No. 18-663

In the Supreme Court of the United States

FREDRIC RUSSELL MANCE, JR., ET AL., PETITIONERS

v.

MATTHEW G. WHITAKER, ACTING ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE STATES OF TEXAS, ALABAMA, ALASKA, ARKANSAS, GEORGIA, IDAHO, KANSAS, LOUISIANA, MICHIGAN, MISSISSIPPI, MONTANA, NEBRASKA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, WEST VIRGINIA, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amici are the States of Texas, Alabama, Alaska, Arkansas, Georgia, Idaho, Kansas, Louisiana, Michigan, Mississippi, Montana, Nebraska, Oklahoma, South Carolina, South Dakota, Utah, West Virginia, and Wyoming. The amici States have an interest in ensuring that their residents are able to fully exercise the rights guaranteed by the Second Amendment. As explained in this brief, the courts of appeals are often unable or unwilling to answer fundamental questions regarding the Second Amendment: what conduct it protects, what test is used in Second Amendment challenges, and what the government must do to justify any restriction of Second Amendment rights. As a result, courts undervalue the Second Amendment and wrongly permit governments to curtail the rights of individuals.

The amici States also have an interest in the Court establishing a clear Second Amendment test. In the wake of recent high-profile shootings, governments at all levels are considering and enacting a variety of measures intended to curb gun violence. The Court should clarify what standard of review applies to such measures in order to allow amici to effectively combat gun violence without infringing constitutional rights.

[1] In accordance with Supreme Court Rule 37.2(a), amici provided notice to the parties' attorneys more than ten days in advance of filing, and the parties consented to the filing. No counsel for any party authored this brief, in whole or in part, and no person or entity other than amici contributed monetarily to its preparation.

SUMMARY OF ARGUMENT

The Court in *Heller v. District of Columbia* acknowledged that the Second Amendment protects the fundamental, individual right to keep and bear arms. That case did not require, or permit, the Court to fully explore the contours of the Second Amendment, so the Court indicated that future cases would flesh out the details of the Second Amendment right. But other than incorporating the Second Amendment against the States, the Court has remained conspicuously quiet.

As a result, the courts of appeals have been forced to resolve the questions this Court has not answered. Their approaches to those questions have produced wildly differing results. The courts of appeals do not agree on fundamental issues such as what conduct is protected by the Second Amendment in the first place and what the government must demonstrate to justify restricting Second Amendment rights. In the end, the courts often resort to an analysis that resembles the interest-balancing test that was explicitly rejected in *Heller*.

The Fifth Circuit's opinion in this case reflects the confusion and circuit splits that have come to characterize this area of law. Only this Court can resolve those issues. It is time for the Court to fulfill its promise in *Heller* by providing additional guidance on the Second Amendment and giving effect to the enumerated constitutional right to keep and bear arms.

ARGUMENT

I. The Second Amendment Is a Fundamental Right that Is Not Subject to Legislative or Judicial Second-Guessing.

Located in the Bill of Rights, alongside other fundamental rights such as freedom of speech and religion, protection against unreasonable searches, and the right to a jury trial, the Second Amendment provides that "the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. This Court in *Heller v. District of Columbia* traced the long history of the right to keep and bear arms that resulted in its constitutional enshrinement. 554 U.S. 570, 592-95 (2008). But governments at all levels have enacted laws eroding the Second Amendment rights of their citizens, and the courts of appeals, lacking strong guidance from this Court, have frequently allowed them to do so. The Court should step in and once again confirm that the Second Amendment is "neither second class, nor second rate, nor second tier." Pet. App. 124a (Willett, J., dissenting from the denial of rehearing en banc).

A. The Second Amendment protects a fundamental, individual right.

The fundamental right of an individual to keep and bear arms pre-existed the Constitution; the Second Amendment merely codified it. U.S. Const. amend II; *Heller*, 554 U.S. at 592 ("[I]t has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right."). It is an individual right, *Heller*, 554 U.S. at 595, and a civil right on par with those found in the First, Fourth, Fifth,

and Sixth Amendments, *see Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950). And it is a right "deeply rooted in this Nation's history and tradition." *McDonald v. City of Chicago*, 561 U.S. 742, 768 (2010) (internal quotation marks and citation omitted).

When incorporating the right to keep and bear arms against the States, the Court refused to treat it as "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees that [it has] held to be incorporated into the Due Process Clause." *Id.* at 780 (plurality op.). Rather, the Court noted that a "clear majority of the States in 1868 . . . recognized the right to keep and bear arms as being among the foundational rights necessary to our system of Government." *Id.* at 777 (maj. op.). Thus, it was "clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty." *Id.* at 778.

Yet, over the years, many governments—federal, state, and local—have chipped away at this fundamental right. This Court has not decided a significant Second Amendment case since 2010, and the courts of appeals have filled that vacuum with holdings that do not properly respect the rights guaranteed by the Second Amendment and that are not consistent with the limited direction given by the Court. The time has come for this Court to act.

B. Restrictions on Second Amendment rights are not judged under a rational-basis or interest-balancing test.

"The [S]econd [A]mendment declares that it shall not be infringed . . . ." *United States v. Cruikshank*, 92 U.S. 542, 553 (1875). While that command is not absolute, *Heller*, 554 U.S. at 595, 626-27, the Court has not specified what test courts should use to judge restrictions on Second Amendment rights either. The Court has indicated only that the handgun ban at issue in *Heller* would fail "any of the standards of scrutiny" that have been applied to enumerated constitutional rights. *Id.* at 628-29.

While the *Heller* Court may not have described the Second Amendment test, it did identify two tests that were not acceptable: rational basis and interest balancing. The Court rejected the rational-basis test, reasoning that "[o]bviously" it would not be used to judge a restriction on an enumerated right, such as freedom of speech, the guarantee against double jeopardy, the right to counsel—or the right to keep and bear arms. *Id.* at 628 n.27. It also concluded that the rational-basis test would be redundant, as irrational laws are already unconstitutional. *Id.*

Justice Breyer, dissenting in *Heller*, proposed an interest-balancing test that would require the Court to ask "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." *Id.* at 689-90 (Breyer, J., dissenting). But the majority rejected this "freestanding 'interest-balanc-

ing'" test, concluding that no other enumerated constitutional right's core protection was subject to that approach. *Id.* at 634. Rather, any "interest balancing" was done by the people when they ratified the Second Amendment and chose to "elevate[] above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 635. Thus,

> [t]he 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. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.

Id. at 634.

In sum, then, infringements on Second Amendment rights cannot be justified by (1) hypothesizing rational reasons for the restriction, as is done in the rational-basis test, *see, e.g.*, *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314-15 (1993); or (2) allowing individual judges to weigh the value of the right against the governmental interests, *Heller*, 554 U.S. at 634-35. But as described below, the courts of appeals routinely uphold restrictions on the Second Amendment rights of citizens based on little more than weighing general notions of safety against a right they are not even sure exists.

II. The Courts of Appeals's Decisions Reflect Confusion and Disagreement About the Second Amendment.

In the absence of guidance from the Court, most courts of appeals have settled on a two-step approach to

Second Amendment cases. *See, e.g.*, *Woollard v. Gallagher*, 712 F.3d 865, 874-75 (4th Cir. 2013) (collecting cases). The court first determines whether the challenged law burdens conduct that falls within the scope of the Second Amendment right to keep and bear arms. *Id.* at 875. If it does, the court then determines whether the law satisfies some form of means-end scrutiny. *Id.* But even within this general framework, confusion and circuit splits abound—as the decision below demonstrates.

A. The courts of appeals do not know what conduct is protected by the Second Amendment.

Review of even a handful of opinions from the courts of appeals reveals a troubling area of confusion: the courts do not know what conduct falls within the scope of the Second Amendment right to keep and bear arms. Occasionally, a circuit will attempt to answer that question, but more often than not, courts avoid the issue entirely.

The typical pattern in many Second Amendment cases is for a court of appeals to offer some thoughts on whether the conduct is within the scope of the Second Amendment, but then conclude that it need not resolve that issue because the restriction survives scrutiny at the second step of the analysis. *See, e.g.*, *Pena v. Lindley*, 898 F.3d 969, 976 (9th Cir. 2018) (following the "judicious course" and assuming, without deciding, that Second Amendment applies); *Woollard*, 712 F.3d at 876 (assuming, but not deciding, that Second Amendment applies); *Kachalsky v. County of Westchester*, 701 F.3d 81, 93 (2d Cir. 2012) (assuming that Second Amendment applies); *Heller v. District of Columbia*, 670 F.3d 1244, 1261 (D.C. Cir. 2011) (*Heller II*) (assuming that Second Amendment

applies); *United States v. Marzzarella*, 614 F.3d 85, 95 (3d Cir. 2010) (holding it need not decide whether the right to bear arms was infringed). Less frequently, the court will conclude that the Second Amendment is not impacted, but will still alternatively analyze the restriction under some form of scrutiny out of an abundance of caution. *See, e.g.*, *Drake v. Filko*, 724 F.3d 426, 434-35 (3d Cir. 2013); *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco Firearms & Explosives*, 700 F.3d 185, 204 (5th Cir. 2012). As the Fourth Circuit has recognized, many courts deem it "prudent to . . . resolve post-*Heller* challenges to firearm prohibitions at the second step." *Woollard*, 712 F.3d at 875; *see also Pena*, 898 F.3d at 976.

The uncertainty regarding what conduct is protected by the Second Amendment is also reflected in the lower courts' discussion of one of the most parsed passages in *Heller*:

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

554 U.S. at 626-27. The Court stated that such laws were "presumptively lawful regulatory measures," but that its list was not exhaustive. *Id.* at 627 n.26.

Courts of appeals do not know whether these longstanding and presumptively lawful measures (1) concern conduct outside the scope of the Second Amendment's protection, or (2) concern conduct within the scope of the Second Amendment that is justifiably restricted under some level of scrutiny. *See Drake*, 724 F.3d at 432 n.7. The Third and Fifth Circuits have concluded that such laws regulate conduct that falls outside the scope of the Second Amendment. *Nat'l Rifle Ass'n of Am., Inc.*, 700 F.3d at 196; *Marzzarella*, 614 F.3d at 91. The Sixth Circuit, however, has concluded that such laws regulate conduct protected by the Second Amendment, but satisfy the appropriate level of scrutiny. *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 690 (6th Cir. 2016) (en banc). This split further demonstrates the confusion among the lower courts as to what the Second Amendment even protects.

The Fourth Circuit believes that this trend of failing to answer the basic question whether conduct is protected by the Second Amendment is "constitutional avoidance . . . finally . . . taking hold." *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011). It is not. Courts are still deciding constitutional questions—whether laws are constitutional under the Second Amendment—but they are doing so with a thumb on the scale. If a court of appeals is uncertain that the Second Amendment is even impacted, it will undervalue the individual's Second Amendment rights when deciding whether the government has sufficiently justified the restriction.

This phenomenon is manifested in the cases concerning limitations on carrying weapons in public. Courts

that conclude that carrying weapons in public is protected by the Second Amendment have little difficulty finding restrictions on that right unconstitutional. *See, e.g.*, *Wrenn v. District of Columbia*, 864 F.3d 650, 661, 667 (D.C. Cir. 2017); *Moore v. Madigan*, 702 F.3d 933, 936, 942 (7th Cir. 2012). But courts that conclude there is no such right or are uncertain whether such a right exists uphold restrictions on public carry. *See, e.g.*, *Peruta v. County of San Diego*, 824 F.3d 919, 939 (9th Cir. 2016) (en banc) (holding Second Amendment does not protect right to public carry and upholding restriction); *Drake*, 724 F.3d at 434, 439-40 (holding Second Amendment does not protect right to public carry and upholding restriction); *Woollard*, 712 F.3d at 882 (assuming Second Amendment applies and upholding restriction on public carry); *Kachalsky*, 701 F.3d at 93, 100-01 (assuming Second Amendment applies and upholding restriction on public carry). Avoiding the question of the scope of the Second Amendment has constitutional consequences. And courts are avoiding it, not because the question is unique and unlikely to recur, but because they do not know the answers to basic questions regarding the Second Amendment. The Court's guidance is necessary.

B. The courts of appeals disagree over the proper test to apply in Second Amendment cases.

Moving to the second step of the analysis, many courts of appeals purport to apply intermediate scrutiny to Second Amendment challenges. *See, e.g.*, *Tyler*, 837 F.3d at 693; *Kachalsky*, 701 F.3d at 96; *Woollard*, 712 F.3d at 876; *United States v. Reese*, 627 F.3d 792, 802

(10th Cir. 2010). But there are still splits between the courts.

For example, there is a developing split over whether heightened scrutiny is necessary when the Second Amendment right is not "substantially burdened." The Second Circuit requires proof of a substantial burden before it will conduct any sort of heightened scrutiny. *United States v. Decastro*, 682 F.3d 160, 164 (2d Cir. 2012) (holding that heightened scrutiny applies only when the Second Amendment right is "substantially burden[ed]"). But the Sixth and Seventh Circuits have decreed that heightened scrutiny is necessary whenever the Second Amendment is infringed, even if not a substantial burden. *Ezell v. City of Chicago*, 846 F.3d 888, 893 (7th Cir. 2017) (rejecting argument that heightened scrutiny does not apply unless the Second Amendment right is "substantially" burdened); *Tyler*, 837 F.3d at 686 (applying heightened scrutiny unless conduct at issue is categorically unprotected).

Further, as noted by then-Judge Kavanaugh, the use of intermediate or strict scrutiny is markedly similar to the interest-balancing test that the Court rejected in *Heller*. *Heller II*, 670 F.3d at 1281-82 (Kavanaugh, J., dissenting) (referring to strict and intermediate scrutiny as "quintessential balancing inquiries"). For many courts, the intermediate/strict scrutiny analysis begins with deciding how important the right is—whether it is a "core" Second Amendment right or something less. *See, e.g.*, *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016); *Kachalsky*, 701 F.3d at 93; *United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010). Then based on that determination, the court decides whether the government has

sufficiently justified its restriction. *See Heller II*, 670 F.3d at 1257 ("[A] regulation that imposes a less substantial burden should be proportionately easier to justify."). The Ninth Circuit has referred to the analysis as a "sliding scale." *Silvester*, 843 F.3d at 821. At bottom, then, many of the courts of appeals's decisions amount to little more than deciding whether the right being restricted is important enough to protect—contrary to this Court's instructions in *Heller*, 554 U.S. at 634-35.

It is, perhaps, for that reason that some judges have questioned the use of the two-step process and the application of strict or intermediate scrutiny, calling instead for a test based on text, history, and tradition. *Heller II*, 670 F.3d at 1271 (Kavanaugh, J., dissenting); Pet. App. 121a (Elrod, J., dissenting from denial of rehearing en banc). But, again, only this Court has the authority to make the ultimate determination of what test courts should apply to judge alleged Second Amendment violations.

C. The courts of appeals are split on what the government must show to justify laws burdening Second Amendment rights.

Finally, courts of appeals are split on what evidence governments must offer to overcome intermediate scrutiny and strict scrutiny. Under intermediate scrutiny, the government bears the burden of demonstrating a reasonable fit or substantial relationship between important government objectives and the restriction at issue. *Tyler*, 837 F.3d at 693; *Heller II*, 670 F.3d at 1258. Strict scrutiny requires the government to show that its

law is narrowly tailored to serve a compelling state interest. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015).

Some courts require little or no evidence supporting the reason for the government's restriction. They instead defer to the judgment of the legislative body. *Drake*, 724 F.3d at 436-37 (3d Cir. 2013) (affording "substantial deference" to the Legislature's predictive judgments); *Kachalsky*, 701 F.3d at 97 ("'[S]ubstantial deference to the predictive judgments of [the legislature]' is warranted."); *see also Silvester v. Becerra*, 138 S. Ct. 945, 945 (2018) (Thomas, J., dissenting from the denial of certiorari) (criticizing Ninth Circuit for basing its judgment on its own "common sense"). In fact, the Third Circuit, after first looking to New Jersey laws to determine the scope of the Second Amendment right, *Drake*, 724 F.3d at 432-34, then excused New Jersey from producing evidence supporting its restriction because the legislature would not have known when enacting its laws that it was impacting Second Amendment rights until *Heller* and *McDonald* were decided, *id.* at 437-38.

Other courts, however, require the government to produce evidence to support any restriction on Second Amendment rights. *Ezell v. City of Chicago*, 651 F.3d 684, 709-10 (7th Cir. 2011) (holding restriction on firearm ownership was unconstitutional because the government produced no evidence to justify it); *Chester*, 628 F.3d at 683 (remanding for further proceedings because the government offered "*reasons*," not "*evidence*" to support the law); *see also Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 714 F.3d 334, 346 (5th Cir. 2013) (Jones, J., dissenting from denial of

rehearing en banc) ("Real scrutiny is different from parroting the government's legislative intentions.").

The circuits also disagree regarding when a generalized desire to prevent crime or protect public safety is sufficient to restrict the Second Amendment rights of citizens. The Fourth Circuit has concluded that a law "reduc[ing] the number of handguns carried in public" advanced the objectives of protecting citizens and inhibiting crime. *Woollard*, 712 F.3d at 879. But the Seventh Circuit has concluded that simply desiring to reduce crime is not enough to justify a law limiting public carry, otherwise *Heller* would have reached a different conclusion. *Moore*, 702 F.3d at 939 (rejecting "mere possibility that allowing guns to be carried in public would increase the crime or death rates" as sufficient justification for restriction of public carry). Suppressing offensive speech, conducting searches without cause, and denying criminal defendants the right to counsel might also arguably reduce crime, but the Constitution does not permit governments to take such actions. It should be no different for the Second Amendment. And, again, this reflects the trend of courts of appeals undervaluing the rights guaranteed by the Second Amendment.

D. The Fifth Circuit's decision implicates many of the circuit splits and devalues the Second Amendment.

Nearly all of the areas of confusion and splits discussed above are present in this case. This case concerns, like *Heller* and *McDonald*, the "quintessential self-defense weapon"—the handgun. The "inherent right of self-defense [is] central to the Second Amendment

right." *Heller*, 554 U.S. at 628. And handguns are the "most preferred firearm in the nation to 'keep' and use for protection of one's home and family." *Id.* at 628-29.

In 1968, Congress concluded that individuals were circumventing state laws on gun ownership by purchasing guns out of state. Pet. App. 12a-13a. It therefore banned the interstate sale of all firearms, 18 U.S.C. § 922(a)(3), but carved out exceptions for rifles and longguns as long as the sale complied with the laws of the retailer's and consumer's states, *id.* § 922(b)(3). If an individual wishes to purchase a handgun from out of state, they must have it transferred to an in-state retailer. Pet. App. 130a; *see also* 18 U.S.C. § 922(a).

Applying the two-step test, the Fifth Circuit in this case made no attempt to answer the first question—whether the federal ban on the interstate sale of handguns infringed the Second Amendment right to keep and bear arms—but simply assumed that it did. Pet. App. 9a-10a. Given this Court's strong endorsement of the right to own a handgun for self-defense, *Heller*, 554 U.S. at 628, the ability to purchase a handgun—including an interstate purchase—undoubtedly falls within the scope of the rights protected by the Second Amendment. As noted by Judge Ho, dissenting from the denial of rehearing en banc, the federal ban amounts to a *de facto* waiting period and tax on interstate handgun sales. Pet. App. 130a-131a. But the Fifth Circuit refused to address the issue, choosing instead to simply assume that the ban on the interstate sale of handguns infringed Second Amendment rights. Pet. App. 9a-10a.

The refusal to conclude that the Second Amendment was actually infringed also led the court to apply an unrecognizable version of strict scrutiny. The Fifth Circuit did not require the Government to produce any evidence that the ban on interstate handgun sales was "narrowly tailored" to serve a compelling governmental interest. Rather, the panel simply proffered reasons why the ban might be helpful in preventing the circumvention of state gun laws—finding it "unrealistic to expect" that licensed retailers can be knowledgeable of the handgun laws of the 50 states. Pet. App. 15a-17a.

The Fifth Circuit's opinion, thus, reflects the confusion regarding what conduct is even protected by the Second Amendment, what standard of review should apply, and what type of evidence (if any) the government must produce to justify its restriction on Second Amendment rights.

These problems did not go unnoticed, as seven judges dissented from the denial of rehearing en banc, touching on all of the above issues: (1) undervaluing the Second Amendment, Pet. App. 123a-124a (Willett, J., dissenting from the denial of rehearing en banc); (2) what test should be used, Pet. App. 119a-122a (Elrod, J., dissenting from the denial of rehearing en banc); and (3) whether the Government sufficiently demonstrated that it survived strict scrutiny, Pet. App. 133a-143a (Ho, J., dissenting from the denial of rehearing en banc). All of these issues need resolution from this Court.

III. This Court Should Grant Certiorari to Resolve the Circuit Splits and Confirm the Importance of Second Amendment Rights.

In *Heller*, the Court indicated that future decisions would guide lower courts in determining the scope and application of the Second Amendment. *Heller*, 554 U.S. at 635 (explaining that there will be "time enough to expound" upon exceptions to the Second Amendment "if and when those exceptions come before us"). Those decisions have not been forthcoming. Instead, Justices and judges have repeatedly noted the need for clarity from this Court.

These issues are not going away, but will only increase as governments at all levels seek to combat gun violence through a variety of measures. The Court should heed the call of those asking for clarity on this issue and resolve this case by firmly cementing Second Amendment rights on a level with other enumerated rights in the Bill of Rights.

A. Justices and judges across the country recognize the need for this Court to act.

As lamented by Justices Thomas and Gorsuch, the lack of guidance and intervention from the Court "reflects a distressing trend: the treatment of the Second Amendment as a disfavored right." *Peruta v. California*, 137 S. Ct. 1995, 1999 (2017) (Thomas, J., joined by Gorsuch, J., dissenting from the denial of cert.); *see also Silvester*, 138 S. Ct. at 945 (Thomas, J., dissenting from denial of certiorari) ("[I]t is symptomatic of the lower courts' general failure to afford the Second Amendment the respect due an enumerated constitutional right").

"[T]he lower courts are resisting this Court's decisions in *Heller* and *McDonald* and are failing to protect the Second Amendment to the same extent that they protect other constitutional rights." *Silvester*, 138 S. Ct. at 950 (Thomas, J., dissenting from the denial of certiorari).

The courts of appeals have acknowledged the lack of guidance from this Court, which has led to a "vast 't*erra incognita*,' [that] has troubled courts" *Kachalsky*, 701 F.3d at 89; a "morass of conflicting lower court opinions," *Chester*, 628 F.3d at 688-89 (Davis, J., concurring); and a "considerable degree of uncertainty," *Masciandaro*, 638 F.3d at 467.

As the en banc Sixth Circuit has noted, "[s]ince 2008, the lower courts have struggled to delineate the boundaries of the right recognized by the Supreme Court in *District of Columbia v. Heller*." *Tyler*, 837 F.3d at 681. Some courts have noted the "relative futility" of "pars[ing] these passages of *Heller* as if they contain an answer" to the constitutional questions facing them. *United States v. Booker*, 644 F.3d 12, 23 (1st Cir. 2011); *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc). Courts also wrestle with having to trace firearm regulations back through history, when some are obviously of recent vintage. *Marzzarella*, 614 F.3d at 94 ("It would make little sense to categorically protect a class of weapons bearing a certain characteristic when, at the time of ratification, citizens had no concept of that characteristic or how it fit within the right to bear arms.").

As urged by Judge Willett in his dissent from the denial of rehearing en banc, "[r]egardless of *what* we decide, *how* we decide matters too." Pet. App. 128a. The lower courts do not know to "how" to decide Second

Amendment cases. This Court should grant certiorari and begin providing that guidance.

B. Second Amendment cases will continue to arise as more governments seek to regulate firearms.

In the wake of any high-profile shooting, federal, state, and local governments understandably seek to take measures to prevent such violence in the future. But those governments must do so in accordance with *all* of the rights guaranteed by the Constitution—including the Second Amendment. *See Heller*, 554 U.S. at 636 ("[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table."). As the D.C. Circuit has observed, "[w]e are bound to leave the District as much space to regulate as the Constitution allows—but no more." *Wrenn*, 864 F.3d at 668.

States have proposed or adopted a variety of measures that will impact the Second Amendment rights of citizens. Some have imposed or increased waiting periods to purchase firearms. *See, e.g.*, Fla. Stat. § 790.0655 (imposing a mandatory waiting period between purchase and delivery of a firearm); 720 Ill. Comp. Stat. 5/24-3(A)(g) (amended by 2017 Ill. S.B. 3256 to increase waiting period for rifles and long guns). Some have adopted bump-stock bans. Del. Code tit. 11, § 1444; Fla. Stat. § 790.222; Haw. Rev. Stat. § 134-8.5; N.J. Stat. § 2C:39-3(*l*). Others have adopted "red-flag" laws that allow courts to remove firearms from a person who poses a danger to himself or others. Mass. Gen. Laws ch. 140, § 131R; N.J. Stat. § 2C:58-23; Vt. Stat. tit. 13, § 4053. New York has proposed requiring gun owners to purchase million-dollar insurance policies, N.Y. S.B.

S2857A, and requiring applicants for gun permits to consent to review of their search engine history and social media accounts for, among other things, "profane slurs" and "biased language," N.Y. S.B. 9191.

While this brief does not comment on the wisdom or constitutionality of any of those measures, it is important to note that they all raise Second Amendment questions. And although a single case cannot provide resolution to all of the Second Amendment issues that have troubled the lower courts, granting certiorari in this case would allow the Court to start bringing much-needed clarity to this area of the law. It should do so in a way that respects the profound importance of the fundamental right the Second Amendment protects.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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