No. 18-280

In The Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

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

BRIEF OF *AMICI CURIAE* PROFESSORS OF SECOND AMENDMENT LAW, SECOND AMENDMENT FOUNDATION, CITIZENS COMMITTEE FOR THE RIGHT TO KEEP AND BEAR ARMS, JEWS FOR THE PRESERVATION OF FIREARMS OWNERSHIP, MILLENNIAL POLICY CENTER, AND INDEPENDENCE INSTITUTE IN SUPPORT OF PETITIONERS

JOSEPH G.S. GREENLEE
MILLENNIAL POLICY CENTER
3443 S. Galena St., #120
Denver, CO 80231
(970) 485-3303
josephgreenlee@gmail.com

DAVID B. KOPEL
Counsel of Record
INDEPENDENCE INSTITUTE
727 E. 16th Ave.
Denver, CO 80203
(303) 279-6536
david@i2i.org

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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OTHER AUTHORITIES

INTEREST OF THE *AMICI CURIAE*[1]

***Amici* professors** are law professors who teach and write on the Second Amendment: Randy Barnett (Georgetown), Royce Barondes (Missouri), Robert Cottrol (George Washington), Nicholas Johnson (Fordham), Joyce Malcolm (George Mason), George Mocsary (Southern Illinois), Michael O'Shea (Oklahoma City), Glenn Reynolds (Tennessee), and Gregory Wallace (Campbell). As described in the Appendix, the above professors were cited extensively by this Court in *District of Columbia v. Heller* and *McDonald v. City of Chicago*. Oft-cited by lower courts as well, these professors include authors of the first law school textbook on the Second Amendment, as well as many other books and law review articles on the subject.

The Second Amendment Foundation ("SAF") is a non-profit foundation dedicated to protecting the right to arms through educational and legal action programs. SAF has over 650,000 members, in every State of the Union. SAF organized and prevailed in *McDonald v. City of Chicago*. Since 2014, instructors certified by SAF's Training Division have taught over 1,500 classes in 27 states.

The Citizens Committee for the Right to Keep and Bear Arms is a non-profit organization dedicated

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[1] No counsel for any party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amici*, their members, or their counsel made such a monetary contribution. Both parties consented to the filing of this brief.

to protecting firearms rights through grassroots organizing.

Jews for the Preservation of Firearms Ownership is a non-profit educational civil rights corporation focused on firearms ownership and responsibility. Its work centers on the history of gun control.

Millennial Policy Center is a research and educational center that develops and promotes policy solutions to advance freedom and opportunity for the Millennial Generation.

Independence Institute is a non-partisan public policy research organization. The Institute's *amicus* briefs in *Heller* and *McDonald* (under the name of lead *amicus* Int'l Law Enforcement Educators & Trainers Association ("ILEETA")) were cited in the opinions of Justices Breyer (*Heller*), Alito (*McDonald*), and Stevens (*McDonald*).

SUMMARY OF ARGUMENT

Since this Court's decision in *District of Columbia v. Heller*, most lower courts have adopted a Two-Part Test for Second Amendment challenges. Part One of the test requires a historical analysis to determine whether the law affects the right. If so, Part Two requires the application of heightened scrutiny.

While the Two-Part Test is capable of effective application, recalcitrant lower courts have misused it to treat the Second Amendment as a second-class right.

Despite acknowledging that strict scrutiny is theoretically available, no circuit court has ever held that strict scrutiny is appropriate for the Second Amendment.

Instead, many courts apply a feeble, watered-down version of intermediate scrutiny by discarding virtually all the requirements mandated by this Court. In the feeble scrutiny, the government is not required to produce substantial evidence, to overcome rebuttal evidence, to consider substantially less burdensome alternatives, or to not suppress protected conduct in the same proportion as secondary effects. Nor does the government have to prove that the objective would be achieved less effectively absent the regulation.

After removing this Court's heightened scrutiny requirements, courts merely decide whether the right is burdened disproportionately to the government's public safety interest—precisely the type of freestanding interest-balancing this Court rejected in *Heller* and *McDonald v. City of Chicago*.

An increasing number of opinions apply rational basis review to the Second Amendment, despite this Court's express disapproval of rational basis in *Heller*.

The above problems are manifest in the opinion below, and in many other cases. Some courts admit that they single out the Second Amendment for specially unfavorable treatment, offering justifications that this Court has rejected.

Unless this Court reinforces *Heller* by elucidating a robust test for Second Amendment cases, lower courts will continue to defy this Court's precedents and infringe the right to keep and bear arms. As this Court has explained, courts must rule in accordance with original meaning.

ARGUMENT

I. Strict scrutiny should apply to a ban on self-defense for law-abiding citizens and to bans on training.

A Two-Part Test has been adopted by all federal circuit courts[2] except the Eighth.[3] Part One uses "a textual and historical inquiry into original meaning,"

[2] The test was established in *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010). It was adopted in *Gould v. Morgan*, 907 F.3d 659, 669 (1st Cir. 2018); *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 254 (2d Cir. 2015) ("*NYSRPA I*"); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012) ("*BATFE*"); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Ezell v. City of Chicago*, 651 F.3d 684, 701–03 (7th Cir. 2011) ("*Ezell I*"); *United States v. Chovan*, 735 F.3d 1127, 1136–37 (9th Cir. 2013); *United States v. Reese*, 627 F.3d 792, 800–01 (10th Cir. 2010); *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1261 n.34 (11th Cir. 2012) ("*GeorgiaCarry.Org I*"); *Heller v. District of Columbia*, 670 F.3d 1244, 1252 (D.C. Cir. 2011) ("*Heller II*").

[3] *See United States v. Hughley*, 691 F. App'x 278, 279 (8th Cir. 2017) (unpublished) ("Other courts seem to favor a so-called 'two-step approach.' . . . We have not adopted this approach and decline to do so here.").

asking "Is the restricted activity protected by the Second Amendment in the first place?" *Ezell I*, 651 F.3d at 701. If so, the court proceeds to Part Two, where it applies heightened scrutiny. *Id.* at 703. *See generally* David Kopel & Joseph Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 ST. LOUIS L.J. 193 (2017).

Most circuit courts agree that strict scrutiny is available for Second Amendment challenges.[4] Yet, no circuit court has ever held that strict scrutiny is appropriate for a particular Second Amendment case.[5]

Given the severity of some of the laws at issue, the refusal to apply strict scrutiny is striking. The laws include bans on the possession of common arms in the home by law-abiding citizens for self-defense, *Heller II*, 670 F.3d 1244, *Worman v. Healey*, No. 18-1545, 2019 WL 1872902 (1st Cir. Apr. 26, 2019), *NYSRPA I*, 804 F.3d 242, *Ass'n of New Jersey Rifle & Pistol Clubs, Inc.*

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[4] *Gould*, 907 F.3d at 671; *New York State Rifle & Pistol Ass'n, Inc. v. City of New York*, 883 F.3d 45, 55 (2d Cir. 2018) ("*NYSRPA II*"); *Chester*, 628 F.3d at 682; *BATFE*, 700 F.3d at 195; *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 690 (6th Cir. 2016) (en banc); *Ezell I*, 651 F.3d at 701–04; *Chovan*, 735 F.3d at 1138; *Reese*, 627 F.3d at 801–02, 804 n.4; *GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Engineers*, 788 F.3d 1318, 1328 (11th Cir. 2015) ("*GeorgiaCarry.Org II*"); *Heller II*, 670 F.3d at 1257.

[5] The Fifth Circuit came closest, assuming without deciding that strict scrutiny was appropriate for a ban on interstate handgun sales because the law would be upheld anyway. *Mance v. Sessions*, 896 F.3d 699, 704 (5th Cir. 2018) ("Because we conclude that the laws and regulations at issue withstand strict scrutiny . . . We will also assume, without deciding, that the strict, rather than intermediate, standard of scrutiny is applicable.").

v. Attorney Gen. New Jersey, 910 F.3d 106 (3d Cir. 2018), *Fyock v. Sunnyvale*, 779 F.3d 991 (9th Cir. 2015); requiring that handguns in the home be locked up if not being worn (so that a person who is sleeping cannot have a functional handgun available), *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953 (9th Cir. 2014); a 10-day waiting period for firearm purchases by persons who have just passed a background check and already own another gun, *Silvester v. Harris*, 843 F.3d 816 (9th Cir. 2016); a ban on commercial handgun sales to young adults, *BATFE*, 700 F.3d 185; and a ban on all new models of semiautomatic handguns, *Pena v. Lindley*, 898 F.3d 969 (9th Cir. 2018).

All the above laws burdened the ability of law-abiding citizens to defend themselves in the home, yet none received strict scrutiny.

A. Strict scrutiny is appropriate for prohibitions on law-abiding citizens because they receive the greatest Second Amendment protections.

As *Heller* held, the Second Amendment "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." 554 U.S. at 635.

The prohibition here applies to the most law-abiding of citizens. "The application process for a license is rigorous and administered locally. Every application triggers a local investigation by police into the applicant's mental health history, criminal history, [and]

moral character." *NYSRPA II*, 883 F.3d at 52 (quoting *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 87 (2d Cir. 2012)).

New York City's prohibitions of self-defense by law-abiding citizens strike at the heart of the Second Amendment.

B. Strict scrutiny is appropriate for burdens on self-defense.

"[T]he inherent right of self-defense has been central to the Second Amendment right." *Heller*, 554 U.S. at 628. Limiting firearms possession to one specific premises "makes it impossible for citizens to use them for the core lawful purpose of self-defense" in all other places. *Id.* at 630.

Forbidding license-holders to take their firearms to places like a second home, relatives' homes, other private property with the owner's consent, and in public places entirely deprives citizens of Second Amendment protections in all those places. With respect to law-abiding citizens like Petitioner Romolo Colantone—who is forbidden from transporting his firearm to his second home outside city limits—"[t]he prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute." *Id.* at 628.

C. Strict scrutiny is appropriate for the City's burdens on travel and range-training.

"Constitutional rights thus implicitly protect those closely related acts necessary to their exercise . . . The right to keep and bear arms, for example, implies a corresponding right to obtain the bullets necessary to use them, and to acquire and maintain proficiency in their use." *Luis v. United States*, 136 S. Ct. 1083, 1097 (2016) (Thomas, J., concurring in the judgment) (quotations and citations omitted).

The Seventh Circuit explained why target ranges and training are essential to the Second Amendment. *Ezell I*, 651 F.3d 684. Declaring unconstitutional a ban on target ranges within city limits, the court wrote: "[T]he core right wouldn't mean much without the training and practice that make it effective." *Id.* at 704. Because maintaining proficiency with firearms is "an important corollary to the meaningful exercise of the core right to possess firearms for self-defense," the court struck down the range restriction under "not quite 'strict scrutiny.'" *Id.* at 708.

1. New York City's travel prohibition is a very severe burden.

The New York City burden is more severe than the one held unlawful in Chicago. Both cities forced residents into inconvenient travel: a resident of central Chicago had to travel to the suburbs; a resident of Staten Island cannot drive to nearby ranges in New Jersey.

Travel inconvenience for local trips is one thing. New York City's outlawing most travel with one's own handgun is a separate burden, and a severe one. The travel ban has additional, very negative consequences for defensive training and for proficient, safe gun use.

A resident of Chicago was free to take her handgun anywhere else in Illinois or the rest of the United States. For purposes of self-defense, she could, in compliance with the laws of the state she was visiting, possess a defensive handgun in her abode, or automobile, or bear a defensive handgun.

To improve her skills, she could participate in a handgun competition in the suburbs, or informal practice at a friend's farm. She could travel anywhere to take classes with the instructors and facilities of her choice. New Yorkers can do none of these.

The National Shooting Sports Foundation ("NSSF," the trade association for the firearms industry) rates shooting ranges on a five-star system. NSSF publishes the ratings for the best ranges—those with four or five stars. No such range is located in New York City. *See Star-Rated Ranges*, NSSF.ORG.[6]

The seven ranges in New York City do not purport to match the variety of facilities available elsewhere. For example, "shoot houses" are multi-room setups teaching students how to move through a home when

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[6] https://www.nssf.org/ranges/range-star-rating-star-rated-ranges/ (last visited May 5, 2019).

a possible intruder's location is unknown. They also teach when not to fire, such as when a resident or bystander might be injured.

While small urban ranges allow shooting straight ahead at short range, training facilities with greater space can teach students how to shoot while moving or behind cover, and how to defend against attackers who are not directly ahead.

Necessarily, New York City's indoor ranges are not suitable for teaching defensive skills for the outdoors.

Many law-abiding handgun owners travel outside their home city to participate in competitions, including those focused on defensive skills, such as those of the International Defensive Pistol Association or the United States Practical Shooting Association. Uniquely, the people of New York City are forbidden to do so with their own handguns.

2. Handgun rentals are no substitute for practice with one's own gun.

The Second Circuit brushed off the travel ban by stating that City residents who venture outside the City can just rent a handgun. *NYSRPA II*, 883 F.3d at 61, 64.

Many ranges do not rent guns. Those that do cannot carry inventory covering the thousands of varieties of handguns owned by law-abiding Americans, including New Yorkers.

Moreover, forced rentals contradict gun safety and good training. As instructors emphasize, a person who might have to use a gun for self-defense should train with that particular gun. In the crisis of a violent attack, the defender often relies on muscle memory. This requires using the particular firearm with which the defender has become familiar via practice.

Defensive shooting uses fine motor skills under extreme stress. Successful defense—survival—is more likely with guns that precisely fit the owner and aid accuracy.

Handgun owners often replace the factory grip handles to improve personal sizing and texture. Gunowners add better sights, such as red dots. For some gunowners, contouring the handgun's frame stops blisters from long practice sessions. The front or back of the pistol grip (the frontstrap or backstrap) may be adjusted for fit or replaced with an aftermarket part.

Even within a given make and model, handguns vary in operation. Just as ten cars of the same model and year will all drive and handle a little differently, handguns vary too. One reason is small variations in the sizes of parts. Another reason is that final assembly is done by hand, with the assembly person manually adjusting internal settings, such as for the trigger. As guns are used, they differ even more, due to variances in wear, replacement or upgrading of parts, and so on.

Thus, one gun may reliably feed a particular brand of ammunition, and another gun may not. The only

way to know how one's particular gun will perform is to practice with that particular gun.

If a gun is developing a mechanical problem, the owner needs to find out *before* self-defense becomes necessary. Using a rental gun at a target range does not allow testing of how one's own gun is functioning.

The Training Division of *amicus* Second Amendment Foundation supplies students with guns in only the most basic classes—where students are not likely to own a firearm. After the basic class, trainers prefer students using their own equipment; students should become very familiar with their own gun's feel and operation.

For example, "trigger break" is the exact point in trigger movement when the trigger initiates the firing of the ammunition. By muscle memory, a proficient user knows this exact point for her particular gun.

The "reset point" is where the trigger returns after the gun has fired. When releasing the trigger, the proficient user should move her finger exactly far enough forward to let the trigger reset—and no further. Then, the user is ready to pull the trigger with just the right amount of finger movement.

Learning the trigger break and reset point requires muscle memory, built through practice with that particular gun. Practice with one's own gun improves gun control, for safety and accuracy.

The burden of the travel ban is exacerbated by the shortage of ranges within the City. It has been a long

time since the City's zoning authorities approved the opening of a public range. Today, there are only seven ranges in a city with a population of over 8.6 million. *NYSRPA II*, 883 F.3d at 59; James Barron, *New York City's Population Hits a Record 8.6 Million*, N.Y. TIMES, Mar. 22, 2018.

3. Target shooting is protected by the Second Amendment.

The Second Circuit opined that target shooting is protected only to the extent necessary for defensive gun use in the home. *NYSRPA II*, 883 F.3d at 58–59. To the contrary, this Court has made clear that recreational firearms use is part of the Second Amendment.

The First Amendment protects the right to read books just for fun, even though serious reading about public affairs is more important. The same is true for lawful recreational use of firearms.

As *Heller* put it: "[T]he purpose for which the right was codified" was "to prevent elimination of the militia," but "most undoubtedly thought it even more important for self-defense and hunting." 554 U.S. at 599. In fact, this Court phrased "the question presented" in *Heller* as "Whether [the Second Amendment] also protects the right to possess and use guns for nonmilitary purposes like hunting and personal self-defense," and held that it does. *Id.* at 636–37.

Several circuit courts have acknowledged that the Second Amendment includes recreational use. *United*

States v. Rene E., 583 F.3d 8, 16 (1st Cir. 2009) (emphasizing that the upheld law "contains exceptions for self- and other-defense in the home, national guard duty, and hunting, among other things"); *Woollard v. Gallagher*, 712 F.3d 865, 879 (4th Cir. 2013) (noting that the upheld restriction still allowed the plaintiff to "wear, carry, and transport handguns if he engages in target shoots and practices, sport shooting events, hunting and trapping, specified firearms and hunter safety classes, and gun exhibitions."); *Heller II*, 670 F.3d at 1260 (recognizing that *Heller* included self-defense, hunting, and other lawful purposes among activities protected by the Second Amendment); *BATFE*, 700 F.3d at 207 (noting that burdened "18–to–20–year–olds may possess and use handguns for self-defense, hunting, or any other lawful purpose"). *See also Marzzarella*, 614 F.3d at 92 ("certainly, to some degree, it must protect the right of law-abiding citizens to possess firearms for other, as-yet-undefined, lawful purposes."); *Heller II*, 670 F.3d at 1287–88 (Kavanaugh, J., dissenting) (noting the importance of the prohibited arms being "commonly used for self-defense in the home, hunting, target shooting and competitions."); *Andrews v. State*, 50 Tenn. 165 (3 Heisk), 178–79 (1871) ("[T]he right to keep arms involves, necessarily, the right to use such arms for all the ordinary purposes, and in all the ordinary modes usual in the country, and to which arms are adapted. . . .").

The Second Circuit itself previously identified target practice as within "the Second Amendment's

protections," along with self-defense and hunting. *Kachalsky*, 701 F.3d at 98.

Even purely recreational target shooting improves firearms proficiency, and thus improves self-defense proficiency. In the instant case, the City is preventing far more than just recreation. New York City thwarts its residents from obtaining defensive training not available in the City. Especially when coupled with the prohibition on self-defense in all places but one, the law warrants the strictest scrutiny.

II. Like other circuits, the Second Circuit has invented a unique and feeble version of intermediate scrutiny for the Second Amendment.

This Court's intermediate scrutiny requires that the government: 1. produce substantial evidence; 2. overcome rebuttal evidence; 3. prove that the government objective is achieved more effectively through the regulation; 4. refrain from suppressing the protected conduct in the same proportion as secondary effects; 5. consider substantially less burdensome alternatives. The Second Circuit ignored all these requirements.

Although purporting to apply intermediate scrutiny, the court created a watered-down substitute. Other courts have done the same—contrary to *McDonald*. *See McDonald*, 561 U.S. at 785–86 (quoting *Malloy v. Hogan*, 378 U.S. 1, 10–11 (1964)) ("this Court decades ago abandoned 'the notion that the Fourteenth

Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights' ").

A. The City must provide actual evidence and cannot rely on shoddy reasoning or data.

Under intermediate scrutiny, "the [government] must prove not merely that its regulation will advance its interest, but also that it will do so 'to a material degree.' " *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996) (quoting *Edenfield v. Fane*, 507 U.S. 761, 771 (1993)). "This burden is not satisfied by mere speculation or conjecture." *Edenfield*, 507 U.S. at 770–71. While "courts must accord substantial deference to the predictive judgments" of legislatures, this "does not mean, however, that they are insulated from meaningful judicial review altogether." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 665–66 (1994) ("*Turner I*").

Thus, the government cannot "get away with shoddy data or reasoning." *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002). Rather, the government "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them." *Edenfield*, 507 U.S. at 770–71. The demonstration must be based on "substantial evidence." *Turner I*, 512 U.S. at 666; *Turner Broad. Sys. v. F.C.C.*, 520 U.S. 180, 195 (1997) ("*Turner II*").

Turner II deferred to the government's "[e]xtensive testimony," "volumes of documentary evidence and

studies," and "extensive anecdotal evidence." *Id.* at 198, 199, 202. In contrast, New York City's Corporate Counsel provided no data, no statistics, no studies, nor any other empirical evidence. The failure to adequately support the ban closely resembles *44 Liquormart, Inc*., where the government failed to justify a ban on price advertising for alcoholic beverages "without any findings of fact." 517 U.S. at 505. Similarly, *Edenfield* struck down a ban on in-person solicitation by CPAs because the government "presents no studies" nor "any anecdotal evidence." 507 U.S. at 771.

As in *Edenfield*, the government relied only on an "affidavit . . . which contains nothing more than a series of conclusory statements." *Id.*

Long after the regulation's imposition, the City still fails to offer supporting empirical evidence. When "evidence is readily available, reviewing courts need to be wary when the government appeals, not to evidence, but to an uncritical common sense." *Alameda Books, Inc.*, 535 U.S. at 459 (Souter, J., dissenting).

Although the City's flimsy evidence was insufficient to satisfy this Court's intermediate scrutiny, it did suffice under the specially unfavorable scrutiny applied by the Second Circuit. The same problem was recently identified in the Third Circuit. *Ass'n of New Jersey Rifle & Pistol Clubs, Inc.*, 910 F.3d at 133–34 (Bibas, J., dissenting) ("the majority's version of intermediate scrutiny is too lax. It cannot fairly be called intermediate scrutiny at all. Intermediate scrutiny requires more concrete and specific proof before the

government may restrict any constitutional right, period.").

B. The Second Circuit applied only the first step of the three-step *Alameda Books* test.

The Second Circuit purported to apply the intermediate scrutiny test explicated by the *Alameda Books* plurality. 535 U.S. at 438–39 (2002) (plurality). However, the Second Circuit used only one step of the three-step test.

According to the Second Circuit, "[s]o long as the defendants produce evidence that fairly supports their rationale, the laws will pass constitutional muster." *NYSRPA II*, 883 F.3d at 62 (quoting *NYSRPA I*, 804 F.3d at 261).

But *Alameda Books* requires more. In fact, the Second Circuit used only the *first* step of the analysis to determine whether the City's evidence "fairly support[s]" its rationale. *Alameda Books*, 535 U.S. at 438 (plurality). Under *Alameda Books*, if the government meets its initial burden, the plaintiffs may "cast direct doubt on this rationale, either by demonstrating that the [government's] evidence does not support its rationale or by furnishing evidence that disputes the [government's] factual findings." *Id.* at 438–39. "If plaintiffs succeed in casting doubt on a [government] rationale in either manner, the burden shifts back to the [government] to supplement the record with

evidence renewing support for a theory that justifies its ordinance." *Id.* at 439.

Assuming that the City's lone affidavit met the initial requirement, the court below should have considered whether the Petitioners' evidence "cast direct doubt on this rationale, either by demonstrating that the [City's] evidence does not support its rationale or by furnishing evidence that disputes the [City's] factual findings." *Id.* at 438–39.

The Petitioners did successfully cast doubt on the City's rationale. They demonstrated that due to the shortage of ranges and their locations, the law results in license-holders transporting arms *more often* throughout the city. Petition for Writ of Certiorari, No. 18-280 at 10, 14–15. The Petitioners also showed that under the licensing process only the most law-abiding citizens are granted licenses, and that requiring arms to be left unattended makes them vulnerable to theft. *Id.* at 15–16. Most importantly, the Petitioners showed that it is contrary to public safety to limit range practice and to inhibit proficiency with firearms. *Id.* at 16–17**.** Thus, the burden should have shifted back to the City to produce additional evidence justifying the travel restriction. *Alameda Books*, 535 U.S. at 439. The City's affidavit—devoid of data, statistics, or empirical evidence—could not have satisfied the complete *Alameda Books* test.

C. Intermediate scrutiny prohibits the government from suppressing secondary effects of firearm ownership by suppressing firearm ownership itself.

While the Second Circuit purported to apply the test from the *Alameda Books* plurality, "because Justice Kennedy's concurrence reached the judgment on the narrowest grounds, his opinion represents the Supreme Court's holding in that case." *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee Cty., Fla.*, 630 F.3d 1346, 1355 (11th Cir. 2011) (citing *Marks v. United States,* 430 U.S. 188, 193 (1977)) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds").

In considering bans on adult bookstores, Justice Kennedy's controlling opinion held that the government "may not regulate the secondary effects of [protected conduct] by suppressing the [protected conduct] itself." *Alameda Books*, 535 U.S. at 445 (controlling opinion of Kennedy, J.). It is impermissible to "reduce secondary effects by reducing speech in the same proportion." *Id.* at 449. Thus, "[t]he rationale of the ordinance must be that it will suppress secondary effects—and not by suppressing speech." *Id*. at 449–50.

The D.C. Circuit, consistent with *Alameda Books*, rejected the argument that "the most effective method of limiting misuse of firearms . . . is to limit the number

of firearms present in the home." "[T]aken to its logical conclusion, that reasoning would justify a total ban on firearms kept in the home." *Heller v. District of Columbia*, 801 F.3d 264, 280 (D.C. Cir. 2015) ("*Heller III*").

Here, the law is aimed at the secondary effects of criminal misuse of firearms. But the law's effect is suppressing the exercise of a constitutional right: transporting firearms for self-defense and range training. Even if the law achieves the objective—and there is no proof that it does—the method is unconstitutional. "A complete ban can be narrowly tailored but only if each activity within the proscription's scope is an appropriately targeted evil." *Ward v. Rock Against Racism*, 491 U.S. 781, 799–800 (1989) (quoting *Frisby v. Schultz,* 487 U.S. 474, 485 (1988)).

D. Intermediate scrutiny requires that the government prove the objective is achieved more effectively through the regulation.

Intermediate scrutiny requires the government to prove that "the regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 782–83. Put differently, "[i]t must demonstrate . . . that the regulation will in fact alleviate these harms in a direct and material way." *Turner I*, 512 U.S. at 664. "If the mere possibility" that a gun control would save lives sufficed, "*Heller* would have been decided the other way." *Moore v. Madigan*, 702 F.3d 933, 939 (7th Cir.

2012). Here, the City provided no evidence that the law has any positive effect.

E. Intermediate scrutiny requires consideration of substantially less burdensome alternatives.

Under intermediate scrutiny, a court must ensure that "the means chosen are not substantially broader than necessary to achieve the government's interest." *Ward*, 491 U.S. at 800.

Thus, in the First Amendment context, "the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *McCullen v. Coakley*, 134 S. Ct. 2518, 2540 (2014). In the Second Amendment context, Justice Breyer's intermediate scrutiny-like balancing test proposed in his *Heller* dissent considered "reasonable, but less restrictive, alternatives." 554 U.S. at 710 (Breyer, J., dissenting).

Some circuit courts recognize the obligation in the Second Amendment context. *Heller III*, 801 F.3d at 277–78; *Ass'n of New Jersey Rifle & Pistol Clubs, Inc.*, 910 F.3d at 124 n.28; *Ezell I*, 651 F.3d at 709; *Moore*, 702 F.3d at 940; *Reese*, 627 F.3d at 803; *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1128 (10th Cir. 2015).

But some courts, including the Second Circuit below, omit the substantially less burdensome analysis for this disfavored right. *See Nat'l Rifle Ass'n of Am.,*

Inc. v. McCraw, 719 F.3d 338, 349 (5th Cir. 2013) (refusing to consider substantially less burdensome alternatives to excluding all young adults from the handgun carry licensing system); *NYSRPA I*, 804 F.3d at 261 (failing to consider a strict licensing system as an alternative to a ban on common firearms and magazines); *Jackson*, 746 F.3d at 969 ("Jackson contends that San Francisco could have adopted less burdensome means of restricting hollow-point ammunition . . . Even if this is correct, intermediate scrutiny does not require the least restrictive means of furthering a given end.").

F. By jettisoning this Court's heightened scrutiny requirements, the lower courts have adopted the freestanding interest-balancing that this Court repeatedly rejected.

"The Supreme Court has at every turn rejected the use of interest balancing in adjudicating Second Amendment cases." *Tyler*, 837 F.3d at 702–03 (Batchelder, J., concurring in most of the judgment).

The *Heller* majority rebuffed the "judge-empowering 'interest-balancing inquiry'" from Justice Breyer's dissent "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.'" 554 U.S. at 634 (quoting *id.* at 689–90 (Breyer, J., dissenting)). "The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—

the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Id.* at 634.

Indeed, "We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach." *Id.* "We would not apply an 'interest-balancing' approach to the prohibition of a peaceful neo-Nazi march through Skokie." *Id.* at 635 (citing *National Socialist Party of America v. Skokie,* 432 U.S. 43 (1977) (per curiam)). Rather, "The Second Amendment . . . [l]ike the First . . . is the very *product* of an interest balancing by the people." *Id.* at 635.

This Court rejected interest-balancing again in *McDonald*:

> Justice BREYER is incorrect that incorporation will require judges to assess the costs and benefits of firearms restrictions and thus to make difficult empirical judgments in an area in which they lack expertise. As we have noted, while his opinion in *Heller* recommended an interest-balancing test, the Court specifically rejected that suggestion.

561 U.S. at 790–91; *id.* at 785 ("we expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing") (quoting *Heller*, 554 U.S. at 633–35).

By removing this Court's heightened scrutiny requirements in Second Amendment cases, lower courts are using the interest-balancing inquiry proposed in Justice Breyer's *Heller* dissent. The Second Circuit

below explained that under its Second Amendment analysis, "[c]onstitutional review of state and local gun control will often involve difficult balancing of the individual's constitutional right to keep and bear arms against the state's obligation to prevent armed mayhem in public places." *NYSRPA II*, 883 F.3d at 64 (quotation omitted). This is simply another way of asking "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*, 554 U.S. at 689–90 (Breyer, J., dissenting).

The lower courts' adoption of Justice Breyer's dissent as if it were the majority opinion is no secret. As one professor approvingly explains, Justice Breyer "stands poised to achieve an unexpected triumph despite having come out on the losing side of both of the Supreme Court's recent clashes over the right to keep and bear arms," for "the lower courts have focused on contemporary public policy interests and applied a form of intermediate scrutiny that is highly deferential to legislative determinations and leads to all but the most drastic restrictions on guns being upheld." Allen Rostron, *Justice Breyer's Triumph in the Third Battle Over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 703 (2012).

"A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." *Heller*, 554 U.S. at 634.

III. Lower courts are nullifying the Second Amendment.

A. The Second Circuit applies rational basis in Second Amendment cases, and the practice is spreading to other courts.

Heller explicitly rejected rational basis review: "Obviously, [rational basis] could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms." 554 U.S. at 629. Most circuits have acknowledged that rational basis review is precluded by *Heller*.[7]

Yet, undeterred, the Second Circuit continues to use rational basis for the Second Amendment. In *United States v. Decastro*, the Second Circuit applied rational basis to the federal prohibition on buying a handgun outside one's home state. 682 F.3d 160 (2d Cir. 2012); 18 U.S.C. § 922(a)(3). "We hold that heightened scrutiny is appropriate only as to those regulations that substantially burden the Second Amendment. Because § 922(a)(3) only minimally affects the ability to acquire a firearm, it is not subject to any form of heightened scrutiny." *Decastro*, 682 F.3d at 164. The language was reiterated in *Kachalsky*, 701 F.3d at 93

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[7] *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011); *Marzzarella*, 614 F.3d at 95–96; *Chester*, 628 F.3d at 680; *BATFE*, 700 F.3d at 195; *Tyler*, 837 F.3d at 686; *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc); *Chovan*, 735 F.3d at 1137; *Reese*, 627 F.3d at 801; *GeorgiaCarry.Org II*, 788 F.3d at 1328; *Heller II*, 670 F.3d at 1256.

and *Kwong v. Bloomberg*, 723 F.3d 160, 167 (2d Cir. 2013).

As stated more recently, rational basis is for "[l]aws that neither implicate the core protections of the Second Amendment nor substantially burden their exercise." *NYSRPA I*, 804 F.3d at 258.

Here, the Second Circuit wrote that rational basis was most appropriate. "[W]e find it difficult to say that the Rule substantially burdens any protected rights" by restricting access to firing ranges. And the travel ban "does not impose a substantial burden" as applied to Colantone's second home. *NYSRPA II*, 883 F.3d at 62. The court merely "assume[d], *arguendo*," that heightened scrutiny could apply. *Id.* at 61–62 ("we need not definitively decide that applying heightened scrutiny is unwarranted here, because we find that the Rule would survive even under intermediate scrutiny.") (quotation omitted).

Emboldened by the Second Circuit's defiance, sister circuits that previously denounced rational basis have begun testing this Court's commitment to its precedent.

The Ninth Circuit previously acknowledged that "[t]he *Heller* Court . . . indicate[d] that rational basis review is not appropriate," *Chovan*, 735 F.3d at 1137. But the Circuit recently endorsed *Decastro*'s rational basis approach, declaring that heightened scrutiny is appropriate only if the law "meaningfully" burdens the right. *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 680 &

n.14 (9th Cir. 2017) (en banc) (rejecting heightened scrutiny for county ban on all new gun stores).

Similarly, Judge Higginson of the Fifth Circuit favored reliance on *Decastro* in reviewing the federal ban on buying a handgun outside one's state of residence. *Mance v. Sessions*, 896 F.3d 390, 392 (5th Cir. 2018) (Higginson, J., concurring in denial of rehearing en banc); 18 U.S.C. § 922(a)(3).

When rational basis is applied, the Second Amendment might as well have never been written. "If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect." *Heller*, 554 U.S. at 629 n.27.

B. Circuit courts admit that they treat the Second Amendment as a second-class right.

This Court declared that the Second Amendment is not a "second-class right" to be "singled out for special—and specially unfavorable—treatment." *McDonald*, 561 U.S. at 778–79, 780. Yet several courts have boldly admitted doing so.

The Second Circuit acknowledged that "analogies between the First and Second Amendment were made often in *Heller*" and that "[s]imilar analogies have been made since the Founding." *Kachalsky*, 701 F.3d at 92. Nevertheless, the court refused to "assume that the

principles and doctrines developed in connection with the First Amendment apply equally to the Second," because "that approach . . . could well result in the erosion of hard-won First Amendment rights." *Id.* In other words, if the First and Second Amendments were treated equally, courts would undermine the First in order to avoid enforcing the Second.

The Tenth Circuit believes the Second Amendment can be treated as inferior because of its inherent dangers. In *Bonidy*, the court determined that "[t]he risk inherent in firearms and other weapons distinguishes the Second Amendment right from other fundamental rights that have been held to be evaluated under a strict scrutiny test, such as the right to marry and the right to be free from viewpoint discrimination." 790 F.3d at 1126.

Similarly, the Third Circuit admitted that "[w]hile our Court has consulted First Amendment jurisprudence concerning the appropriate level of scrutiny to apply to a gun regulation, we have not wholesale incorporated it into the Second Amendment. This is for good reason: 'the risk inherent in firearms and other weapons distinguishes the Second Amendment right from other fundamental rights. . . .'" *Ass'n of New Jersey Rifle & Pistol Clubs, Inc.*, 910 F.3d at 124 n.28 (quoting *Bonidy*, 790 F.3d at 1126) (brackets omitted). Thus, "the articulation of intermediate scrutiny for equal protection purposes is not appropriate here." *Id.*

As the Third Circuit dissent noted, "the majority candidly admits that it is not applying intermediate

scrutiny as we know it. It concedes that its approach does not come from the First Amendment or the Fourteenth Amendment (or any other constitutional provision, for that matter). It offers only one reason: guns are dangerous." *Id.* at 133 (Bibas, J., dissenting) (citations omitted).

This Court has denounced special treatment for the Second Amendment. "The right to keep and bear arms, however, is not the only constitutional right that has controversial public safety implications. All of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes fall into the same category." *McDonald*, 561 U.S. at 783.

As "*Heller* explained, other rights affect public safety too. The Fourth, Fifth, and Sixth Amendments often set dangerous criminals free. The First Amendment protects hate speech and advocating violence. The Supreme Court does not treat any other right differently when it creates a risk of harm. And it has repeatedly rejected treating the Second Amendment differently from other enumerated rights. The Framers made that choice for us. We must treat the Second Amendment the same as the rest of the Bill of Rights." *Ass'n of New Jersey Rifle & Pistol Clubs, Inc.*, 910 F.3d 106, 133–34 (3d Cir. 2018) (Bibas, J., dissenting) (citing *Heller*, 554 U.S. at 634–35; *McDonald*, 561 U.S. at 787–91).

"*Heller* noted, while it is true that, in the decades before the Founding, the right to bear arms was often treated by English courts with far less respect than

other fundamental rights . . . that is not how *we* may treat that right." *Tyler*, 837 F.3d at 706–07 (Batchelder, J., concurring in most of the judgment) (citing *Heller*, 554 U.S. at 608; *McDonald*, 561 U.S. at 780).

Justices of this Court have lamented lower courts' disregard for its precedents. *See Jackson v. City & Cty. of San Francisco*, 135 S. Ct. 2799, 2799 (2015) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari) ("Despite the clarity with which we described the Second Amendment's core protection for the right of self-defense, lower courts, including the ones here, have failed to protect it."); *Friedman v. City of Highland Park*, 136 S. Ct. 447, 447 (2015) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari) (denouncing "noncompliance with our Second Amendment precedents" by "several Courts of Appeals"); *Peruta v. California*, 137 S. Ct. 1995, 1999 (2017) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari) (noting "a distressing trend: the treatment of the Second Amendment as a disfavored right."); *Silvester v. Becerra*, 138 S. Ct. 945, 950 (2018) (Thomas, J., dissenting from denial of certiorari) ("the lower courts are resisting this Court's decisions in *Heller* and *McDonald* and are failing to protect the Second Amendment").

Others have noticed the nullification problem. *See*, *e.g.*, *Ass'n of New Jersey Rifle & Pistol Clubs*, 910 F.3d at 126 (Bibas, J., dissenting) (the majority opinion and five other circuits that reached similar decisions "err in subjecting the Second Amendment to different, watered-down rules and demanding little if any proof."); *Mance*, 896 F.3d at 398 (Ho, J., dissenting from denial

of rehearing en banc) ("the Second Amendment continues to be treated as a 'second-class' right"); David Kopel, *Data Indicate Second Amendment Underenforcement*, 68 DUKE L.J. ONLINE 79 (2018) (identifying systemic problems in the Second, Fourth, and Ninth Circuits); George Mocsary, *A Close Reading of an Excellent Distant Reading of* Heller *in the Courts*, 68 DUKE L.J. ONLINE 41, 53–54 (2018) (Second Amendment claims are subjected to a substantially weakened form of heightened scrutiny with extremely lower success rates than heightened scrutiny for other rights); Kopel & Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 ST. LOUIS L.J. at 294–95 (criticizing one-sided view of evidence in some Second Amendment cases).

Unless this Court reinforces *Heller* by elucidating a robust test for Second Amendment cases, lower courts will continue to defy this Court's precedents and mistreat the right to keep and bear arms.

IV. Even the Seventh Circuit shows the need for a robust, universal Second Amendment test.

Several important decisions protecting Second Amendment rights have been issued by the Seventh Circuit. Yet the Circuit's record also illustrates the need for substantial explicit guidance from this Court.

For example, in a case upholding a ban on common arms, the panel did not apply the Circuit's previously-adopted Two-Part Test; instead, heightened scrutiny

analyses were brushed off as "inquiries that do not resolve any concrete dispute." *Friedman v. City of Highland Park*, 784 F.3d 406, 410 (7th Cir. 2015). So "instead of trying to decide what 'level' of scrutiny applies," the court invented its own three-element test: "whether a regulation bans weapons that were common at the time of ratification or those that have some reasonable relationship to the preservation or efficiency of a well regulated militia, and whether law-abiding citizens retain adequate means of self-defense." *Id.* (quotation and citations omitted).

The Seventh Circuit's test was like what this Court later reversed in *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016) (per curiam). *See id.* at 1027 ("This is inconsistent with *Heller*'s clear statement that the Second Amendment 'extends . . . to . . . arms . . . that were not in existence at the time of the founding.'") (quoting *Heller*, 554 U.S. at 582); *id.* at 1028 ("*Heller* rejected the proposition 'that only those weapons useful in warfare are protected.'") (quoting *Heller*, 554 U.S. at 624–25).

Friedman's discursion on the availability of alternate arms also contradicted this Court: "It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed." *Heller*, 554 U.S. at 629. Nevertheless, *Friedman* remains binding precedent in the Seventh Circuit.

In another case, the Circuit skipped the Two-Part Test and instead applied the federal Administrative

Procedure Act to a challenge to the state concealed carry licensing scheme. *Berron v. Illinois Concealed Carry Licensing Review Bd.*, 825 F.3d 843 (7th Cir. 2016).

When the Seventh Circuit does utilize the Two-Part Test, it often does so more fairly than sister circuits.

In *Ezell I*, the court applied "not quite 'strict scrutiny'" to a shooting range ban in city limits, because "the plaintiffs are the 'law-abiding, responsible citizens' whose Second Amendment rights are entitled to full solicitude," and because the firing-range ban was "a serious encroachment on the right to maintain proficiency in firearm use, an important corollary to the meaningful exercise of the core right to possess firearms for self-defense." 651 F.3d at 708. The law was invalid because the City failed to sufficiently "supply actual, reliable evidence" as required by *Alameda Books*, "produced no empirical evidence whatsoever and rested its entire defense of the range ban on speculation about accidents and theft." 651 F.3d at 709. Also, substantially less burdensome alternatives existed. *Id.* at 710 (the safety concerns "may be addressed by more closely tailored regulatory measures" that are less burdensome).

Applying the Two-Part Test in *Ezell II*, the court struck an ordinance that left "only 2.2% of the city's total acreage . . . even theoretically available" for a firing range. *Ezell v. City of Chicago*, 846 F.3d 888, 890 (7th Cir. 2017) ("*Ezell II*"). The court also voided

a law banning everyone under 18 from firing ranges. *Id.* Noting that "[i]n all cases the government bears the burden of justifying its law under a heightened standard of scrutiny," the court repeatedly lamented the City's lack of evidence. *Id.* at 892, 895, 897–98.

The Seventh Circuit correctly stated that "broadly prohibitory laws restricting the core Second Amendment right . . . are categorically unconstitutional." *Ezell I*, 651 F.3d at 703 (citing *Heller,* 554 U.S. at 628–35; *McDonald,* 130 S.Ct. at 3047–48). Thus, a near-prohibition on bearing arms in public was categorically invalidated. *Moore*, 702 F.3d at 941 ("our analysis is not based on degrees of scrutiny").

V. The right protected from state infringement by the Fourteenth Amendment has the same original meaning as the right protected from federal infringement by the Second Amendment.

"Constitutional rights are enshrined with the scope they were understood to have when the people adopted them." *Heller*, 554 U.S. at 634–35. Thus, "*Heller* examined the right to keep arms as it was understood in 1791 when the Second Amendment was ratified," *Friedman*, 784 F.3d at 417 (Manion, J., dissenting), and concluded with "our adoption of the *original understanding* of the Second Amendment." *Heller*, 554 U.S. at 625 (emphasis added).

The right to arms comes from "natural right," *id.* at 585, 594, 612, 665, namely "the inherent right of self-defense." *Id.* at 628. The right was guaranteed by the Second Amendment in 1791 and was protected against state or local infringement by the Fourteenth Amendment in 1868. The double fortification of the right has led some courts to believe that there is one kind of arms rights originalism for federal laws, and a different one for state and local laws.

The Seventh Circuit wrote:

> *Heller* suggests that some federal gun laws will survive Second Amendment challenge because they regulate activity falling outside the terms of the right as publicly understood when the Bill of Rights was ratified; *McDonald* confirms that if the claim concerns a state or local law, the "scope" question asks how the right was publicly understood when the Fourteenth Amendment was proposed and ratified.

Ezell I, 651 F.3d at 702–03 (citing *Heller*, 554 U.S. at 625–28; *McDonald*, 561 U.S. at 769–85).

The Sixth Circuit has adopted this approach. *Greeno*, 679 F.3d at 518. Recently, so did the First Circuit. *Gould*, 907 F.3d at 669 ("Because the challenge here is directed at a state law, the pertinent point in time would be 1868.").

McDonald, however, explicitly denied that the right should be protected differently against a state law than a federal law:

> [I]ncorporated Bill of Rights protections "are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment."

561 U.S. at 765 (quoting *Malloy,* 378 U.S., at 10).

Justice Stevens' *McDonald* dissent suggested that "[t]he rights protected against state infringement by the Fourteenth Amendment's Due Process Clause need not be identical in shape or scope to the rights protected against Federal Government infringement by the various provisions of the Bill of Rights." 561 U.S. at 866 (Stevens, J., dissenting). This Court rejected the suggestion:

> As we have explained, the Court, for the past half century, has moved away from the two-track approach. If we were now to accept Justice STEVENS' theory across the board, decades of decisions would be undermined. We assume that this is not what is proposed. What is urged instead, it appears, is that this theory be revived solely for the individual right that *Heller* recognized, over vigorous dissents.
>
> The relationship between the Bill of Rights' guarantees and the States must be governed by a single, neutral principle.

McDonald, 561 U.S. at 788.

As *Heller* recognized, the evidence surrounding the adoption of the Fourteenth Amendment shows

the continuing application of the original meaning of "the right to keep and bear arms." After detailing founding-era evidence of public meaning, *Heller* "address[ed] how the Second Amendment was interpreted . . . through the end of the 19th century." 554 U.S. at 605. Because Fourteenth Amendment "discussions took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources." *Id.* at 614. Even so, *Heller* noted that "those born and educated in the early 19th century faced a widespread effort to limit arms ownership by a large number of citizens; their understanding of the origins and continuing significance of the Amendment is instructive." *Id.*[8]

This same evidence is directly germane to the original meaning of the Fourteenth Amendment, which

[8] The *McDonald* plurality applied the Second Amendment to the states under this Court's precedents for incorporating fundamental rights into the Due Process Clause of the Fourteenth Amendment. 561 U.S. at 791. According to the plurality, because the application of modern substantive due process doctrine to the right to keep and bear arms was so clear, there was no need to reexamine the original meaning of the Fourteenth Amendment—in particular the Privileges or Immunities Clause. *Id.* at 758. As noted above, the plurality reiterated the modern rule that incorporated rights under substantive due process are the same at the state and federal levels. Thus, under existing precedent, the right incorporated into the Due Process Clause of the Fourteenth Amendment is the very same Second Amendment right that *Heller* identified according to original public meaning.

manifestly protected an individual right to keep and bear arms wholly apart from service in an organized militia.[9]

Should this Court base its decision on the original meaning of the Fourteenth Amendment, rather than substantive due process, adherence to original meaning would be enhanced. The practical result would be the same.

[9] *See McDonald* at 813–50 (Thomas, J., concurring) (locating the right to arms in the original meaning of the Fourteenth Amendment's Privileges or Immunities Clause). In *McDonald*, the plurality did not dispute Justice Thomas's findings that the original meaning of "the privileges or immunities of citizens of the United States" includes an individual right of the same scope as that protected by the Second Amendment. *Id.* at 758. Indeed, the Reconstruction Era highlighted the pressing need for a federal guarantee of such a right from state laws disarming freedmen, leaving them defenseless in the face of such terrorist organizations as the Ku Klux Klan, from whom southern state governments were unable or unwilling to protect them.

Accordingly, whether the right is viewed as protected by the original meaning of the Privileges or Immunities Clause or by modern substantive due process doctrine makes little difference in its application. As both *Heller* and *McDonald* showed, the right was always understood as protecting all lawful purposes, including personal and community defense.

CONCLUSION

For these reasons, and those stated by the Petitioners, the decision below should be reversed.

Respectfully submitted,

DAVID B. KOPEL
Counsel of Record
INDEPENDENCE INSTITUTE
727 E. 16th Ave.
Denver, CO 80203
(303) 279-6536
david@i2i.org

JOSEPH G.S. GREENLEE
MILLENNIAL POLICY CENTER
3443 S. Galena St., #120
Denver, CO 80231
(970) 485-3303
josephgreenlee@gmail.com

May 14, 2019