations did not enact such laws because they did not need them. A purely historical approach to assessing Second Amendment challenges offers courts no guidance regarding which States' or regions' traditions of

regulation should define the contours of the contemporary right to keep and bear arms, or which regulatory traditions violate the right.

Our communities are no less varied and diverse today than they were in the past. In some places, firearms are an important part of everyday life. In others, the risks of widespread gun possession far outweigh the rewards. Although the Constitution takes some forms of regulation off the table, with respect to the rest, our federalist system was designed to encourage regulatory flexibility. The Court should not adopt an approach to the Second Amendment that would prevent States and local governments from adopting sensible gun regulations that protect citizens from violence while still respecting the core right to keep firearms in the home for the purpose of self-protection.

CONCLUSION

If the Court reaches the Second Amendment question, it should adopt the consensus two-step test, pursuant to which the courts select a tier of scrutiny for laws that implicate the Second Amendment based on "the relative severity of the burden and its proximity to the core" of the Second Amendment right. *Ezell*, 846 F.3d at 899 (quoting *Ezell,* 651 F.3d at 708). This methodology appropriately respects both rights and public safety, empowering governments to protect their citizens from the grave threat of gun violence while respecting constitutional limits that are determined according to normal principles of constitutional jurisprudence.

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