No. 18-843

In the Supreme Court of the United States

IVAN PENA, ET AL., PETITIONERS
v.
MARTIN HORAN, DIRECTOR, CALIFORNIA DEPARTMENT OF JUSTICE BUREAU OF FIREARMS

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

BRIEF FOR THE STATES OF TEXAS, ALABAMA, ALASKA, ARKANSAS, FLORIDA, GEORGIA, IDAHO, INDIANA, KANSAS, LOUISIANA, MISSOURI, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, WEST VIRGINIA, AND THE COMMONWEALTH OF KENTUCKY, BY AND THROUGH GOVERNOR MATTHEW G. BEVIN, 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, Florida, Georgia, Idaho, Indiana, Kansas, Louisiana, Missouri, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Utah, West Virginia, and the Commonwealth of Kentucky, by and through Governor Matthew G. Bevin. The amici States have an interest in ensuring that their residents may fully exercise the rights guaranteed by the Second Amendment. As this brief explains, the lack of clarity and guidance from the Court has resulted in a confusing patchwork of lower court decisions which often fail to answer fundamental questions in deciding Second Amendment cases: what conduct it protects, what test is used, and what the government must show to justify any restriction of Second Amendment rights. The lack of clarity has led to courts undervaluing the Second Amendment and wrongly permitting governments to curtail the rights of individuals—which is exactly what happened in this case.

The amici States also have an interest in the Court establishing a clear Second Amendment test so that they may regulate firearms within constitutional parameters. In the wake of recent high-profile mass shootings, governments at all levels are considering a variety of measures intended to curb gun violence. The Court

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[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.

should clarify what standard of review applies to such measures so that States may effectively combat gun violence without unlawfully infringing constitutional rights.

SUMMARY OF ARGUMENT

District of Columbia v. Heller affirmed that the Second Amendment protects the fundamental, individual right to keep and bear arms. In particular, it affirmed that the "inherent right of self-defense" is "central" to the Second Amendment right. 554 U.S. 570, 628 (2008). Accordingly, the Court struck down the District of Columbia's onerous handgun law, which "amount[ed] to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for th[e] lawful purpose [of self-defense]." *Id.*

Fast-forward a decade, and Second Amendment jurisprudence has become "complicated and backwards," to put it mildly. Pet. App. 42a (Bybee, J., concurring in part and dissenting in part). Because *Heller* did not require, or permit, the Court to explore the full contours of the Second Amendment right, the Court indicated that the answers to outstanding questions would be resolved in future cases. But other than incorporating the Second Amendment against the States in *McDonald v. City of Chicago*, the Court has not provided further guidance.

Because of the Court's silence on the Second Amendment, the courts of appeals "have spilled considerable ink in trying to navigate the Supreme Court's framework," Pet. App. 10a, having been forced to themselves answer the questions the Court left unanswered. This has produced wildly divergent results. There are conflicts among the circuits on fundamental issues like what

conduct is protected by the Second Amendment and what the government must demonstrate in order to justify restricting this fundamental right. Courts are unclear on what test applies, and often resort to analysis that closely resembles the interest-balancing test that was explicitly rejected in *Heller*.

Now a State has enacted what amounts to a ban on the sale of new models of semiautomatic handguns. *See* Pet. 8 ("[N]o new semiautomatic handguns have been approved for sale in California for over five years, and none are forthcoming.") The Ninth Circuit upheld the law, dodged the question of whether the law implicates the Second Amendment right, and applied what it called "intermediate scrutiny" because it concluded the law placed no substantial burden on that right, and there was a "reasonable" fit between the State's goals and the law. It refused to engage in a searching evaluation of the "fit" between the State's purported interest and the law, instead limply asserting that even "in the face of policy disagreements, or even conflicting legislative evidence," it must allow the State to "experiment with solutions," where the State's evidence "fairly support[ed]" its conclusions. Pet. App. 19a-20a (alteration in original). But *Heller* made clear that "enshrinement of constitutional rights necessarily takes certain policy choices off the table." 554 U.S. at 636.

This outcome—seemingly inconsistent with *Heller*—is an acute symptom of the disease of uncertainty that has plagued the lower courts since the *Heller* decision. There is now a full-scale outbreak of confusion and splits between the circuits that only the Court can cure. This Court has not decided a significant Second Amendment

case since 2010, and the courts of appeals have filled the silence with holdings that fail to properly respect Second Amendment rights and that are contrary to the limited direction given by the Court. The underlying case is just the latest example.

The time has come for the Court to correct this. While the Court recently granted certiorari in another Second Amendment case, *see N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York*, No. 18-280, 2019 WL 271961, *1 (U.S. Jan. 22, 2019), this case is a good vehicle for providing guidance to the lower courts on how to apply the law to regulations like this one, which clearly implicate the law as already set forth in *Heller*. The Court should grant the petition, provide additional guidance on the Second Amendment and how it applies, and give effect to the fundamental constitutional right to keep and bear arms.

ARGUMENT

I. Courts Nationwide Routinely Fail to Respect Fundamental Second Amendment Rights.

Enumerated in the Bill of Rights alongside other fundamental rights like 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. The Second Amendment right is a fundamental liberty. "The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic." 3 Joseph Story, *Commentaries on the Constitution of the United States* 746-47 (1833). "[T]he liberties of the American

people [a]re dependent upon the ballot-box, the jury-box, and the cartridge-box; that without these no class of people could live and flourish in this country." Frederick Douglass, *Life and Times of Frederick Douglass, Written By Himself* 462 (1892) (available at https://docsouth.unc.edu/neh/dougl92/dougl92.html).

Yet some States have enacted laws which infringe this important right, and due to a lack of clear guidance from this Court, the lower courts have allowed this to happen by failing to treat the right guaranteed by the Second Amendment on par with other enumerated fundamental rights. Instead, "it is spurned as peripheral, despite being just as fundamental as the First Amendment. . . . [s]nubbed as anachronistic, despite being just as enduring as the Fourth Amendment. . . . [And] scorned as fringe, despite being just as enumerated as the other Bill of Rights guarantees." *Mance v. Sessions*, 896 F.3d 390, 396 (5th Cir. 2018) (Willett, J., dissenting from the denial of rehearing en banc).

In short, the Second Amendment has become the "Rodney Dangerfield of the Bill of Rights"—getting no respect. *Id.* (quoting Robert J. Cottroll, *Taking Second Amendment Rights Seriously*, 26 Hum. Rts. 5, 5 (Fall 1999); Glenn Harlan Reynolds, *Foreword: The Third Amendment in the 21st Century*, 82 Tenn. L. Rev. 491, 491 (2015)). The Court should step in and confirm that the Second Amendment is "neither second class, nor second rate, nor second tier." *Id.* And it should prescribe a test that requires lower courts to treat Second Amendment rights accordingly.

A. The Second Amendment protects an individual right that predates the Constitution.

In *District of Columbia v. Heller*, the Court recounted the long history of the right to keep and bear arms that resulted in its constitutional enshrinement. 554 U.S. at 592-95. Importantly, 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 like 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).

When incorporating the right to keep and bear arms against the States, 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 (footnote omitted). 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.

Thus, "[t]he right categorically exists, subject to such limitations as were present at the time of the Amendment's ratification." *Nat'l Rifle Ass'n, Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 714 F.3d 334, 338 (5th Cir. 2013) (Jones, J., dissenting from denial of

rehearing en banc) (footnote omitted). The Second Amendment "is the very *product* of an interest balancing by the people . . . [w]hatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635.

B. The core right protected by the Second Amendment is self-defense, which is implicated by laws regulating the use of handguns.

As this Court stated in *Heller*, "the inherent right of self-defense has been central to the Second Amendment right." 554 U.S. at 628. The Court concluded that possession of a handgun was particularly central to that right, as it is "'the most preferred firearm in the nation to 'keep' and use for protection of one's home and family.'" *Id.* at 628-29 (quoting *Parker v. District of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007)). In fact, "the American people have considered the handgun to be the quintessential self-defense weapon," *id.* at 629, as it may be stored in a place that can be easily accessed in an emergency, it can be easily used by most people, and it is harder for an attacker to wrestle away than a long gun, *id.* Laws that limit the right to possess a handgun, or which compromise its use for self-defense, therefore, are particularly suspect. *See, e.g., id.* at 629-30 ("[H]andguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid. . . . . [A requirement] th[at] makes it impossible for citizens to use [handguns] for the core lawful purpose of self-defense" is "unconstitutional.")

That is not to say that handguns may never be regulated, or that States may not have important reasons for doing so. But it is clear that if the "core" Second Amendment right is implicated by those laws, a more searching inquiry should be required than what the Ninth Circuit performed. Though *Heller* declined to prescribe a particular test for evaluating restrictions on Second Amendment rights, it made two things clear: First, rational-basis scrutiny is inappropriate for enumerated constitutional rights, *id.* at 628 n.27; and second, an interest-balancing test is inapplicable in the Second Amendment context, at least not where the right's "core protection" is at issue, as it was in *Heller* with a complete ban on operable handguns in the home, *id.* at 634. In *McDonald*, the Court also failed to prescribe a test, but also refused to treat the Second Amendment right 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." 561 U.S. at 780.

But applying a different body of rules is exactly what the lower courts have been doing. Some courts have applied what they defined as intermediate or strict scrutiny, but which falls short of those standards in application. The Court should no longer leave the lower courts to follow a trail of bread crumbs to find their way to the right conclusion and should provide a clear road map for courts evaluating laws affecting Second Amendment rights.

II. The Courts of Appeals Need Guidance Because Their Decisions Reflect Confusion and Disagreement About the Second Amendment.

Most courts of appeals have coalesced around using a two-step approach for evaluating gun regulations: First, the court determines whether the challenged law burdens conduct that falls within the scope of the Second Amendment right to keep and bear arms; if it does, the court applies some sort of means-end scrutiny. *See, e.g.*, *Woollard v. Gallagher*, 712 F.3d 865, 874-75 (4th Cir. 2013) (collecting cases); *see also United States v. Focia*, 869 F.3d 1269, 1285 (11th Cir. 2017). But the resulting opinions are far from consistent, even among those who purport to be following similar approaches. The need for clarification on the proper test is plain.

A. The courts of appeals are struggling to determine what conduct is protected under the Second Amendment.

While *Heller* could not be expected to "clarify the entire field" of Second Amendment law, 554 U.S. at 635, it did clarify that the Second Amendment is not "extinct," *id.* at 636, that it takes certain policy choices regarding gun regulation "off the table," *id.*, and fundamentally, that it includes the rights of individuals to keep and bear arms, *id.* More specifically, it held that laws which severely restrict handguns—the most common arms chosen by Americans for self-defense—violates the "core lawful purpose" of self-defense protected by the Second Amendment. *Id.* at 630.

Courts of appeals have since struggled to determine whether challenged gun regulations implicate the Second Amendment, even regulations involving handguns like the regulations in *Heller*. *See, e.g.,* Pet. App. 11a-12a (bypassing the "constitutional obstacle course of defining the parameters of the Second Amendment's individual right in the context of commercial sales" of handguns); *Drake v. Filco*, 724 F.3d 426 (3d Cir. 2013) (upholding "justifiable need" requirement for public carry of a handgun after holding it was a "presumptively lawful" "longstanding" regulation under *Heller* and therefore did not burden Second Amendment rights); *Woollard*, 712 F.3d 865 (upholding "good and substantial reason" requirement to obtain a permit to publicly carry a handgun after assuming, without deciding, that the requirement burdens the Second Amendment); *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012) (upholding "proper cause" requirement for a license to carry a concealed handgun in public after assuming the Second Amendment has "some" application outside the home).

1. Courts have had difficulty determining whether the "longstanding prohibitions" described by *Heller* as "presumptively lawful regulatory measures," 554 U.S. at 626, 627 n.26, concern conduct protected by the Second Amendment, *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. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 196 (5th Cir. 2012); *United States v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010). 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). Some courts have given up on attempting to interpret this language. *See United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc) ("We do not think it profitable to parse these passages of *Heller* as if they contained an answer.") This split demonstrates that the lower courts are confused as to what the Second Amendment even protects.

This confusion has resulted in many courts side-stepping the question of whether the challenged law implicates protected rights. They simply skip to the second step of the analysis and then hold that the first inquiry does not matter because the law survives scrutiny. *See, e.g., Woollard*, 712 F.3d at 876 (assuming, but not deciding, that Second Amendment applies); *Kachalsky*, 701 F.3d at 93 (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); *Marzzarella*, 614 F.3d at 95 (holding it need not decide whether the right to bear arms was infringed). That is what the Ninth Circuit did in this case. Pet. App. 11a-12a.

Sometimes, courts will even conclude that the Second Amendment is *not* implicated, but still analyze the restriction under some form of scrutiny out of an abundance of caution. *See, e.g.*, *Drake*, 724 F.3d at 434-35; *Nat'l Rifle Ass'n of Am.,* 700 F.3d at 204. Some courts believe it most "prudent to . . . resolve post-*Heller* challenges to firearm prohibitions at the second step." *Woollard*, 712 F.3d at 875; *see also* Pet. App. 12a (following

the "judicious course" and assuming, without deciding, that the Second Amendment applies (quoting *Woollard*, 712 F.3d at 876)).

2. But this course is not "judicious." Nor is it "constitutional avoidance . . . finally . . . taking hold," as one court put it. *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011). The courts are still deciding constitutional questions—whether laws are constitutional under the Second Amendment. The approach outlined above is problematic because has led to a chronic devaluing of the fundamental Second Amendment right. In practice, 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. In other words, "avoiding" deciding whether Second Amendment rights are at stake simply fixes the outcome of the scrutiny test.

This is illustrated by examining cases involving restrictions on the public carrying of weapons. 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 that the Second Amendment does not protect public carry, or that are uncertain about it, uphold the restrictions. *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).

Thus, contrary to the view of the Ninth Circuit in this case and of other courts of appeals, deciding the question of whether certain conduct implicates the Second Amendment is not unnecessary, and avoiding the question has been outcome-determinative in practice. This fundamental flaw in Second Amendment jurisprudence must be corrected to protect the constitutional rights embodied in the Second Amendment.

B. The courts of appeals disagree about the level of scrutiny to apply to gun regulations.

"Disagreement abounds[] . . . on a crucial inquiry: What doctrinal test applies to laws burdening the Second Amendment—strict scrutiny, intermediate scrutiny, or some other evaluative framework altogether?" *Mance*, 896 F.3d at 394-95 (Elrod, J., dissenting from denial of rehearing en banc). Aside from the problem of courts putting a thumb on the scale of scrutiny by purporting to avoid deciding whether a regulation affects protected rights, the courts of appeals cannot agree on what level of scrutiny to apply, and have not applied even identified levels of scrutiny correctly.

1. As an initial matter, the use of either intermediate or strict scrutiny to evaluate restrictions on Second Amendment rights bears an uncanny resemblance 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 or 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.

Fundamentally, many of the court of appeals 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. Judges have pointed out that *Heller*'s rejection of interest-balancing is incompatible with balancing tests like intermediate and strict scrutiny. This has led some judges to question the use of the two-step test and application of intermediate or strict scrutiny at all in the Second Amendment context, instead advocating for a test based on text, history, and tradition. *Heller II*, 670 F.3d at 1271 (Kavanaugh, J., dissenting); *Mance*, 896 F.3d at 394-95 (Elrod, J., dissenting from denial of rehearing en banc, joined by Jones, Smith, Willett, Ho, Duncan, and Engelhardt, JJ.); *Nat'l Rifle Ass'n*, 714 F.3d at 338–39 (Jones, J., dissenting from denial of rehearing en banc, joined by Jolly, Smith, Clement, Owen, and Elrod, JJ.).

2. Many courts of appeals claim to apply intermediate scrutiny to Second Amendment challenges. *See, e.g.*, Pet App. 14a; *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 even decisions that agree on this test are fractured. For instance, 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 held 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).

If a law "'implicates the core of the Second Amendment right *and* severely burdens that right,'" the Ninth Circuit applies strict scrutiny. Pet. App. 13a (emphasis added) (quoting *Silvester*, 843 F.3d at 821). If the law "'does not implicate the core Second Amendment right *or* does not place a substantial burden on that right,'" the Ninth Circuit applies intermediate scrutiny. Pet. App. 13a (quoting *Fyock v. Sunnydale*, 779 F.3d 991, 998-99 (9th Cir. 2015)).

But as demonstrated above, courts have struggled to decide whether laws implicate the Second Amendment, and confusion also exists on whether a particular law "substantially burdens" Second Amendment rights. For instance, in *Jackson v. City & County of San Francisco*, the Ninth Circuit upheld a San Francisco ordinance that required handguns kept in the home to be stored in a locked container or disabled with a trigger lock when not kept on one's person. 746 F.3d 953 (9th Cir. 2014). Even though the restriction was very similar to the restriction struck down in *Heller*, the Ninth Circuit held that because the requirement was not a complete ban, it was not a significant burden. *Id.* at 964. "But nothing in . . . *Heller* suggested that a law must rise to the level of the absolute prohibition at issue in that case to constitute a 'substantial burden' on the core of the Second Amendment right." *Jackson v. City & County of San Francisco*, 135 S. Ct. 2799, 2801 (2015) (Thomas, J., dissenting from denial of cert.).

3. Courts are also split on what kind of evidence States must provide—or even if they must provide any—in order to justify gun regulations under the scrutiny they are applying. 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). Both of

these tests are searching inquiries, yet some courts require little or no evidence supporting the State's restriction.

For instance, some courts have merely deferred to the judgment of the state legislature, rather than requiring evidence regarding "fit" or supporting the governmental interest. *See Drake*, 724 F.3d at 436-37 (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." (second alteration in original)); *see also Silvester v. Becerra*, 138 S. Ct. 945, 945 (2018) (Thomas, J., dissenting from the denial of cert.) (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 have required the government to produce at least some evidence. *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.*, 714 F.3d at 346 (Jones, J., dissenting from denial of rehearing en

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

In this case, the Ninth Circuit appeared to require some evidence, but refused to impose an "'unnecessarily rigid burden of proof'" and allowed California "to rely on any material 'reasonably believed to be relevant' to substantiate its interests in gun safety and crime prevention." Pet. App. 18a (quoting *Mahoney v. Sessions*, 871 F.3d 873, 881 (9th Cir. 2017)). It largely deferred to the legislature. Pet. App. 18a-20a.

The courts of appeals are also split on whether a generalized desire to prevent crime or protect public safety is sufficient to restrict Second Amendment rights. For instance, the Fourth Circuit 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 such a rubber-stamp approach is inconsistent with heightened scrutiny and the Court's treatment of other fundamental, enumerated rights. Suppressing offensive speech may also prevent crime, but the government is not permitted to do that merely by uttering those magic words. Indeed, the Seventh Circuit 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).

III. The Ninth Circuit's Decision Is a Product of This Confusion and Inconsistency and Is a Good Vehicle for Resolving These Issues.

A. 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. But the Ninth Circuit avoided the question of whether the regulations implicated the Second Amendment, deeming that the "judicious" course since it avoided the "constitutional obstacle course of defining the parameters" of Second Amendment rights, Pet. App. 12a, and purported to apply intermediate scrutiny because it concluded the restrictions are not a "substantial[] burden," Pet. App. 14a.

In reality, the test applied by the panel majority bears no resemblance to intermediate scrutiny. In the face of evidence showing that *no handgun currently sold in the United States* can meet California's microstamping requirement, and testimony from multiple gun manufacturers that implementation of the requirement was impracticable, Pet. App. 39a, 47a-48a, the panel majority deemed it sufficient for the State to rely only on the *inventor of microstamping technology* to rebut those contentions, Pet. App. 28a. The panel majority threw up its hands and insisted it must defer unquestioningly to the legislature. Pet. App. 19a-20a.[2]

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[2] The dissent also notes that there is no indication in the legislative record that the legislature relied on the testimony of the microstamping inventor, who did not testify there. Pet. App. 69a-70a.

As the dissent points out, the panel majority did not acknowledge that even if some legislative policy judgments are "'entitled to substantial deference'—where appropriately applied—they are not 'insulated from meaningful judicial review altogether.'" Pet. App. 68a. Indeed, in the First Amendment context, "courts are obliged 'to assure that, in formulating its judgments, [a legislature] has drawn reasonable inferences based on substantial evidence.'" Pet. App. 69a (quoting *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (alteration in original)). Instead, the panel majority merely concluded California had "fairly support[ed]" its conclusions. Pet. App. 26a. Moreover, completely missing from the panel majority's analysis is the showing normally required by intermediate scrutiny: that the law does not "burden substantially more [protected activity] than is necessary to further the government's legitimate interests." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994); *see also Jackson*, 135 S. Ct. at 2801-02 (Thomas, J., dissenting from denial of cert.).

The Ninth Circuit's opinion therefore reflects the confusion regarding what conduct is protected by the Second Amendment, what standard of review should apply, and what type of evidence—and even if any—the government must produce to justify its restriction on Second Amendment rights. It also illustrates the problem with applying interest-balancing tests at all, given that courts are applying what purport to be well-known tests, but are far different in practice when it comes to the Second Amendment. *See also Mance*, 896 F.3d at 398-405 (Ho, J., dissenting from denial of rehearing en

banc) (explaining how strict scrutiny was applied incorrectly and noting that "the Second Amendment continues to be treated as a 'second-class right'"). This is precisely the problem *Heller* predicted when rejecting interest-balancing:

> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. 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. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.

Heller, 554 U.S. at 634. All of these issues need resolution by the Court, making this case an excellent vehicle for doing so.

B. The Court recently granted certiorari in another Second Amendment case involving a New York City ordinance that prohibits "premises permit" holders from carrying their handgun outside their home for any purpose other than to practice at a New York City shooting range. Pet. App. 88-90, *N.Y. State Rifle & Pistol Ass'n*, No. 18-280 (U.S. Sept. 4, 2018). The States are hopeful that the Court's resolution of that case will be a good start on addressing some of the confusion chronicled in this brief. But regardless of how the Court resolves that case, it will not eliminate all the confusion documented in this brief. The Court should grant review here as well. *See Heller*, 554 U.S. at 635.

Moreover, this case picks up precisely where *Heller* left off and provides the Court with the opportunity to clarify what test applies to significant restrictions on the ability of law-abiding citizens to obtain a handgun for self-defense, which arguably impacts the "core" of the Second Amendment right. It is time for the Court to clear this issue up. Without more direction, the States remain in the dark as to how they may lawfully regulate handguns, and are forced to pass laws and take their chances in the courts. Courts are left fumbling as well. And importantly, Americans are left without the full exercise of an enumerated constitutional right. Granting the petition gives the Court another opportunity to provide much-needed clarity to this area of the law. And the Court should do so in a way that finally gives the Second Amendment—and the fundamental right it protects—the respect its text demands.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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