No. 14-704

IN THE
Supreme Court of the United States

ESPANOLA JACKSON, *ET AL.*, *Petitioner*s,
v.
CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, *ET AL.*, *Respondent*s.

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

Brief *Amicus Curiae* of Gun Owners of America, Inc., Gun Owners Foundation, U.S. Justice Foundation, Lincoln Institute for Research and Education, Abraham Lincoln Foundation, Conservative Legal Defense and Education Fund, and Policy Analysis Center in Support of Petitioners

MICHAEL CONNELLY
U.S. JUSTICE FOUNDATION
932 D Street, Ste. 2
Ramona, CA 92065
Attorney for Amicus U.S. Justice Foundation

ROBERT J. OLSON
HERBERT W. TITUS*
WILLIAM J. OLSON
JOHN S. MILES
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com
Attorneys for Amici Curiae

**Counsel of Record*

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INTEREST OF *AMICI CURIAE*[1]

Gun Owners of America, Inc. and The Abraham Lincoln Foundation for Public Policy Research, Inc., are nonprofit social welfare organizations, exempt from federal income tax under section 501(c)(4) of the Internal Revenue Code ("IRC"). Gun Owners Foundation, U.S. Justice Foundation, The Lincoln Institute for Research and Education, Conservative Legal Defense and Education Fund, and Policy Analysis Center are nonprofit educational organizations, exempt from federal income tax under IRC section 501(c)(3).

These organizations were established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research and to inform and educate the public on important issues of national concern, the construction of state and federal constitutions and statutes, and questions related to human and civil rights secured by law, including the defense of the rights of crime victims, the Second Amendment and individual right to acquire, own, and use firearms, and related issues. Each organization has filed many *amicus curiae* briefs in this Court and other federal courts, including an *amicus* brief in this case below in support of the petition for rehearing.

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to the filing of it; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

In this case, the Ninth Circuit[2] has declined to follow this Court's declaration in District of Columbia v. Heller, 554 U.S. 570 (2008), that the Second Amendment protects an individual right that "shall not be infringed" — "whether or not future legislatures or (yes) even future judges think [it] too broad." *Id.* at 635. In issuing the opinion below, the Ninth Circuit panel appears to have been operating under an assumption that "the appellate power of the supreme court of the United States does not extend to this court," and that "obedience to its mandate [may] be declined." *See* Martin v. Hunter's Lessee, 14 U.S. 304, 323-24 (1816).

In Heller, this Court struck down a District of Columbia ordinance requiring handguns in the home to be disabled. Heller at 630. In this case, the Ninth Circuit upholds just such an ordinance. Jackson v. San Francisco, 746 F.3d 953, 970 (9th Cir. 2014). In Heller, this Court prohibited the use of "a judge-empowering 'interest-balancing inquiry'...." Heller at 634. In this case, the Ninth Circuit employs one. Jackson at 964. In Heller, this Court refused 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

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[2] Ruling on Petitioners' Petition for Rehearing *En Banc*, "no judge requested a vote for en banc consideration." Order of July 17, 2014 denying Appellants' Petition for Rehearing and Petition for Rehearing *En Banc*, Docket No. 12-17803.

governmental interests.'" Heller at 634. In this case, the Ninth Circuit did just that, weighing the "severity of [the] burden on the Second Amendment right" against the "self-evident[ly] important government interest [of] public safety." Jackson at 964-65. In Heller, this Court noted that to employ such a malleable form of judicial review would "result[] in the" opposite conclusion, and a finding that the law is "constitutional." Heller at 634. Not unsurprisingly, in this case the panel reached exactly that opposite conclusion that Heller said it would — deciding that the restriction was "constitutional." Jackson at 958. To quote Justice Scalia — "Q.E.D." Heller at 634.

At each and every opportunity, the Ninth Circuit did exactly what this Court specifically and directly told it not to do. It has denied San Franciscans the right of ready access to constitutionally protected firearms for the purpose of self-defense in the home, based on the alleged government counterclaim of a threat to public safety. Not only has the Ninth Circuit held Heller in total disregard, it has usurped the power of the people, exercised through the adoption of a written constitution, to "establish, for their future government, such principles as, **in their opinion**, shall most conduce to their own happiness[,] the basis, on which the whole American fabric has been erected." *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) (emphasis added). It is up to this Court to decide whether Heller is the law of the land throughout the United States, as this Court ruled in McDonald v. Chicago, 561 U.S. 742 (2010), or if the holding in Heller will be treated as a mere *dictum*, to be recited but then disregarded.

ARGUMENT

I. THE NINTH CIRCUIT PANEL'S OPINION DIRECTLY CONFLICTS WITH HELLER.

In Heller, the invalidated D.C. ordinance required handguns within the home to be at all times "disassembled or bound by a trigger lock or similar device...." *Id.* at 630. This Court stated in no uncertain terms that such a restriction "makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional." *Id.* In the present case, the Ninth Circuit upheld a San Francisco ordinance (section 4512) that requires handguns within the home at all times to be "stored in a locked container or disabled with a trigger lock" unless "[t]he handgun is carried on the person...." Jackson v. San Francisco, 746 F.3d 953, 958 (2014).

These two regulations are nearly identical, aside from San Francisco's narrow exception for handguns "carried on the person." But this is no meaningful distinction because, as the Ninth Circuit admitted, "as a practical matter, section 4512 sometimes requires that handguns be kept in locked storage or disabled with a trigger lock." *Id.* at 964.

In the Ninth Circuit's words, the San Francisco ordinance "sometimes" (or more realistically, most of the time) has the same "unconstitutional" effect as the District's ordinance — to deprive Americans of their right to keep a "lawful firearm in the home operable for the purpose of immediate self-defense." Heller at 635.

Indeed, the best that can be said for the San Francisco ordinance is that, while the D.C. ordinance infringed Second Amendment rights all of the time, the San Francisco ordinance infringes Second Amendment rights only some of the time. Petitioners note that "law-abiding individuals must render their handguns inoperable or inaccessible precisely when they are needed most, whenever they are not physically carrying them on their persons — including when they are asleep in the dark of night...." Pet. at 1. The panel freely admitted that the San Francisco ordinance "limit[s] ... Second Amendment rights,"[3] nearly conceding that the ordinance "infringes" Second Amendment rights. 746 F.3d at 957. But of course to "limit" is to impose a new boundary on an action, while to "infringe" is to cross an existing boundary. *See* Webster's Encyclopedic Unabridged Dictionary of the English Language ("Webster's Dictionary") (Gramercy Books, New York, 1989), pp. 731, 831. It is a distinction without a difference. Both words describe violations of Second Amendment rights.

The Ninth Circuit's action below is reminiscent of the Montana Supreme Court's recent attempt to circumvent this Court's categorical holding in Citizens

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[3] The panel held the San Francisco regulations to be constitutional even while admitting they **"limit but do not destroy** Second Amendment rights...." 746 F.3d at 957 (emphasis added). This judicial confession stands in stark contrast to the Second Amendment, which demands that the right "**shall not be infringed**."

United[4] that "political speech does not lose First Amendment protection simply because its source is a corporation." *See* American Tradition Partnership, Inc. v. Bullock, ___ U.S. ___, 132 S.Ct. 2490, 2491 (2012). In Bullock, the Montana courts treated Citizens United as fact-dependent and therefore inapplicable to Montana's historic corporate culture of political corruption. *See* Amer. Trad. at 2491 (Breyer, J., dissenting). Likewise, the Ninth Circuit here treated the Second Amendment principle in Heller as dependent upon the court's appraisal of the expectations and practices of "San Franciscans." 746 F.3d at 964. But Heller, like Citizens United, does not turn on malleable policy nuances and sociological "fact" scenarios, to be investigated and appraised by the judiciary. *Compare* McDonald at 3048-3050 *with* Amer. Trad. at 2491.[5]

By engaging in such malleable judicial maneuvering, the Ninth Circuit easily found a way to uphold a statute nearly identical to one that this Court has already struck down. Disregarding the Second Amendment's plain and unambiguous text, the appellate panel upheld the ordinance using the "two-step" test commonly adopted and used by the lower courts to circumvent Heller and the Second Amendment. In step one, the panel was forced to

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[4] Citizens United v. Federal Election Commission, 558 U. S. 310, 342-343 (2010).

[5] In Bullock, this Court summarily reversed the Montana Court. *Id.* at 2490.

admit that the San Francisco ordinances burden "core" fundamental rights. *Id.* at 961. In step two, however, the panel was free to conclude that the burden imposed on self-defense in the home is "indirect" and thus insubstantial. *Id.* at 964. Thus, the panel determined that it was free to apply intermediate scrutiny to the ordinances. *Id.* at 969. Employing intermediate scrutiny, the panel recited the representations made by San Francisco, and then rubber-stamped its ordinances.[6]

II. A STATE OF OPEN REBELLION EXISTS IN THE LOWER FEDERAL COURTS.

Since Heller was decided in 2008, it has been met with great hostility in the lower federal courts, for at least two reasons.

A. Judicial Antipathy toward Gun Rights.

First, Heller declared unequivocally that the Second Amendment protects an individual right to possess and use firearms, whereas the federal judiciary was then, and is now, largely composed of judges who hold deeply rooted, anti-gun views. *See* G. Reynolds & B. Denning, "*Heller*'s Future in the Lower Courts," 102 NORTHWESTERN L. REV. at 2039 (2008) ("the courts of appeals have a history of more or less open hostility to claims of a private right to arms").

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[6] *See* Brief Amicus Curiae of Gun Owners of America, Inc., *et al.* in the U.S. Court of Appeals for the Ninth Circuit, Docket No. 12-17803, July 3, 2014, pp. 14-20, http://www.lawandfreedom.com/site/firearms/Jackson%20GOA%20amicus%20brief.pdf.

Prior to Heller, the "collective rights" approach "characterized virtually all writing on the subject from the federal courts of appeals after the Supreme Court's 1939 opinion" in U.S. v. Miller, 307 U.S. 174 (1939).[7] The federal judiciary's "collective rights" jurisprudence was described as "a mixture of sheer opposition to the idea of private ownership of guns and the perhaps subconscious fear that altogether plausible, perhaps even 'winning,' interpretations of the Second Amendment would present real hurdles to those of us supporting prohibitory regulation." S. Levinson, "The Embarrassing Second Amendment," 9 YALE L. J. 637-659 (1989). Today, "[n]ine of the 13 federal courts of appeal now have a majority of judges who were appointed by anti-gun presidents,"[8] and it is no secret that the legal opinions of judges more often reflect more of their personal political viewpoints and less of any principled legal reasoning.[9]

B. Judicial Antipathy toward the Second Amendment Text.

Second, in Heller, this Court used none of the

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[7] *See* Heller's Future at 2036.

[8] C. Cox, "The Judiciary's Role In Fundamental Transformation," The Daily Caller, Nov. 26, 2014, http://dailycaller.com/2014/11/26/the-judiciarys-role-in-fundamental-transformation/.

[9] *See, e.g.*, H. Willis, "The Doctrine of the Supremacy of the Supreme Court," 6 INDIANA L. J. 241 (1931) ("more frequently ... a change in the position of the United States Supreme Court has been due to ... a change in the personnel of the Bench").

familiar "standards of scrutiny" to review the law at issue. Instead, the Court returned to an unfamiliar method of constitutional interpretation that had largely been lost in many aspects of American jurisprudence for many decades: a search for the meaning of the constitutional text itself. At oral argument in Heller, Chief Justice Roberts warned against the District's invitation to import existing First Amendment balancing tests to the Second Amendment, calling them unnecessary "baggage."[10] Following that reasoning, the Court's majority opinion noted that a member of the People who keeps arms for self-defense in the home may do so regardless of any alleged important or even compelling government interest in keeping him from doing so. Heller at 635.

In that sense, Heller was outside the box. The lower courts have clearly found themselves uncomfortable with and unaccustomed to Heller's textual reasoning. However, rather than attempt to employ the tools given them by the Heller majority, the lower courts have reverted to what is familiar, safe, and known.

In order to limit Heller, the lower courts have scoured Heller in an effort to tease out any isolated words or phrases which can be claimed to support their continued use of interest-balancing tests. For example, various courts have claimed that Heller's explicit rejection of "rational basis" (*id.* at 629 n.27) means that all other balancing tests are left on the

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[10] Heller oral argument at 44.

table. *See* Jackson at 960. Other courts have claimed that Heller's statement that the D.C.'s ordinance failed "[u]nder any of the standards of scrutiny" (Heller at 628-29) means only that in Heller it was not necessary to choose among the standards of scrutiny. *See* United States v. Marzzarella, 614 F.3d 85, 95 (3rd Cir. 2010). Generally, the lower courts have claimed that Heller "failed" or "declined" to establish a level of scrutiny, and then have conveniently appointed unto themselves the authority to establish the appropriate test. *See, e.g.*, U.S. v. Chester, 628 F.3d 673, 676, 686 (4th Cir. 2010).

C. The Post-Heller Two-Step.

The test that has been almost uniformly adopted by the lower courts in post-Heller Second Amendment cases is known as the "two-step" approach. "Step one" of this approach asks "whether the challenged law burdens conduct that falls within the scope of the Second Amendment right, as historically understood." U.S. v. Greeno, 679 F.3d 510, 518 (6th Cir. 2012). Under Heller, this should be the only step. If conduct is outside the scope of the Second Amendment, then the Amendment does not apply. However, (i) if a person is part of the People, (ii) a weapon is an "arm" and (iii) an activity involves "keeping" or "bearing" — then the Second Amendment provides its own unequivocal and unambiguous standard of review: "shall not be infringed." If a multi-part test is required by judicial sensibilities, then it should be this three-part test.

Unfortunately, the lower courts have not been

content with such a fixed textual standard, as it is not sufficiently "judge-empowering." *See* Heller at 634. Thus, they have created "step two" of the approach, in order to provide judges the freedom to reach the results they desire. "Step two" is further subdivided into two prongs, where a court first selects, then applies, one form or another of judicial interest balancing. *See* Greeno at 518. The second prong created by the lower courts abandons the text, and divides the Second Amendment into atextual categories — so-called "core" and "non-core" rights. United States v. Marzzarella, 614 F.3d 85, 92 (3d. Cir. 2010). Under this approach, laws affecting "core" rights typically get strict scrutiny, while laws affecting "non-core" rights get lesser forms of scrutiny. *Id.* at 97-99.

Unsurprisingly, as it has turned out in the lower courts, "core" rights consist **only** of the narrow Heller holding — the right to keep a handgun in the home for self defense.[11] "Non-core" rights consist of everything else. In reality, this decision to distinguish between Heller and "everything else" has acted as camouflage, giving the appearance of fidelity to Heller, but in reality freeing up the courts to disregard Heller entirely.

Although Heller used the text of the Second Amendment as its test for Second Amendment

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[11] Not every court has so limited Heller. The Seventh Circuit has held that Heller's statement about the acuteness of self-defense in the home "doesn't mean [self defense] is not acute outside the home." Moore v. Madigan, 702 F.3d 933, 935 (7th Cir. 2012).

challenges, that approach has proven alien to the lower courts. They have reverted to balancing tests, deciding that they must "choose" between strict and intermediate scrutiny. Under the "two-step" approach, courts pay lip service to the idea that **in theory** there may be cases where strict scrutiny applies,[12] but **in practice** there are almost none. The Sixth Circuit is the only court of appeals of which *amici* are aware that has chosen to apply real strict scrutiny in a post-Heller challenge. *See* Tyler v. Hillsdale County Sheriff's Dep't, 2014 U.S. App. LEXIS 23929, *45 (6th Cir. 2014).[13] After Heller, intermediate scrutiny (or a derivative under another name) has been applied to just about every gun law challenge.[14]

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[12] *See* U.S. v. Masciandaro, 638 F.3d 458, 470 (4th Cir. 2011).

[13] A small minority of other panels have avoided wading into the level-of-scrutiny quagmire in the first place, such as that headed by Judge Posner in the Seventh Circuit, who relied solely on Heller and held that an Illinois law prohibiting all form of carry was unconstitutional as a preliminary matter, without engaging in any standard of review. Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012). Judge Posner's approach was later followed by the Ninth Circuit. *See* Peruta v. County of San Diego, 742 F.3d 1144, 1173 (9th Circuit 2014) (currently on petition for rehearing).

[14] *See* U.S. v. Booker, 644 F.3d 12, 25 (1st Cir. 2011); Kachalsky v. County of Westchester, 701 F.3d 81, 93-94 (2nd Cir. 2012); U.S. v. Marzzarella, 614 F.3d 85, 97 (3rd Cir. 2010); U.S. v. Masciandaro, 638 F.3d 458, 470-71 (4th Cir. 2011); NRA v. ATF, 700 F.3d 185, 195 (5th Cir. 2012); Ezell v. City of Chicago, 651 F.3d 684, 708 (7th Cir. 2011) (applying something "more rigorous" than intermediate scrutiny but "not quite 'strict scrutiny'"); U.S. v. Chovan, 735 F.3d 1127, 1136 (9th Cir. 2013); U.S. v. Reese, 627 F.3d 792, 802 (10th Cir. 2010); Heller v. D.C., 670 F.3d 1244, 1270 (D.C. Cir. 2011).

In this case, the Ninth Circuit has gone even further. Here, the Ninth Circuit was not able to distinguish between "core" and "non-core" conduct, since the San Francisco ordinances regulate the same conduct as the District's in Heller. Nevertheless, even though forced to admit that the San Francisco ordinances burden "core" Second Amendment rights, the Ninth Circuit **still** employed intermediate scrutiny based on the notion that the burden is not a severe one — since it only infringes the Second Amendment some of the time. *Id.* at 964.

III. THIS COURT'S INTERVENTION IS NECESSARY TO ENSURE CONSTITUTIONAL UNIFORMITY.

In the earliest days of the American constitutional republic, the founders aspired to be ruled by law, not by men. To that end, Article III, Section 1 establishes an independent judicial department composed of judges who "hold their offices during good behavior" and "receive for their services ... compensation which shall not be diminished...." "The complete independence of the courts of justice," they believed, "is peculiarly essential in a limited constitution." *See* Federalist No. 78.[15]

Article III, Section 1 vests "[t]he judicial Power of the United States[] in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." To "avoid the confusion which

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[15] Federalist No. 78, *The Federalist* (G. Carey & J. McClellan, eds., Liberty Fund: 2001).

would unavoidably result from the contradictory decisions of a number of independent judicatories," Article III, Section 1 "establish[es] one court paramount to the rest — possessing a general superintendence, and authorized to settle and declare in the last resort, a uniform rule of civil justice." *See* Federalist No. 22.

As Justice Story observed in his acclaimed opinion in Martin v. Hunter's Lessee, the "uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution" is a "necessity"[16]:

> Judges of equal learning and integrity, in different states, might differently interpret ... the constitution itself: If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, ...the constitution of the United States would be different in different states.... The public mischiefs that would attend such a state of things would be truly deplorable.... [*Id.* at 348.]

Although Justice Story penned these words well before the present system of lower federal courts was established, issues of uniformity of judicial decisions in cases arising under the Constitution are, if anything, more numerous and challenging. Such is the case in the aftermath of Heller. *See* Section II, *supra.*

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[16] *Id.,* 14 U.S. (1 Wheat) 304, 347-348 (1816).

If this Court is to attain national consistency, as well as its supremacy in Second Amendment cases, it must recognize that "it is the function of the Supreme Court of the United States to define and maintain the doctrine of [its] supremacy" because "[n]either the Constitution nor any of the doctrines found in it can compel obedience to themselves. Yet each and all of these doctrines are likely to be violated." *See* Willis at 224-25. The Second Amendment should provide the same protections to Americans living on the West Coast as the East Coast. If the District of Columbia may not prohibit its citizens from possessing operable firearms within the home for immediate self defense, then neither may San Francisco. This Court's intervention is necessary in this case to remind the Ninth Circuit that it is, indeed, an "inferior" court — under the authority of the U.S. Constitution — and not a law unto itself.

CONCLUSION

It is indisputable that the federal judiciary got it wrong before Heller, having determined that a right of "the People" protected nothing more than a collective right to serve in a militia controlled by "the State." That same judiciary is getting it wrong now, with many courts determining that a fundamental right which the Second Amendment itself clearly states "shall not be infringed" can be "burdened,"[17]

[17] Marzzarella, 614 F.3d at 95.

"limited,"[18] or even "infringed"[19] through the use of intermediate scrutiny. As expected, "lower-court foot-dragging [has] limit[ed] Heller's reach."[20] The view of the Second Amendment in the lower courts has been essentially unchanged by Heller, with most federal judges merely paying lip service to this Court's holdings, before tossing them aside in favor of tried-and-true interest-balancing tests that permit judges to do literally whatever they want.

Heller and McDonald are unquestionably this Court's most important Second Amendment decisions. Yet their holdings are being strategically evaded — if not outrightly ignored — by the lower courts who are unwilling to yield power to the constitutional text. It is up to this Court to decide whether Heller is to have any continuing legal significance other than a symbolic one.

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

MICHAEL CONNELLY
U.S. JUSTICE FOUNDATION
932 D STREET, STE. 2
Ramona, CA 92065

ROBERT J. OLSON
HERBERT W. TITUS*
WILLIAM J. OLSON
JOHN S. MILES

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[18] Jackson at 957-58.

[19] Kolbe v. O'Malley, 2014 U.S . Dist. LEXIS 110976, p. *45.

[20] G. Reynolds & B. Denning, "*Heller*'s Future in the Lower Courts," 102 NORTHWESTERN L. REV. at 2035 (2008).

Attorney for Amicus
U.S. Justice Foundation

**Counsel of Record*
January 15, 2015

JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com
Attorneys for Amici Curiae