No. 13-137

In The
Supreme Court of the United States

NATIONAL RIFLE ASSOCIATION
OF AMERICA, INC., et al.,

Petitioners,

v.

BUREAU OF ALCOHOL, TOBACCO,
FIREARMS AND EXPLOSIVES, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF SECOND AMENDMENT FOUNDATION, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Second Amendment Foundation, Inc. ("SAF"), is a non-profit tax-exempt educational foundation incorporated in 1974 under Washington state law. SAF seeks to preserve the Second Amendment's effectiveness through educational and legal action programs. SAF has over 650,000 members and supporters throughout the Nation.

Among its most notable recent cases, SAF organized and prevailed in *McDonald* v. *City of Chicago*, 130 S. Ct. 3020 (2010); *Moore* v. *Madigan*, 702 F.3d 933 (7th Cir. 2012); and *Ezell* v. *City of Chicago*, 651 F.3d 684 (7th Cir. 2011).

SAF has a direct interest in the outcome of this case, as it unfortunately finds itself in the position of a petitioner before this Court in three cases raising the same issues presented here: *Woollard* v. *Gallagher*, No. 13-42 (filed July 9, 2013); *Schrader* v. *Holder*, No. 12-1443 (filed June 11, 2013); and *Lane* v. *Holder*, No. 12-1401 (filed May 28, 2013). SAF will petition this Court to review *Drake* v. *Filko*, No. 12-1150, 2013

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of *amicus curiae's* intention to file this brief. The parties have consented to the filing of this brief in letters on file in the Clerk's office. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members or its counsel made a monetary contribution to the brief's preparation or submission.

U.S. App. LEXIS 15635 (3d Cir. July 31, 2013) and, absent relief en banc, *Kwong* v. *Bloomberg*, No. 12-1578, 2013 U.S. App. LEXIS 13798 (2d Cir. July 9, 2013) – additional "part[s] of a pervasive pattern of stubborn resistance to this Court's holding that the Second Amendment secures a right that is not just individual, but *fundamental*." Petition at 14.

These cases challenge widely disparate infringements of Second Amendment rights, ranging from the broad prohibition of the right to bear arms outside the home (*Woollard*, *Drake*), to taxing Second Amendment rights out of practical existence (*Kwong*), to categorical disarmament for ancient and minor criminal transgressions (*Schrader*), to the imposition of substantial barriers to access firearms at retail (*Lane*). But SAF's varied cases have largely met the same fate suffered by Petitioners below: rubber-stamp rejection under the now-familiar Second Amendment "Two-Step" analysis, and its application of rational basis review (often euphemistically labeled "intermediate" review, but in practice bearing no resemblance to that test).

One of SAF's outcomes was arguably more jarring. *Lane* challenges the federal prohibition on interstate handgun transfers, nestled in a statutory subdivision neighboring the 18-20-year-old prohibition targeted by Petitioners here. Unlike the court below, Petition at 10, App. 11-12a; and the D.C. Circuit, *Dearth* v. *Holder*, 641 F.3d 499 (D.C. Cir. 2011), the Fourth Circuit in *Lane* accepted "[t]he government's extraordinary efforts to prevent law-abiding

adults from even asserting – let alone vindicating – their Second Amendment rights," Petition at 35, by holding that consumers barred from purchasing handguns lack an injury traceable to the criminal prohibition. *Lane* v. *Holder*, 703 F.3d 668 (4th Cir. 2012).

The Fourth Circuit accepted this "quite remarkabl[e]" "dubious logic," Petition at 34, in a published opinion without so much as mentioning the Fifth Circuit's directly contrary decision here – notwithstanding *Lane* Petitioners' repeated calls to follow the decision below respecting standing. See Petition for Certiorari, *Lane* v. *Holder*, No. 12-1401 at 16-17.

Should this Court reach the merits of Petitioners' claim, it would necessarily reject the Fourth Circuit's opinion in *Lane*. This circuit split supplies an additional ground to grant the Petition. For unless the Government wishes to concede the petition for certiorari in *Lane*, it would presumably press its Second Amendment standing theories here.

And if "*no one* has standing to challenge the federal ban," Petition at 34 (emphasis in original), the end result is no different than what is normally experienced under the Second Amendment "Two-Step" – a doctrine demanding review not just in this case, but in *Schrader*, *Woollard*, *Drake*, and *Kwong* as well.

SUMMARY OF ARGUMENT

This brief supplies additional perspective on two critical points. *First*, notwithstanding its strong language, the petition might understate the "massive resistance to the clear import of [this Court's] landmark decisions." Petition at 1.

This Court's recent pronouncement that the right to keep and bear arms is fundamental is just that – a pronouncement. It does not appear to have the force of law in most lower courts, where the Second Amendment right is summarily rejected in nearly all circumstances – if the courts deign to reach the issue at all. If *District of Columbia* v. *Heller*, 554 U.S. 570 (2008) and *McDonald*, supra, were intended as more than mere declarations of principle, this Court should rebuke the challenge to its authority in this area.

Second, while the Petition capably surveys the conflict between the lower courts' use of purported "intermediate" review and this Court's precedent, it bears recalling the extent to which interest-balancing, rational-basis type standards for evaluating Second Amendment claims were litigated in *Heller*. This Court's rejection of rational basis review (by whatever euphemism) did not transpire by happenstance. Reviewing the arguments advanced in *Heller* reveals the extent to which this Court rejected the "form of right-denying scrutiny," Petition at 26, persisting throughout the lower courts today.

REASONS FOR GRANTING THE PETITION

I. The Second Amendment Again Faces Elimination In The Lower Courts.

The opinion below is, without question, worthy of review. It would place highly on any list ranking opinions most defiant of *Heller* and *McDonald*, a crowded, rapidly growing field crowning no clear "winner." As Petitioners demonstrate, the Fifth Circuit's entry into this contest is a strong contender, but other examples abound underscoring the fact that this problem is indeed pervasive and requires this Court's urgent attention.

Courts remain largely steadfast in their belief that the keeping and bearing of arms is less a fundamental right than a social evil. The near-uniform syllogism, played out in countless cases, holds: (1) any firearm, under any circumstances, might be misused; (2) the government has a powerful interest in preventing the misuse of firearms; (3) courts cannot question the government's assertion that any given law is necessary as a matter of public safety, therefore; (4) any firearm law is constitutional.

Refusing to consider the Second Amendment beyond *Heller*'s facts, Judge Wilkinson crystallized the lower courts' hostility to the right to keep and bear arms:

> This is serious business. We do not wish to be even minutely responsible for some unspeakably tragic act of mayhem because in

> the peace of our judicial chambers we miscalculated as to Second Amendment rights.

United States v. *Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011).

Would a court publish such a statement regarding the First, Fourth, Fifth, Sixth, or Eighth Amendments? Consider this language's incredible implications: "This is serious business" – Is *enforcement* of fundamental rights, including the Second Amendment, not the courts' "serious business?" "We do not wish to be even minutely responsible" – reflecting a belief that judges enforcing constitutional rights bear personal culpability for any resulting harms, and thus exercise *legislative* responsibility in granting rights. "The peace of our judicial chambers" – constitutional rights are an academic luxury unsuited to the hard realities of the street.

And then, the overriding concern that "miscalculat[ing] as to Second Amendment rights" on the side of liberty might lead to "unspeakably tragic act[s] of mayhem." Nevermind that this might be said of *all* individual rights, as

> [t]he right to keep and bear arms . . . is not the only constitutional right that has controversial public safety implications. All of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes fall into the same category.

McDonald, 130 S. Ct. at 3045 (citations omitted). Judge Wilkinson apparently assumes that Second Amendment rights have only the potential to harm, not benefit society.

Absent from the equation is any allowance for the prospect that should judges "miscalculate" by stifling Second Amendment rights, some defenseless innocent might thereby fall prey to an "unspeakable act of mayhem," to say nothing of the people's lost sense of security owing to their unconstitutional disarmament. Where fundamental rights are concerned, American courts should prefer erring on the side of liberty. But judges who feel personally responsible for any potential negative consequences of enforcing constitutional guarantees might tend to defer to any regulatory imposition, and reflexively approve whatever police and legislators claim essential to public safety.

Courts thus issue opinions like *Masciandaro*, criminalizing a tired motorist who pulled over to sleep in a park because his car contained a gun. Or decisions like the one below, where the prospect that some fraction of one percent of adults age 18-20 may be "irresponsible" denies the remaining ninety-nine-plus percent of this cohort – voters, jurors, soldiers, spouses, parents, homeowners, and adults otherwise manifesting full participation in our society – a fundamental right.

Indifference or hostility to Second Amendment rights pervades the lower courts. One could imagine the protests were New York to require that voters

show government-issued photo identification, a document costing $9-$10 for four to five years' validity, $13-$14 for eight to nine years' validity, or $6.50 for each ten-year card issued seniors. See "How to Apply for a New York Identification Card," http://www.dmv.com/ny/new-york/apply-id-card (last visited August 28, 2013). But New York City residents must pay *$340 every three years* to possess a handgun (in addition to the initial $94.25 fee for fingerprinting and background checks). *Kwong*, 2013 U.S. App. LEXIS 13798, at *5-*6 n.5. The Second Circuit approved of this outrageous levy because, again, "intermediate" scrutiny – *if* rational basis were insufficient to dispose of the case, which the court pointedly declined to hold. *Id.* at *21-*24 & n.15.

The Second Circuit found it "difficult to say that" a $340 fee – well over a week's wages for some people, 29 U.S.C. § 206(a)(1)(C); N.Y. Lab. Law § 652 – for a three-year license to exercise a fundamental right "is anything more than a 'marginal, incremental or even appreciable restraint.'" *Kwong*, 2013 U.S. App. LEXIS 13798, at *21 (citation omitted). Indeed, the plaintiffs did not *prove* that the fee is "prohibitively expensive," as they managed to scrape up the money. *Id.* at *21 & n.14. Apparently, any fee imposed upon a fundamental right that would not literally bankrupt an individual is not "even [an] appreciable restraint" warranting what passes for "intermediate" scrutiny in the Second Circuit.

For its part, the City suggests that the $340 fee is a bargain, since it believes the true cost of licensing

gun ownership is $977.16 initially and $346.92 on renewal. *Id.* at *9. While the court allowed for "hypothetically" imposing some constitutional limit on New York's gun fees, *id.* at *23-*24 n.15, its alternative "intermediate scrutiny" rationale left no room for any limiting principle:

> We recently observed that "New York has substantial, indeed compelling, governmental interests in public safety and crime prevention." Because the record demonstrates that the licensing fee is designed to allow the City of New York to recover the costs incurred through operating its licensing scheme, which is designed to promote public safety and prevent gun violence, we agree with the District Court that [the $340 fee] easily survives "intermediate scrutiny."

Id. at *25 (citations omitted).

Kwong's result was utterly predictable, as is every future Second Amendment case in the Second Circuit in the wake of *Kachalsky* v. *County of Westchester*, 701 F.3d 81 (2d Cir. 2012). There the court invoked "intermediate" scrutiny to uphold New York's prohibition on carrying handguns for self-defense, absent "proper cause" to exercise this fundamental, but unacceptably dangerous right. N.Y. Penal Law § 400.00(2)(f). So much for "[f]reedom resides first in the people without need of a grant from government." *Hollingsworth* v. *Perry*, 133 S. Ct. 2652, 2675 (2013) (Kennedy, J., dissenting).

In *Kachalsky*, this is what passed for "intermediate" scrutiny to secure a fundamental right: "'[S]ubstantial deference to the predictive judgments of [the legislature]' is warranted . . . our role is only 'to assure that, in formulating its judgments, [the state] has drawn reasonable inferences based on substantial evidence." *Kachalsky*, 701 F.3d at 97 (citation omitted). "It is the legislature's job, not ours, to weigh conflicting evidence and make policy judgments." *Id.* at 99. Moreover, gun laws must be upheld unless "the lack of constitutional authority to pass [the] act in question is clearly demonstrated." *Id.* at 100-01 (citation omitted).

The Fourth Circuit followed *Kachalsky*'s entirely deferential "intermediate" review standard in upholding Maryland's requirement that law-abiding, responsible adult citizens prove a "good and substantial reason," Md. Code Ann., Pub. Safety § 3-506(a)(5)(ii), to exercise Second Amendment rights. *Woollard* v. *Gallagher*, 712 F.3d 865 (4th Cir. 2013), *petition for cert. pending*, No. 13-42. The district court had surveyed the parties' "commendably thorough research," and arguments consuming "considerable time and energy . . . debating the relative merits of [opposing] studies and statistics," before finding that the State had failed to prove that enjoining its law would harm public safety. *Woollard* v. *Brown*, 863 F. Supp. 2d 462, 480 (D. Md. 2012). But, again, "intermediate scrutiny" called for reversal, based on little more than rubber-stamping the State's theories.

Maryland's legislature had found that many people are killed and injured by armed criminals, and that therefore, "additional regulations on the wearing, carrying and transporting of handguns are necessary. . . ." *Woollard*, 712 F.3d at 877 (quoting Md. Code Ann., Crim. Law § 4-202). Three police affidavits attesting to the law's wisdom, *id.* at 877 n.6, sufficed to support the conclusion that the State "clearly demonstrated" the law's constitutionality. *Id.* at 879.

> [W]e cannot substitute [contrary] views for the considered judgment of the General Assembly that the good-and-substantial-reason requirement strikes an appropriate balance between granting handgun permits to those persons known to be in need of self-protection and precluding a dangerous proliferation of handguns on the streets of Maryland.

Id. at 881. SAF submits that after *Heller*, lower courts must understand that the "persons known to be in need of self-protection" are the American people, who ratified a constitutional amendment so that their "need of self-protection" might be secured against legislative "judgment," "considered" or not.

But at least *Woollard* and *Kachalsky* claimed to assume that the Second Amendment guarantees a right to bear arms for self-defense outside the home. *Woollard*, 712 F.3d at 876; *Kachalsky*, 701 F.3d at 89. Upholding New Jersey's requirement that individuals demonstrate a "justifiable need" to bear arms,

N.J.S.A. § 2C:58-4(c),[2] the Third Circuit refused even to assume that the right to bear arms passes Step One of the Second Amendment Two-Step. *Drake*, 2013 U.S. App. LEXIS 15635, at *23.

Drake "recognize[d] that the Second Amendment's individual right to bear arms *may* have some application beyond the home," but found it unnecessary to determine whether it does. *Id.* at *13. Asserting that "certain longstanding regulations are 'exceptions' to the right to keep and bear arms," *id.* (citations omitted), *Drake* noted that as far back as the twentieth century, New York and New Jersey required "proper cause" and "justifiable need," respectively, to carry defensive arms. Combined with the fact that historically, some states had barred carrying some weapons in some manner, *id.* at *15-*20; but see *id.* at *72-*74 (Hardiman, J., dissenting), this sufficed to show that New Jersey's "justifiable need" law "regulates conduct falling outside the scope of the Second Amendment's guarantee." *Id.* at *23.

Although it could have concluded at this point, the Third Circuit opted to nonetheless explore "intermediate" scrutiny. *Id.* at *23-*24. That analysis consisted almost entirely of referencing the fact that

[2] "Justifiable need to carry a handgun" is defined as "the urgent necessity for self-protection, as evidenced by specific threats or previous attacks which demonstrate a special danger to the applicant's life that cannot be avoided by means other than by issuance of a permit to carry a handgun." N.J.A.C. § 13:54-2.4(d)(1).

the legislature had rendered a "judgment." See, *e.g.*, *id.* at 30 ("The predictive judgment of New Jersey's legislators is that limiting the issuance of permits to carry a handgun in public to only those who can show a 'justifiable need' will further its substantial interest in public safety") (footnote omitted); but see *id.* at *87 ("[T]he overriding philosophy of our Legislature is to limit the use of guns as much as possible") (Hardiman, J., dissenting) (quoting *State* v. *Valentine*, 124 N.J. Super. 425, 307 A.2d 617, 619 (N.J. Super. Ct. App. Div. 1973)).

The *Drake* majority was unconcerned about the complete lack of evidence supporting the legislature's "predictive judgment," because neither *Heller* nor *McDonald* were decided when the law was written. *Id.* at *32-*33. In any event, again,

> New Jersey legislators . . . have made a policy judgment . . . It is New Jersey's judgment that when an individual carries a handgun in public for his or her own defense, he or she necessarily exposes members of the community to a somewhat heightened risk that they will be injured by that handgun. New Jersey has decided that this somewhat heightened risk to the public may be outweighed by the potential safety benefit to an individual with a "justifiable need" to carry a handgun. . . .

Id. at *36-*37. "We refuse Appellants' invitation to intrude upon the sound judgment and discretion of the State of New Jersey, and we conclude that the 'justifiable need' standard withstands intermediate scrutiny." *Id.* at *39.

Of course *Drake* plaintiffs already knew that the legislature had rendered a "judgment" – they brought suit hoping to get an *independent* judgment from a court more concerned with securing their fundamental rights. This Court may have stated that "the natural meaning of 'bear arms'" as used in the Second Amendment is to "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person." *Heller*, 554 U.S. at 584 (citations omitted). But under "intermediate scrutiny," hardly anyone in New Jersey may bear arms, and no one may do so in the sense of having a *right*, because that state's legislature determined that it makes for bad policy.

In another case, sponsored by Petitioner NRA, the D.C. Circuit purportedly invoked intermediate scrutiny to uphold prohibitions on broad categories of firearms notwithstanding the "clear enough" record that such arms are in "common use" for traditional lawful purposes. *Heller* v. *District of Columbia*, 670 F.3d 1244, 1261 (D.C. Cir. 2011) ("*Heller II*").

More recently, in a case highly reminiscent of the one here at issue, the D.C. Circuit purportedly invoked intermediate scrutiny to uphold application of the *felon*-in-possession ban to all common law *misdemeanants* – a rather broad category of individuals – because some misdemeanors are "quite egregious." *Schrader* v. *Holder*, 704 F.3d 980, 990 (D.C. Cir. 2013), *petition for cert. pending*, No. 12-1443 (filed June 11, 2013).

And quite apart from the problems attending "intermediate review," the direct circuit split between the decision below and *Lane*, concerning "[t]he government's extraordinary efforts to prevent law-abiding adults from even asserting – let alone vindicating – their Second Amendment rights," Petition at 35, makes this petition (along with *Lane*) yet more compelling.

The situation is unlikely to improve absent this Court's intervention. It is technically true, "as the bar has been told many times," *United States* v. *Carver*, 260 U.S. 482, 490 (1923), "that a denial of certiorari is not a ruling on the merits of any issue raised by the petition." *Evans* v. *Stephens*, 544 U.S. 942 (2005) (Opinion of Stevens, J., respecting denial of certiorari) (footnote omitted).

But asking people whose rights are infringed to reflect upon the nature of this Court's discretion "again and again," *Singleton* v. *Commissioner*, 439 U.S. 940, 942 (1978) (Opinion of Stevens, J., respecting denial of certiorari), as appellate court after appellate court refuses to honor an enumerated, fundamental right, is unsatisfying. Each time this Court looks the other way as allegedly "intermediate scrutiny" extinguishes the Second Amendment in another circuit, additional judges are emboldened to resist *Heller* and *McDonald* – and the public is slowly confirmed in the conclusion that the right to bear arms, whatever this Court declared, means a great deal less in practical, applied reality.

Would the lower courts' nearly categorical rejection of *Heller* and *McDonald* ever merit review, it merits review today.

II. This Court Has Already Considered – And Rejected – The Lower Court's Methodology.

Petitioners find notable the view that the lower courts' response to *Heller* appears to follow Justice Breyer's dissent. See Petition at 32 (citation omitted). That interest-balancing approach did not want for advocacy in *Heller*. Justice Breyer's dissent and its apparent progeny, below and in all the aforementioned "Two-Step"/"intermediate" scrutiny cases, seemingly owe much to the Solicitor General's *Heller* brief. Its arguments, and the responses they elicited, merit revisiting in light of the past five years' experience.

After *Heller*, Petitioners "expected a major reconsideration of extant firearm laws," provided "the number of laws enacted by the federal government, states, and localities in the years when a mistaken understanding of the Second Amendment held sway." Petition at 1. "Given that *Heller*'s holding was contrary to the law that had held sway over most of the Nation for decades, one would have expected to see federal, state, and local governments . . . reexamin[e]" their laws for Second Amendment compliance. *Id.* at 17. Indeed, "[i]n the pre-*Heller* era, Congress filled an entire chapter of the United States Code with firearms regulations," *id.* at 1, of which the laws

challenged here comprise but one constitutionally-dubious example.

But in *Heller*, the Solicitor General assured that "[n]othing in the Second Amendment properly understood – and certainly no principle necessary to decide this case – calls for invalidation of the numerous federal laws regulating firearms." Brief for the United States as *Amicus Curiae*, *District of Columbia* v. *Heller*, No. 07-290 ("U.S. Br.") at 8. Rejecting the D.C. Circuit's "categorical approach" to securing arms of the kind in common use for traditional lawful purposes, the Solicitor General advanced "a more flexible standard of review." *Id.* at 9. "[S]omething less than strict scrutiny is appropriate." Solicitor General, Transcript of Oral Argument, *District of Columbia* v. *Heller*, No. 07-290, at 35, ll. 4-5.

The Solicitor General's *Heller* test is indistinguishable from the two-step approach plaguing the Second Amendment throughout today's lower courts. First, the Second Amendment is "subject to important exceptions," U.S. Br. at 8, perhaps including "[l]icensing requirements such as those contained in the [Federal Gun Control Act];" "the government's ability to regulate the manufacture or sale of such arms," with which the Framers were allegedly unconcerned; and "[g]overnment restrictions on the importation and interstate transportation of firearms," which were allegedly "even further afield from the Framers'

concerns." *Id.* at 26-27.[3] And "[i]n addition," individuals enjoy reduced protection against "regulation of firearm-related *commercial* activities." *Id.* at 27 (emphasis in original).

In other words, the Second Amendment might condemn the "direct prohibition on the possession of firearms by individuals," *id.* at 26, who enjoy few if any rights to purchase, manufacture, import, or transport those firearms. As for what remains, the Solicitor General's "intermediate" scrutiny bears a striking resemblance to today's "Step Two":

> When, as here, a law directly limits the *private possession* of "Arms" in a way that has no grounding in Framing-era practice, the Second Amendment requires that the law be subject to heightened scrutiny that considers (a) the practical impact of the challenged restrictions on the plaintiff's ability to possess firearms for lawful purposes (which depends in turn on the nature and functional adequacy of available alternatives), and (b) the strength of the government's interest in enforcement of the relevant restriction.

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[3] Contra Respondent's Brief, *District of Columbia* v. *Heller*, No. 07-290 at 22-23 and sources therein; see also *Andrews* v. *State*, 50 Tenn. 165, 178 (1871) ("The right to keep arms, necessarily involves the right to purchase them . . . and to purchase and provide ammunition suitable for such arms, and to keep them in repair"); 3 THE WRITINGS OF THOMAS JEFFERSON 230 (T.J. Randolph, ed., 1830) ("Our citizens have always been free to make, vend and export arms. It is the constant occupation and livelihood of some of them.").

> Under that intermediate level of review, the "rigorousness" of the inquiry depends on the degree of the burden on protected conduct, *and important regulatory interests are typically sufficient to justify reasonable restrictions*.

U.S. Br. at 8 (citations omitted) (emphasis added).

Under this form of two-step "intermediate" review, it was not only Congress's "entire chapter" of gun regulations, Petition at 1, that could be immunized from Second Amendment scrutiny. The Solicitor General argued that since Washington, D.C.'s handgun and functional firearms prohibitions might pass so-called "intermediate" review, this Court should have remanded *Heller* to the D.C. Circuit for re-evaluation under this lesser standard.

The District of Columbia believed a remand unnecessary, titling a section of its reply brief, "The District's Laws Satisfy The United States' Proposed Standard." Reply Brief, *District of Columbia* v. *Heller*, No. 07-290, at 24. Only in the alternative did the city seek remand, but to the District Court. *Id.* at 27 n.6. Beyond claiming its laws were "ground[ed] in Framing-era practice," *id.* at 25, the District asserted that its laws "also satisf[ied] heightened scrutiny, which requires assessing the reasons for the laws and their impact on an individual's ability to have weapons for self-defense." *Id.* (citation omitted). After all, "[n]o one disputes that the general governmental interests in

regulating dangerous weapons are 'paramount.'" *Id.* (citations omitted). And

> [t]he District's laws also directly further the kinds of "important regulatory interests" the United States agrees are "typically sufficient to justify restrictions" on gun ownership. The Council concluded that concealable and lethal handguns are responsible for a disproportionately high number of violent crimes, accidents, and suicides, particularly in an exclusively urban jurisdiction. It acted to target those weapons without unduly burdening any asserted right.

Id. at 25-26 (citations omitted).

Experience has proven the District of Columbia's argument correct: its laws would have easily been upheld under the "intermediate" standard the Solicitor General proposed, as adopted below and in *Schrader*, *Drake*, *Woollard*, *Kwong*, *Kachalsky*, and *Heller II*. The District's intermediate scrutiny arguments could have been written by any of these later courts. The District's laws would have been upheld not because they were grounded in Framing-era practice – obviously, they were not – but because in *every* Second Amendment case, the government asserts an "interest in regulating dangerous weapons," and the lower courts reflexively defer to the government's judgment that its laws "further" those public-safety interests "without unduly burdening any asserted right."

Indeed, so-called "intermediate" review, as seen below and in every Second Amendment case pending

before or on its way to this Court, is indistinguishable from the "reasonableness" standard that the District of Columbia proffered in *Heller*. Under that standard, courts would rubber-stamp "the predictive judgment of the District's Council on a quintessentially legislative matter." *Id.* at 28. That, too, reads very much like the "intermediate" scrutiny Second Amendment opinions coming before the Court this term.

The Solicitor General's *Heller* brief triggered a comprehensive response from *amicus curiae* Goldwater Institute, which noted that the Government had changed its position regarding the application of strict scrutiny to the Second Amendment:

> [I]n urging this Court not to review [*United States* v. *Emerson*, 270 F.3d 203 (5th Cir. 2001)], the government confirmed that the United States believed that "the Second Amendment more broadly protects the rights of individuals" and that *Emerson* applied "strict scrutiny" and "did not purport to apply a relaxed standard of review."

Brief of Goldwater Institute as *Amicus Curiae*, *District of Columbia* v. *Heller*, No. 07-290 ("Goldwater Br."), at 3 (quoting Brief for the United States in Opposition, *Emerson* v. *United States*, No. 01-8780, at 19 n.3, 21). "Without acknowledging its change of course to this Court, the government now advocates the very 'relaxed standard of review' it declined to endorse before this Court just five years ago." Goldwater Br. at 3 (footnote omitted).

Goldwater then observed that

> [t]he government would have this Court find that the Bill of Rights expressly protects a personal, fundamental right, and then decline to afford it the standard of judicial protection afforded to all other such rights. No other personal right, at its core, is protected through only "intermediate" scrutiny. Instead, that level of scrutiny is afforded in circumstances that less clearly implicate the essence of an enumerated personal right, or in circumstances where some *upward* adjustment to rationality review is required.

Id. at 5. The brief explored intermediate scrutiny's role, pointing out that

> [a]t base, intermediate scrutiny is simply an extension of rational basis review. See *Plyler* v. *Doe*, 457 U.S. 202, 217 n.16 (1982) ("'intermediate' scrutiny permits us to evaluate the rationality of the legislative judgment" concerning quasi-suspect classes). It raises the level of judicial scrutiny in areas where legislatures are otherwise free to regulate; it does not lower the protection given to rights that are meant to be immune from legislative infringement. Intermediate scrutiny is not, and is not intended to be, a substitute for strict scrutiny applied to core individual rights and liberties explicitly enumerated in the Constitution.

Id. at 18-19. These points are well-worth recalling, and explain the ease with which today's Second

Amendment courts have blurred the line between intermediate and rational basis review.

For his part, Heller not only rejected the weaker forms of means-ends scrutiny urged by the District and the Solicitor General, but asked this Court to forego, at least in his case, standards of review entirely. "[T]his case does not call upon the Court to determine the standard of review applicable to regulations of Second Amendment rights." Respondent's Brief, *District of Columbia* v. *Heller*, No. 07-290, at 4.

"To determine whether a particular weapon falls within the Second Amendment's protection, the Court need not apply any particular standard of review. The question is categorical. . . ." *Id.* at 41. As the District conceded that a functional firearms ban lacking a home self-defense exception would violate an individual Second Amendment right, the only dispute on that score was whether the District's law contained such an exception. It did not. *Id.* at 52-54. As Heller summed up the methodological landscape:

> [T]his case does not require the application of any standard of review, because it involves a ban on a class of weapons protected under [*United States* v. *Miller*, 307 U.S. 174 (1939)] and a statutory interpretation dispute concerning whether a particular provision enacts a functional firearms ban.

Id. at 55. Only in the alternative – "should the Court venture to comment on the standard of review governing

the regulation of Second Amendment rights," *id.*, did Heller press his strict scrutiny claim.

This Court adopted Heller's proposed approach, and declined to employ balancing tests. It struck down the handgun ban because handguns are protected "arms" – "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes," *Heller*, 554 U.S. at 625, but "the sorts of weapons protected were those 'in common use at the time.'" *Id.* at 627 (citation omitted). The District's functional firearm ban failed as an interpretive matter. The law "makes it impossible for citizens to use [firearms] for the core lawful purpose of self-defense and is hence unconstitutional." *Id.* at 630.

Categorical and interpretive solutions to Second Amendment problems remain preferable to means-ends scrutiny wherever possible. See, *e.g.*, *Moore*, 702 F.3d at 941. Means-ends scrutiny can play a role in evaluating the constitutionality of laws neither having direct Framing-era antecedents nor literally contradicting a constitutional command, but it risks tremendous abuse absent this Court's strong guidance and close supervision.

The means-ends process requires first identifying a constitutional right – through text, history, tradition and with the aid of this Court's precedent (including *Heller* and *McDonald*). Only upon concretely defining a right can that right's values be weighed against regulatory interests and alternatives.

Standards of review are not tools by which courts determine a right's content, thereby balancing rights out of existence. Disagreement with the right – a belief that the right's exercise is inherently harmful – can never be a valid regulatory interest. Discouraging or frustrating a right's exercise cannot serve the public interest.

It should not be surprising that the Solicitor General, ordinarily tasked with arguing that just about anything and everything the government does is constitutional, would have devised a Second Amendment test reliably yielding precisely that result. But that test, so deferential that it would have all-but assuredly saved Washington, D.C.'s handgun and functional firearm bans, was argued, considered – and rejected – by this Court in *Heller*. The only surprise is that the lower courts act as though the United States had prevailed – making the necessary concessions to the Second Amendment's ratification, only to erase the right under the guise of "intermediate" scrutiny.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

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