No. 18-280

IN THE
Supreme Court of the United States

NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC.,
ET AL., *Petitioners*,

v.

CITY OF NEW YORK, NEW YORK, *ET AL.*, *Respondents*.

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

Brief *Amicus Curiae* of Gun Owners of America, Inc., Gun Owners Foundation, The Heller Foundation, Tennessee Firearms Association, Conservative Legal Defense and Education Fund, and Restoring Liberty Action Committee in Support of Petitioners

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INTEREST OF THE *AMICI CURIAE*[1]

Gun Owners of America, Inc. and Tennessee Firearms Association are nonprofit social welfare organizations, exempt from federal income tax under section 501(c)(4) of the Internal Revenue Code ("IRC"). Gun Owners Foundation, The Heller Foundation, and Conservative Legal Defense and Education Fund are nonprofit educational and legal organizations, exempt from federal income tax under IRC section 501(c)(3). Restoring Liberty Action Committee is an educational organization.

Each of these *amici* was established, *inter alia*, for the purpose of participating in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

Some of these *amici* also filed an *amicus* brief in this case at the petition stage on October 9, 2018. Many of these *amici* have filed *amicus* briefs in dozens of cases involving the Second Amendment, including both:

- District of Columbia v. Heller, Brief *Amicus Curiae* of Gun Owners of America, Inc., *et al.* (Feb. 11, 2008); and

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

- McDonald v. City of Chicago, (July 6, 2009), Brief *Amicus Curiae* of Gun Owners of America, Inc., *et al*. (July 6, 2009).

STATEMENT OF THE CASE

Practically speaking, the Second Amendment has no application in New York City. Residents are forbidden to possess any firearm at all, unless they first obtain government preclearance. Licenses to "bear arms" are virtually nonexistent within the City. Even to "keep" an operable handgun in the home for self-defense — which this Court recognized to be a fundamental right — a city resident first must obtain a "premises license" at a cost of hundreds of dollars, many hours of time, and invasive government scrutiny. *See* Petition for Certiorari ("Pet.") at 5. Even then, the licensee is restricted to possessing his firearm only at the premises listed on his license, or when transporting it (locked up, unloaded, in a container separate from the ammunition) to and from a very few government-approved locations.[2] *Id*. As a

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[2] The petitioner has not challenged the New York requirement to obtain a license prior to purchasing a firearm. Indeed, the restrictions being challenged in this case are but a tiny portion of the "draconian" and "perverse" (*see* Pet. at 1) firearm regulatory scheme that exists within New York City and New York State. For example, mere possession of a so-called "assault weapon" — one of the most popular rifles in America — is by state law a "violent felony" subject to a mandatory minimum prison sentence of two years. *See* NY Statute 265.02(7), (10); 265.00(22); *see also* NYC Admin Code 10-301.1; 10-301(16). Of course, not only is mere possession of a firearm inherently a nonviolent act and a victimless crime, but it also deprives potential victims of the

result of these repressive laws, fewer than 7 in 1,000 New York City residents legally possess a firearm (*see* New York State Rifle & Pistol Association v. City of New York, 86 F. Supp. 3d 249, 255 (S.D.N.Y.) (Feb. 5, 2015) ("NYSRP 2015")), compared to more than 3 in 10 Americans nationally who reportedly own at least one firearm.[3]

SUMMARY OF ARGUMENT

In the courts below, four federal judges applied what Justice Scalia warned against: "judge-empowering 'interest-balancing inquir[ies]'" — drawn directly from Justice Breyer's dissent in District of Columbia v. Heller, 554 U.S. 570 (2008) — that this Court expressly rejected.[4] Unsurprisingly, the courts below easily concluded that some of the most restrictive gun laws in the country "do not [so much as] generate a constitutional issue." NYSRP 2015 at 261.

Thankfully, some members of this Court have recognized a hostility to gun rights that has become the norm in the lower courts. Justice Thomas has observed that "[t]he right to keep and bear arms is apparently this Court's constitutional orphan. And the lower courts seem to have gotten the message." Silvester v. Becerra, 138 S. Ct. 945, 952 (2018)

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ability to defend themselves from **actual** violent crimes.

[3] J. Gramlich, "7 Facts About Guns in the U.S.," Pew Research Center (Dec. 27, 2018).

[4] Heller at 689.

(Thomas, J., dissenting). Justice Thomas has charged that "the lower courts are resisting this Court's decisions in Heller and McDonald and are failing to protect the Second Amendment...." *Id.* at 950.

It is long past time that this Court put a stop to the open anti-gun prejudice of many lower court judges, quell the open rebellion in the lower courts, admonish their near-universal rejection[5] of this Court's Heller and McDonald decisions, and explicitly ban their use of the "standards of scrutiny" that Chief Justice Roberts described as unfortunate "baggage" imported from this Court's confusing and convoluted First Amendment jurisprudence. As Chief Justice Roberts asked, "Isn't it enough to determine the scope of the existing right that the amendment refers to?" District of Columbia v. Heller Oral Argument (Mar. 18, 2008), p. 44, ll. 5-21. To date, the answer thus far is "apparently not."

The right protected by the Second Amendment is of the highest order. It was born out of the lessons of a struggle for Independence, and the hard lessons learned that individual citizens faces threats from many sources, including fellow citizens, foreign powers, and potentially even their own government.

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[5] The lower courts' near unanimous hostility to Second Amendment rights is hardly surprising given that, until 2008, nearly every lower federal court in the country held that the Second Amendment protects only a collective right. Under the collective rights theory, the Second Amendment would protect only the right of government troops to possess firearms. *See* Parker v. District of Columbia, 311 F. Supp. 2d 103, 104-05 (D.D.C. 2004).

Both Heller and McDonald identify the right as "pre-existing" the Constitution. Indeed, the right to self-defense is not one given us by government, but by God. As such, it is an unalienable right, as described in the Declaration of Independence. It can neither be yielded up by the People, nor compromised by the Government.

Although often overlooked, the preamble to the Second Amendment reveals the Framers' views that the right protected was deemed to be "necessary to the security of a free State." The Framers understood that, to preserve the nation's security and each individual's freedom, the people must be armed. Lastly, the notion that no constitutional rights are absolute must be recognized to be false. Each right, as its scope is properly understood by "text, history, and tradition," must be considered to be absolute, or it will be compromised incrementally and eventually disappear entirely.

ARGUMENT

The Petition's Second Amendment argument gives primary treatment to the "Text, History, and Tradition of the Second Amendment" in accordance with Justice Scalia's opinion for the Court in Heller. *See* Pet. Cert at section I.A. The Petition then supplements that analysis with the argument that the New York ban would fail "any level of meaningful means-end scrutiny" along the lines of Justice Breyer's "interest balancing" dissent in Heller. Pet. Cert at 30, sections I.B. and I.C. This *amicus* brief urges that this Court follow the "Text, History, and Tradition" method of

analysis, and criticizes the "interest-balancing" approach as has been routinely used by the lower federal courts.

I. THE LOWER COURTS' "TWO-STEP INQUIRY" IS A LEGAL CHARADE, CAREFULLY CRAFTED TO CIRCUMVENT THE SECOND AMENDMENT'S TEXT AND THIS COURT'S DECISIONS.

Remarkably, the court of appeals below began its Second Amendment analysis with the curious "assumption" that the laws challenged in this case impinge on firearms rights that shall not be infringed. *See* New York Rifle & Pistol Association v. City of New York, 883 F.3d 45 (2nd Cir. 2018) ("NYSRP 2018") at 55. The court then devoted 10 pages of its opinion to explaining why that is okay.

As the court of appeals noted, the Second Circuit (along with nearly all the other circuits)[6] uses what is termed the "'two-step inquiry'" when analyzing Second Amendment cases. NYSRP 2018 at 55. First, the court explains, "we 'determine whether the challenged legislation **impinges** upon conduct protected by the Second Amendment,' and second, if we 'conclude[] that the statute[] **impinge[s]** upon Second Amendment rights, we must next determine and apply the appropriate level of scrutiny.'" *Id.* (emphasis added).

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[6] *See* Powell v. Tompkins, 783 F.3d 332, 347 n.9 (1st Cir. 2015).

The lower court's disregard of the Second Amendment text could not be more blatant, postulating that a restriction could "impinge," yet still not "infringe," Second Amendment rights.[7] Had the courts' starting point been the actual text of the Second Amendment, the two-step test would have needed only one step: does the law infringe Second Amendment rights that "shall not be infringed?"[8] Yet such a straightforward metric does not satisfy many federal judges, who apparently believe that their positions give them, at a minimum, the power — if not the authority — to reshape the constitutional text to suit their own personal policy predilections. Thus, "step two" was designed to provide a lawful-sounding cover to authorize Second Amendment violations that appeal to judges.[9]

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[7] *See* https://www.thesaurus.com/browse/impinge?s=t.

[8] Failing even to recite the text of the Second Amendment in its decision, the district court missed the part about "bearing arms," concluding that "nothing in the Second Amendment requires municipalities or states to allow citizens to transport their firearms." NYSRP 2015 at 261. After reaching that indefensible conclusion, the court then skipped over the part about "shall not be infringed," and asserted that a judge need only determine whether he thinks the city's restrictions on "keeping" arms are "reasonable." *Id.* at 261.

[9] This test empowers judges to act in line with former Judge Posner's approach: "I pay very little attention to legal rules, statutes, constitutional provisions. A case is just a dispute. The first thing you do is ask yourself — forget about the law — what is a sensible resolution of this dispute?" A. Liptak, "An Exit Interview With Richard Posner, Judicial Provocateur," *New York Times* (Sept. 11, 2017). *See also* W.O. Douglas, The Court Years, 1939-1975 at 8 (Random House: 1980) (quoting Chief Justice

Even worse, within "step two," the lower courts have further devised an additional, atextual two-part test. As the lower court explains, "the test ... is whether **core** rights are **substantially** [infringed]." NYSRP 2018 at 60 (emphasis added). Thus, a court looks at "(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.'" *Id.* at 56. Of course, the Second Amendment does not speak in terms of "core" and non-core rights — rather, it categorically and unequivocally protects certain persons ("the People"), engaged in certain activities ("keep" and "bear") with respect to certain weapons ("arms").[10] Nor does the Second Amendment speak in terms of the "severity" of infringements — rather, it draws a clear, bright line test — "shall not be infringed."

Typically "core" rights are said to include nothing more than that falling within the four corners of

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Hughes as saying "At the constitutional level where we work, ninety percent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilections.").

[10] To be sure, in his Heller opinion, Justice Scalia at one point described the right of a person to keep a handgun in the home for self-defense as being at the "core" of the Second Amendment (D.C. v. Heller, 554 U.S. 570, 634 (2008)), but that statement certainly gives no indication this Court intended to derogate other of the Amendment's protections (such as bearing arms) to secondary or tertiary status. Rather, such linguistic cherry-picking of Heller by the lower courts reflects the widespread effort to limit Heller as closely as possible to the precise facts of that case (applicable only to a total and complete ban on handguns in the home).

Heller,[11] so that if a challenged law does not categorically prohibit possession of handguns in the home for self-defense, then the lower courts almost always deem it to affect a non-core right.[12] *See* NYSRP 2018 at 59; *see also* Masciandaro at 470-71.

Moreover, if there remains any way for any person to exercise any bit of his rights that have not been infringed, the courts triumphantly assert that "'adequate alternatives remain'" (NYSRP 2018 at 60) to the prohibited conduct, and thus that the burden on Second Amendment rights is insignificant. The lower courts' "adequate alternatives" standard stands in direct conflict with Heller, where this Court explicitly rejected a similar argument: "[i]t is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of

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[11] *See, e.g.*, Drake v. Filko, 724 F.3d 426, 431 (3rd Cir. 2013) ("we decline to definitively declare that the individual right to bear arms for the purpose of self-defense extends beyond the home, the 'core' of the right as identified by Heller."); however *cf.* Moore v. Madigan, 702 F.3d 933, 935 (7th Cir. 2012) ("Both Heller and McDonald do say that 'the need for defense of self, family, and property is *most* acute' in the home ... but that doesn't mean it is not acute outside the home.").

[12] At least in part, this shabby treatment is owed to the decidedly anti-American assumption that societal "interests often outweigh individual interests." United States v. Masciandaro, 638 F.3d 458, 470-71 (4th Cir. 2011). Of course, as this Court has made clear, the Second Amendment "is the very product of an interest balancing by the people," and "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." Heller at 634-35.

other firearms (*i.e.*, long guns) is allowed. It is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon." Heller at 629.

The circuit court concluded that, when it comes to the ability to transport a firearm to a second home to be "kept" there, "the Rule does not substantially burden [the] ability to obtain a firearm ... because an 'adequate alternative[] remain[s] ... to acquire a firearm for self-defense.'" NYSRP 2018 at 57. As to the ban on transport to shooting ranges and competitions, the court begrudgingly "assume[d] that the ability to obtain firearms training and engage in firearm practice is sufficiently close to core Second Amendment concerns...." *Id.* at 58. However, the court brushed off the restrictions in this case, asserting that they "impose at most trivial limitations [*i.e.*, infringements] on the ability of law-abiding citizens to possess and use firearms for self-defense ... in their residences, where 'Second Amendment guarantees are at their zenith'...." *Id.* at 57.

Having thus satisfied itself that the admitted Second Amendment **infringement** in this case was relatively **insignificant** and involved **unimportant** Second Amendment protections, the court decided that the "judge-empowering 'interest-balancing inquiry'" of intermediate scrutiny was appropriate. *Id.* at 62.[13]

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[13] In reality, application of a standard of scrutiny is "step three" of the two-step test. It permits the courts yet another way out — allowing judges to find that a law is permissible **even if** it infringes Second Amendment rights, **even if** it affects a "core"

Finally, purporting to apply the atextual and ever-flexible "standard" of "intermediate scrutiny," the lower court concluded that Second Amendment rights can be infringed if the government finds it helpful to do so — if "'the statute[] at issue [is] substantially related to ... an important governmental interest.'" *Id.* at 62. The court first invoked the tired mantra of "'substantial, indeed compelling, governmental interests in public safety and crime prevention.'" *Id.* Then, with a wave of its wand, the court declared the city's restrictions to have a "substantial fit between the Rule and the City's interest in promoting public safety." *Id.* at 64.

Abracadabra! With that, the court of appeals concluded that the challenged law represents merely a smidgeon of infringin' and thus "does not violate the Second Amendment." NYSRP 2018 at 55. No thought is given to the meaning of the text, so long as the infringement seems "reasonable" to the judges.

II. THIS COURT'S REJECTION OF STANDARDS OF SCRUTINY IN HELLER AND MCDONALD WAS NOT AN OVERSIGHT TO BE FILLED IN BY THE LOWER COURTS.

Many claim that this Court's Heller and McDonald opinions failed to provide guidance to the lower courts

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right, and **even if** the infringement is substantial. At most, the government would be required to show that its interests are compelling and the law is narrowly tailored. In other words, under the two-step test, even the Heller decision could have come out differently.

with respect to how to analyze future Second Amendment cases. In fact, every court of appeals — except one, it appears — has reached that erroneous conclusion.[14] Yet nothing could be further from the

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[14] *See* Gould v. Morgan, 907 F.3d 659, 667 (1st Cir. 2018) (SCOTUS "did not provide much clarity as to how Second Amendment claims should be analyzed in future cases"); United States v. Viloski, 814 F.3d 104, 110 n.8 (2nd Cir. 2016) ("The Supreme Court often declines to provide definitive tests when interpreting constitutional provisions for the first time. *See, e.g.*, *District of Columbia v. Heller*...."); Binderup v. AG of United States, 836 F.3d 336, 344 (3rd Cir. 2016) (assuming some "level of scrutiny" must apply to Second Amendment cases); United States v. Masciandaro, 638 F.3d 458, 466-467 (4th Cir. 2011) ("Not only did the Heller Court not define the outer limits of Second Amendment rights, it also did not address the level of scrutiny that should be applied to laws that burden those rights"); NRA of Am. v. Bureau of Alcohol, 700 F.3d 185, 194 (5th Cir. 2012) ("In so doing, Heller did not set forth an analytical framework with which to evaluate firearms regulations in future cases.... But our fellow courts of appeals have filled the analytical vacuum"); Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 686 (6th Cir. 2016) ("Heller rejected rational-basis review but otherwise left the issue open"); Ezell v. City of Chicago, 651 F.3d 684, 703 (7th Cir. 2011) ("Both Heller and McDonald suggest that broadly prohibitory laws restricting the core Second Amendment right ... are categorically unconstitutional.... For all other cases, however, we are left to choose an appropriate standard of review...."); Bauer v. Becerra, 858 F.3d 1216, 1221 (9th Cir. 2017) ("Because Heller did not specify a particular level of scrutiny for all Second Amendment challenges, courts determine the appropriate level...."); Peterson v. Martinez, 707 F.3d 1197, 1208 (10th Cir. 2013) ("The [Heller] Court rejected application of rational-basis scrutiny, but declined to select another standard"); GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Eng'rs, 788 F.3d 1318, 1323 (11th Cir. 2015) ("The Court did not identify the applicable tier of constitutional scrutiny...."); Heller v. District of Columbia, 670 F.3d 1244, 1256 (D.C. Cir. 2011) ("Heller II") ("Heller ... leaves open the question what level

truth. Invoking this falsehood permits judges to “fill in the gaps” where there are no gaps, and adopt the two-step approach discussed above to circumvent the Heller decision, the McDonald decision, and the Second Amendment. In this ignoble collection of cases, one decided by the Ninth Circuit stands out as perhaps the most brazen of all. In one breath, it recognized “Heller gave us the framework for addressing Second Amendment challenges [which] requires a textual and historical analysis,” but then adopted the atextual and non-historical “two-step inquiry.” Silvester v. Harris, 843 F.3d 816, 819-21 (9th Cir. 2016).

Thankfully, a few judges on the lower courts “get it,” and have openly embraced Heller’s positive textual/contextual approach. Notably, then-Judge Kavanaugh wrote in 2011 that “the Supreme Court was not silent about ... the constitutional test we should employ” in Second Amendment cases. Heller II at 1271. Rather, he concluded that “Heller and McDonald leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny.” *Id.* But if, as Judge Kavanaugh opined, this Court had provided such an “up-front” and “clear message” (*id.* at 1271, 1285), why have the lower courts almost universally concluded the opposite? Justice Scalia has given the answer: “future legislatures [and] (yes) even future judges think th[e] scope [of the Second Amendment] too broad.” Heller at 634-35.

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of scrutiny we are to apply to laws regulating firearms.”).

Judge Kavanaugh explained that "'[r]ather than adopting one of the First Amendment's many Frankfurter-inspired balancing approaches, the [Heller] majority endorsed a categorical test under which some types of "Arms" and arms-usage are protected absolutely from bans and some types of "Arms" and people are excluded entirely from constitutional coverage.'" Heller II at 1273. He explained further that "Heller was resolved in favor of categoricalism — with the categories defined by text, history, and tradition...." *Id.* at 1282.

Providentially, now-Justice Kavanaugh's view does not stand alone. Two months after his dissent in Heller II, the U.S. Court of Appeals for the Eighth Circuit concluded that "[i]t seems most likely that the Supreme Court viewed the regulatory measures listed in Heller as presumptively lawful because they do not infringe on the Second Amendment right.... That the Supreme Court contemplated such a historical justification for the presumptively lawful regulations is indicated by the Court's reference to the 'historical tradition' that supported a related limitation on the *types* of weapons protected by the Second Amendment ... and by the Court's assurance that it would 'expound upon *the historical justifications* for the exceptions' mentioned, including categories of prohibited persons, if and when those exceptions come before the Court." United States v. Bena, 664 F.3d 1180, 1183 (8th Cir. 2011). Several years later, the Eighth Circuit was more explicit: "[o]ther courts seem to favor a so-called 'two-step approach.'... We have not adopted this approach and decline to do so here." United States v. Hughley, 691 Fed. Appx. 278, 279 n.3 (8th Cir. 2017).

Thus, according to the Eighth Circuit, Second Amendment challenges do not revolve around whether a government has good reasons for its restrictions, or whether those restrictions appear reasonable to judges. Rather, at issue is whether a given law applies to protected persons, conduct, and weapons. This is a bright-line "is or isn't" test — not a malleable[15] standard for judges to shape as they see fit.

More recently, in July of 2018, the Fifth Circuit voted against granting rehearing *en banc* in Mance v. Sessions, 896 F.3d 390 (5th Cir. 2018). However, a near majority of the Court, in dissent, wrote that "unless the Supreme Court instructs us otherwise, we should apply a test rooted in the Second Amendment's text and history—as required under Heller and McDonald — rather than a balancing test like strict or intermediate scrutiny." Mance at 394 (Elrod, J., dissenting). The judges continued that "Constitutional scholars have dubbed the Second Amendment 'the Rodney Dangerfield of the Bill of Rights.' As Judge Ho relates, it is spurned as peripheral, despite being just as fundamental as the First Amendment. It is snubbed as anachronistic, despite being just as enduring as the Fourth Amendment. It is scorned as fringe, despite being just as enumerated as the other Bill of Rights guarantees. The Second Amendment is neither second class, nor second rate, nor second tier.

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[15] In other words, "more determinate and 'much less subjective'...." Heller II at 1274. *See also* Crawford v. Washington, 541 U.S. 36, 67-68 (2004) ("replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design. Vague standards are manipulable.").

The 'right of the people to keep and bear Arms' has no need of penumbras or emanations. It's right there, 27 words enshrined for 227 years." *Id.* at 396 (Willett, J., dissenting).

III. THE JUDICIAL ASSESSMENT OF A SECOND AMENDMENT CHALLENGE TO ANY REGULATION OF FIREARMS MUST FOLLOW THE TEXT, HISTORY, AND TRADITION APPROACH SET OUT BY JUSTICE SCALIA IN HELLER.

Section I, *supra*, discusses the deficiencies in the atextual two-part Second Amendment test applied not only by the district and circuit courts below, but also used by most federal courts. Section II, *supra*, addresses how the Heller majority rejected interest balancing and directed use of a "text, history, and tradition test," and identifies some of the decisions that have been faithful to that test. This concluding section explains the great importance of the rights protected by the Second Amendment, and how judges should evaluate challenges to infringements utilizing the test identified by Justice Scalia in the Heller decision.

A. The Second Amendment Protects a God-Endowed, Not a Government-Granted Right.

If the U.S. Constitution were erroneously viewed to be the source of the right protected in the Second Amendment, it would be in constant peril, for whatever the government giveth, it can later taketh

away. Fortunately, this is not the case. In McDonald v. City of Chicago, 561 U.S. 742 (2010), this Court described the Second Amendment as a "'*pre-existing* right.'" McDonald at 915. Heller too rejected the idea that the right "'is ... in any manner dependent on [the Bill of Rights] for its existence.'" Heller at 592. These statements raise the question as to what the source of that right is.

The right to keep and bear arms was recognized in nascent form in the English Bill of Rights, but with three limitations — protecting only firearms "suitable to their conditions," that the right of self-defense applied only for Protestants, and only "as allowed by law." *See* Sources of Our Liberties at 246. The Second Amendment removed those qualifiers, acknowledging that this full right belonged to all the People, and employing the categorical prohibition found in the words "shall not be infringed."[16] This reflected the change from the English tradition where the king had been sovereign, to the American system premised on the sovereignty of the People — and the necessity of preserving an armed citizenry in order to protect that sovereignty. Thus, Heller explained that the English Bill of Rights was only "the predecessor to our Second Amendment" (*id.* at 593) — but not its source.

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[16] Thomas Cooley explained that "The [Second] amendment ... was adopted with some modification and enlargement from the English Bill of Rights of 168[9]...." T. Cooley, The General Principles of Constitutional Law in the United States of America at 298 (Little Brown & Company, Boston: 1898).

The ultimate source of the Second Amendment is not 17th-century English law, for the right of self-defense is one with which we were "endowed by [our] Creator." *See* Declaration of Independence. McDonald characterized the right to keep and bear arms as "an inalienable right that pre-existed the Constitution's adoption." McDonald at 809. Inalienable rights come from God, and can neither be taken away by government nor surrendered by individuals. Inalienable rights exist independent of any government, document, or written guarantee. As Heller noted, Blackstone called it "'the natural right of resistance and self-preservation.'" Heller at 594. And, putting it perhaps even more specifically, McDonald "understood the Bill of Rights to declare inalienable rights that pre-existed all government ... it declared rights that no legitimate government could abridge." McDonald at 842.[17]

In sum, federal judges must understand that the right protected by the Second Amendment is beyond the authority of government to compromise, and thus whenever that right is "infringed," it is the sacred duty of the judiciary to constrain the offending government entity.

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[17] *See, e.g.,* L. Pratt, Safeguarding Liberty: The Constitution and Citizen Militias (Legacy Communications: 1995); L. Pratt, "What Does the Bible Say About Gun Control?" Gun Owners of America; T. Baldwin & C. Baldwin, To Keep or Not to Keep: Why Christians Should Not Give up Their Guns (Baldwin: 2013).

B. The Second Amendment's Preamble Asserts the Necessity of an Armed Citizenry to Protect Freedom.

The Second Amendment is the one provision in the Bill of Rights that carries its own preamble. Prior to Heller, the prevailing "collective rights" view among the federal courts was that the Second Amendment protected no individual right. Rather, it protected only the right of a state government-controlled militia to keep and bear arms — actually not a right, but a power, and one that few questioned. The view was so fervently held that courts rarely considered how nonsensical it would have been for the people to have called for and ratified a constitutional amendment to protect a government power, but not an individual right.

Today, there is another aspect of the Second Amendment's preamble that is routinely missed. The amendment asserts that "a well regulated Militia" — meaning the people's militia and not the government's militia — is not just desirable, but actually "necessary to the security of a free State." Without an armed populace, over time, the natural tendency of government to grow its powers could not be checked. No unarmed populace could be considered sovereign, and its rights could never be effectively protected against government abuses. Indeed, the Battles of Lexington and Concord were precipitated by British efforts to confiscate colonial guns and powder in order to render the American People powerless to resist its

dictates.[18] History is replete with instances of governments which disarm their own people to make them less able to resist the will of the rulers, including the rule of Philistines over ancient Israel,[19] Hitler's reign over Germany,[20] and Hugo Chavez's installed dictatorship over Venezuela.[21]

In sum, federal judges should understand the natural tendency of governments to arrogate power to themselves in an attempt to deprive the People of arms. The role of the judge to preserve our free society, under the rule of law, by preventing the government from stripping away the People's ability to resist tyranny.

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[18] For a discussion of the role of British gun control in precipitating the American revolution, *see* Gun Owners of America, Inc., *et al.* Amicus Brief, filed in Heller, at 22-27.

[19] *See* 1 Samuel 13:19 ("Now there was no smith found throughout all the land of Israel: for the Philistines said, Lest the Hebrews make them swords or spears:").

[20] *See, e.g.,* Stephen P. Halbrook, "Nazi Firearms Law and the Disarming of the German Jews," 17 ARIZONA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW, No. 3, 483-535 (2000).

[21] *See* "Venezuela bans private gun ownership," BBC (June 1, 2012); B. Adams, "MSNBC gives quick, minute-and-a-half lesson on the need for our Second Amendment," *Washington Examiner* (Apr. 30, 2019).

C. The Claim that No Constitutional Right Is Absolute Is Absolutely False.

Those seeking to restrict the rights of people often invoke the saying that "no right is absolute." *See, e.g.*, Heller at 681. The classic illustration of that supposed principle occurs in the context of the First Amendment with a paraphrase of Justice Oliver Wendell Holmes' observation that one cannot yell fire in a crowded theater. *See* Schenck v. United States, 249 U.S. 47 (1919). Although that saying did not concern the specific issue decided in Schenck, nor the exact words used in that case, assuming that principle of law to be true, the question here is how that legal principle is reached — in a constitutionally legitimate or illegitimate manner. If the Court were to conclude that the shout of "fire" does not textually, historically, and traditionally fall under the definition of "the freedom of speech" as stated and preserved in the First Amendment, the Court has applied the correct test. However, if that same conclusion were reached because the speech seems unreasonable, the judge would have elevated his personal feelings over the constitutional text and abrogated the duties of his office.

In the context of the Second Amendment, defenders of gun control will typically quote Justice Scalia's statement in Heller — "[o]f course the right was not unlimited." Heller at 595. However, in context, Justice Scalia's statement is correct: the Second Amendment does not provide unlimited protection to every person (*e.g.,* a child), every weapon (*e.g.,* a tank), every activity (*e.g.*, robbing a bank), and

every location (*e.g.,* a federal prison). But when the Second Amendment protects the person, the arm, the activity, and the location, it protects absolutely, and cannot be infringed for some so-called "good reason."

Sadly, most modern federal judges read that Amendment to have only a scope which makes sense to them personally. In other words, they read into the Second Amendment the subjective, flexible, judge-empowering word "unreasonably" before "infringed." But no federal judge has the authority to add to or take from the constitutional text. The Marbury Court understood that courts are obligated to apply the original meaning of the text:

> That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected.... The principles ... so established, are ... fundamental. And as the authority, from which they proceed, is supreme, ... they are designed to be permanent. [Marbury v. Madison, 5 U.S. 137, 176 (1803).]

Thus, the principle that it is "the province and duty of the judicial department to say what the law is" (*id.* at 177) obligates the courts to examine the actual words of the Constitution in deference to the "form and ... substance" of the "government of the Union" as having "emanate[d]" from the People, not from this Court. *See* McCulloch v. Maryland, 17 U.S. 316, 404-05 (1819). Because the courts "must never forget,

that it is a constitution [they] are expounding," the "objects" and the "limitations" prescribed therein must be applied as the people originally ordained. *Id.* at 407. Thus, the rights protected by the text, history, and tradition of the Second Amendment are indeed absolute, as the text of the Amendment clearly states.

If it is believed that no right is absolute, a device to evade the clear "shall not be infringed" prohibition must be found — and that device is "interest balancing." Interest balancing speaks of rights that are "core" or not, "fundamental" or not. It allows "narrowly tailored," but not broad infringements, designed to serve "compelling," but not moderately compelling, state interests. It allows judges to choose levels of scrutiny — that those judges then apply. The common denominator of all tests and terms used in interest balancing is the authority of a modern federal judge to override the constitutional text. Inevitably, adoption of such an approach to applying the constitution's text will lead to the growth of government power, the loss of liberty, and the judicial eradication of constitutional protections.

In sum, although a federal judge may entertain a personal opinion that the Framers were unwise to recognize the People's "uninfringable" right to keep and bear arms, that personal bias can never be the basis for his rulings.

D. Heller Provides a Simple Test to Examine the Constitutionality of the New York City Firearms Ordinance.

With the superceding principles discussed in subsections A through C, *supra* kept firmly in mind, judges must guard the People's Second Amendment as written: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Certainly, no one case can, or should, anticipate and resolve all future legal issues that can arise from application of this Amendment to various federal and state laws. Nevertheless, the text raises three simple issues to be addressed to decide the case under review — tests which are far different from the two-step test employed by the courts below.

1. Does the Second Amendment protect the plaintiff? The Second Amendment protects a right of those who are part of the polity — "the People."[22] *See* Heller at 579-80. The ordinance in question regulates citizens of New York, and therefore citizens of the United States. Here, there are no complicating questions, such as whether a citizen may lose or regain his right to keep and bear arms.

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[22] In McDonald v. City of Chicago, four justices adopted the textual view that the Second Amendment applied to the states on the theory that it was incorporated into the Due Process Clause of the Fourteenth Amendment. However, Justice Thomas' concurrence presented a textualist position — that the Second Amendment is among the Privileges or Immunities guaranteed to Citizens against deprivation by States in the Fourteenth Amendment. *See* McDonald at 806 (Thomas, J., concurring).

2. Does the item being regulated constitute an "arm"? The ordinance in question prohibits transport of rifles and handguns. Justice Scalia's analysis established that all firearms are "arms." *See* Heller at 581. There are no complicating issues such as whether a taser, a nunchuck, or a machinegun is a bearable arm.

3. Does the law regulate the "keeping" or "bearing" of "arms"? The ordinance in question involves transporting a firearm and thus fits within the scope of these terms. *See* Justice Scalia's discussion of the meaning of the word "bear" in Heller at 584-86. There are no complicating questions, such as taking a firearm into a government building where the government could have superior proprietary rights.

Keeping in mind that the Second Amendment protects a God-given right, that its preservation is absolutely necessary for the preservation of a free state, and that, within its terms, the rights it protects are absolute, then the issue before the Court is a simple one: the New York City ordinance prevents law-abiding American citizens from transporting lawfully owned bearable arms for lawful purposes, and viewed as such cannot stand.

CONCLUSION

For years, this Court has defended neither the Second Amendment nor its own opinions. That failure has not gone unnoticed. The lower courts have grown

increasingly bold in their disrespect[23] for this Court's decisions and the Second Amendment's text. Unfortunately, the opinions below are not aberrations. Rather, they are the norm. The lower courts reject the People's choice in ratifying the Second Amendment as written. They reject this Court's decisions stating as much. Rather, these courts have laid out their own vision for this country based on the personal policy preferences of unelected and unaccountable judges.

Once this Court granted certiorari in this case, New York City found itself caught with its hand in the cookie jar. Thus, the City recently sought to evade review by this Court by proposing to change its draconian restrictions — just enough to attempt to moot the issues raised in this case. *See* Respondents' Motion to Hold Briefing Schedule in Abeyance (Apr. 12, 2019). Thankfully, this Court has rejected those attempts.

In deciding this case, this Court should not ask **to what degree** Second Amendment rights have been infringed, but rather whether they have been infringed at all. If they have, the Second Amendment makes the decision an easy one. This Court should not ask whether the conduct at issue in this case is sufficiently close to "core" Second Amendment conduct — rather,

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[23] For example, the district court in this case concluded that "nothing in the Second Amendment requires municipalities or states to allow citizens to transport their firearms if they are owned under a restricted license." NYSRP 2015 at 261. In other words, the district court concluded that Americans have no constitutional right to bear arms.

the only inquiry is whether the People wish to keep or bear arms. Finally, this Court should reject the City's arguments that it has good reasons to infringe Second Amendment rights — those reasons are irrelevant.

As Justice Scalia explained, any policy making or interest balancing that may be required has already been done — by the People — in their ratification of the Second Amendment. *See* Heller at 635. This Court's task, then, is a simple one — to enforce that mandate from the People.

Respectfully submitted,

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