NO. _____

In the
Supreme Court of the United States

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC.; ANDREW M. PAYNE; AND KATHERINE TAGGART,

Petitioners,

v.

BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, ET AL.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under federal law, it is illegal for a licensed firearms dealer to sell a handgun or handgun ammunition to anyone under the age of 21. 18 U.S.C. § 922(b)(1). Because everyone who sells firearms on anything even approaching a regular basis must be federally licensed, this restriction precludes law-abiding adults under the age of 21 from purchasing handguns from the most common (and most logical) sources. According to the panel decision below, this categorical burden on the fundamental right to keep and bear arms passes constitutional muster because law-abiding young adults likely do not possess Second Amendment rights *at all*, but in any event are sufficiently removed from the "core" of the Amendment's concern that their rights may be infringed based on Congress' factually unsupported "predictive judgment" that they are too "irresponsible" to be entrusted with them. In an opinion dissenting from denial of rehearing en banc, six judges found this dubious logic impossible to square with this Court's holdings in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), that the Second Amendment protects a *fundamental* individual right that may not be relegated to "second-class" status.

The question presented is:

Whether a nationwide, class-based, categorical ban on meaningful access to the quintessential means to exercise the right to keep and bear arms for self-defense can be reconciled with the Second Amendment, the equal protection guarantee, and this Court's precedents.

PARTIES TO THE PROCEEDING

Petitioners are the National Rifle Association of America, Inc., Andrew M. Payne, and Katherine Taggart. Along with Rebekah Jennings and Brennan Harmon, the NRA and Payne were plaintiffs and appellants below. Since the case was commenced, Jennings and Harmon have turned 21, and Taggart, who is 19, has been added as a plaintiff.

Respondents, who were defendants and appellees below, are the Bureau of Alcohol, Tobacco, Firearms, and Explosives; B. Todd Jones, in his official capacity as acting director of the Bureau of Alcohol, Tobacco, Firearms, and Explosives; and Eric H. Holder, Jr., U.S. Attorney General.

CORPORATE DISCLOSURE STATEMENT

The National Rifle Association of America, Inc., has no parent corporation. No publicly held company owns 10% or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

It has been five years since this Court concluded in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that the Second Amendment secures an individual right to keep and bear arms, and three years since the Court underscored in *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), that this individual right is a fundamental one. Given 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, one would have expected a major reconsideration of extant firearms laws to have occurred. It has not. Instead, jurisdictions have engaged in massive resistance to the clear import of those landmark decisions, and the lower federal courts, long out of the habit of taking the Second Amendment seriously, have largely facilitated the resistance.

The decision below is a case in point. In the pre-*Heller* era, Congress filled an entire chapter of the United States Code with firearms regulations. Perhaps no provision in that chapter is more obviously incompatible with an individual right subject to some form of heightened scrutiny than the provisions at issue here, which effectively preclude adults under the age of 21 from purchasing the quintessential self-defense weapon from the most common, obvious, and regulated sources (yet permit them to purchase handguns in circumstances that actually render the prohibitions well-nigh irrational). Nonetheless, both lower courts deemed it doubtful that the Second Amendment was even implicated, and both courts concluded that any Second

Amendment rights could be overridden on the flimsiest of theories that adults in the first three years of their legal majority are too "irresponsible" to be entrusted with them. As six judges who dissented from the denial of rehearing en banc recognized, that reasoning is at profound odds with this Court's holding that the individual right to keep and bear arms is a fundamental one, and even more so with its insistence that this fundamental right may not be relegated to second-class status. It is unthinkable that a court would allow Congress to declare law-abiding individuals in the first three years of their legal majority too "irresponsible" to be entrusted with First Amendment rights or to exercise fundamental unenumerated rights to autonomy. And this Court has already rejected one post-*Heller* effort to treat the Second Amendment as a lesser right.

Regrettably, the decision below is not an outlier in the post-*Heller* landscape. It is instead reflective of a stubborn resistance to treating *Heller* and *McDonald* like other decisions of this Court. Jurisdictions across the country have tried to narrow those decisions to the precise laws they considered, expressing doubt about whether they extend outside the home or even to a summer home. The federal government for its part has categorically deemed a whole class of legal adults unsuitable for exercising Second Amendment rights, and the courts below condoned it. Surely that is not what this Court intended when it admonished that "the enshrinement of" the Second Amendment "necessarily takes certain policy choices off the table." *Heller*, 554 U.S. at 636. The time has come for the Court to make clear that *Heller* and *McDonald* did more than invalidate a

collection of outlier ordinances. The Framers' decision to enshrine the Second Amendment and this Court's decisions recognizing that the right it secures is both individual and fundamental are decisions with consequences. One obvious consequence is that individuals above the legal age of majority cannot be denied any meaningful ability to purchase the quintessential means for exercising the core individual right. This Court should grant certiorari and reaffirm the fundamental nature of the Second Amendment.

OPINIONS BELOW

The panel opinion of the Court of Appeals is reported at 700 F.3d 185 and reproduced at App. 3–56. The order of the Court of Appeals denying rehearing en banc and the opinion of six dissenting judges are reported at 714 F.3d 334 and reproduced at App. 57–85. The order of the District Court granting summary judgment to respondents is not reported but is reproduced at App. 86–106.

JURISDICTION

The Court of Appeals issued its opinion on October 25, 2012, and denied petitioners' timely petition for rehearing en banc on April 30, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portions of the Second, Fifth, and Fourteenth Amendments to the United States Constitution, 18 U.S.C. §§ 921 and 922, and 27

C.F.R. §§ 478.96, 478.99, and 478.124 are reproduced at App. 109–77.

STATEMENT OF THE CASE

A. Statutory and Regulatory Scheme

This case involves a challenge to a set of federal laws and regulations that bar law-abiding adults under the age of 21 from purchasing handguns and handgun ammunition in the most common and logical of circumstances. Under federal law dating back to the pre-*Heller* era, it is "unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver—

> (1) any firearm or ammunition to any individual who the licensee knows or has reasonable cause to believe is less than eighteen years of age, and, if the firearm, or ammunition is other than a shotgun or rifle, or ammunition for a shotgun or rifle, to any individual who the licensee knows or has reasonable cause to believe is less than twenty-one years of age[.]

18 U.S.C. § 922(b)(1); *see also* 27 C.F.R. § 478.99(b)(1) (same). Because federal law also prohibits anyone "except a licensed importer, licensed manufacturer, or licensed dealer" from "engag[ing] in the business of importing, manufacturing, or dealing in firearms" or ammunition, 18 U.S.C. § 922(a)(1); *see also id.* § 921(21), section 922(b)(1) operates to preclude law-abiding adults under the age of 21 from participating in the licensed market for handguns.

Section 922(c) reinforces this ban by prohibiting a licensed dealer—also known as a "federal firearm

licensee" ("FFL")—from selling a firearm to someone "who does not appear in person at the licensee's business premises (other than another licensed importer, manufacturer, or dealer)" unless the person submits a sworn statement that, among other things, "in the case of any firearm other than a shotgun or rifle, [he or she is] twenty-one years or more of age." *Id.* § 922(c)(1); *see also* 27 C.F.R. §§ 478.124(a), (f); 478.96(b).

Congress enacted these federal laws in 1968 as part of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197. At the time, males were required to register for the Selective Service when they turned 18 and, as had been the case since the founding, were fully eligible to enlist in the military. *See* Selective Service Act of 1948, Pub. L. No. 62-759, §§ 3–4, 62 Stat. 604, 605–06 (1948); Universal Military Training and Service Act, Pub. L. No. 65-51, § 1(c)–(d), 65 Stat. 75, 76 (1951); Act of May 8, 1792, 1 Stat. 271 ("Militia Act"). Nonetheless, 21 was still considered the age of majority for other purposes, including, in some states, the right to vote. *See Oregon v. Mitchell*, 400 U.S. 112 (1970). That changed with the ratification of the Twenty-Sixth Amendment in 1971; since then, individuals who have reached the age of 18 generally have been considered legal adults entitled to all the same fundamental rights as other adults.

Since the Twenty-Sixth Amendment was ratified, Congress has amended its age-based firearms regulations to prohibit individuals *under* the age of 18 from possessing handguns and to prohibit the transfer of handguns to these minors in

most circumstances. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110201, 108 Stat. 1796, 2010 (adding 18 U.S.C. § 922(x)). Congress has not imposed any possession prohibition on those who have reached age 18, but it nonetheless has left in place the prohibition on handgun and handgun ammunition *sales* to adults under age 21.

The net effect of this web of federal statutes and regulations is that law-abiding adults under age 21 may *possess* handguns, but they may obtain them in only two ways. First, BATF has advised that a licensed dealer may sell a handgun to someone age 21 or older, such a parent or guardian, who is purchasing it as a gift for someone between the ages of 18 and 20 (unless state or local law prohibits such sales). *See* App. 7 n.1. Second, because the term "engaged in the business" of dealing in firearms does "not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms," 18 U.S.C. § 921(a)(21)(C), an 18-to-20-year-old may purchase a handgun from a casual, unregulated seller (again, unless state or local law prohibits such sales). In other words, federal law precludes a 19-year-old from purchasing a handgun through the normal and logical course of a heavily regulated transaction requiring a background check and registered record of the sale, but does not preclude a 19-year-old from buying a handgun at a garage sale.

B. Parties and Proceedings Below

1. The National Rifle Association of America, Inc., ("NRA") is America's oldest civil rights organization and is widely recognized as its foremost defender of the Second Amendment. The NRA was founded in 1871 by Union generals who, based on their experiences in the Civil War, desired to promote marksmanship and expertise with firearms among the citizenry. The NRA is America's leading provider of firearms marksmanship and safety training for both civilians and law enforcement. Today, the NRA has approximately five million members, including tens of thousands of 18-to-20-year-olds.

The NRA and three of its law-abiding adult members under age 21—Rebekah Jennings, Brennan Harmon, and Andrew Payne—brought this lawsuit asserting that the federal ban described above violates both the Second Amendment and the Equal Protection Clause, as applicable against the federal government through the Fifth Amendment. Jennings, a decorated pistol marksman and former member of the U.S. Olympic Development Team, attested that she was injured by the ban because she wished to purchase a handgun, both for self-defense and to further her interest in competitive shooting, but was precluded by the ban from doing so. App. to Pls.' Opp. to Defs.' Mot. to Dismiss (Dist. Ct. Doc. 35) 5–9. Jennings also detailed the many complications with purchasing a handgun or handgun ammunition from an unlicensed seller, including serious safety, quality, and reliability concerns. *Id.* at 7–8. Harmon and Payne likewise attested that, but for the ban, they would purchase handguns from licensed dealers

for self-defense. *Id.* at 11–22. The NRA proceeded on behalf of its tens of thousands of young adult members whose constitutional rights are similarly abridged by the ban, as well as its federally licensed firearm dealer members, who are prohibited by the ban from selling handguns and ammunition to these otherwise-qualified, would-be customers. *Id.* at 1–3.[1]

During the course of the proceeding, Jennings and Harmon have turned 21, and Payne will turn 21 on July 30, 2013. Accordingly, petitioners recently sought and were granted permission to add another plaintiff, Katherine Taggart. Mot. to Add Pl. (Dist. Ct. Doc. 68); June 7, 2013 Order (Dist. Ct. Doc. 71); Third Amended Complaint (Dist. Ct. Doc. 72). Like the other individual plaintiffs, Taggart, a 19-year-old martial arts instructor and NRA member, would like to purchase a handgun from a licensed dealer for self-defense but is prevented by the ban from doing so. App. in Supp. of Mot. to Add Pl. (Dist. Ct. Doc. 70).

2. The government moved to dismiss for lack of standing, arguing, *inter alia*, that adults under age 21 are not injured by the ban because their parents can purchase handguns for them, they can obtain them through unregulated channels, or they can purchase them when they turn 21. In the alternative, the government sought summary judgment; petitioners cross-moved for summary judgment as well.

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[1] The NRA's nationwide membership also includes young adults who, through a combination of the federal ban and state or local laws, have *no* legal avenue for purchasing handguns. *See, e.g.*, Cal. Penal Code §§ 27545, 28050; Md. Code Pub. Safety §§ 5-101(r), 5-106, 5-124; D.C. Code §§ 22-4509, 22-4510.

On September 29, 2011, the District Court granted summary judgment to the government. The court began by concluding that both the individual plaintiffs and the NRA have standing. App. 94–99. As to the individuals, the court explained that each "desires to obtain [a handgun] for lawful purposes, including self-defense," each "identified a specific handgun [he or she] would purchase from an FFL if lawfully permitted to do so," and each would obtain the relief sought "[w]ere the Court to hold that the ban is unconstitutional." App. 95. As to the NRA, the court concluded that it has associational standing on behalf its adult members under age 21, emphasizing the NRA's uncontested "evidence of several other similarly situated members between the ages of 18 to 20 who allege to have been injured by the ban in ways similar to those asserted by the Individual Plaintiffs." App. 96. The court also concluded that the NRA has standing on behalf of "its vendor members" who "would sell handguns to law-abiding citizens in this age range if it were legal to do so." App. 99.

Turning to the merits, the court first concluded that the ban does not violate the Second Amendment. Characterizing this Court's decision in *Heller* as having "carved out conditions and qualifications on the commercial sale of arms as presumptively lawful regulatory measures," the court deemed it "within the purview of Congress, not the courts, to weigh the relative policy considerations and to make decisions as to the age of the customer to whom those licensed by the federal government may sell handguns and handgun ammunition." App. 100, 103. The court also denied petitioners' equal protection challenge,

declaring it sufficient that "Congress identified a legitimate state interest—public safety—and passed legislation that is rationally related to addressing that issue—the ban." App. 105.

3. Petitioners timely appealed, and the Court of Appeals affirmed. Like the District Court, the court first rejected the government's standing argument. Although Jennings and Harmon had turned 21 (and Taggart had not yet been added to the case) by the time its decision issued, the court concluded that "Payne and the NRA, on behalf of its under-21 members, have standing" because the federal ban causes both Payne and those NRA members "a concrete, particularized injury—i.e., the injury of not being able to purchase handguns from FFLs." App. 11–12. The court did not address the NRA's additional basis for associational standing on behalf of its vendor members. App. 13.

Turning to the merits, the court began by adopting what it described as a "two-step inquiry" to resolve Second Amendment challenges, under which "the first inquiry is whether the conduct at issue falls within the scope of the Second Amendment right." App. 17. If it does, the second step is "to apply the appropriate level of means-ends scrutiny." App. 19. According to the court, any "longstanding, presumptively lawful regulatory measure … would likely fall outside the ambit of the Second Amendment" entirely, but even if it did not, such a measure would be subject only to "our version of 'intermediate' scrutiny." App. 21. The court also declared that "a regulation can be deemed

'longstanding' even if it cannot boast a precise founding-era analogue." App. 22.

Applying this two-part test, the court first posited that, "[i]n the view of at least some members of the founding generation, disarming select groups for the sake of public safety was compatible with the right to arms specifically and with the idea of liberty generally." App. 31. To support this proposition, the court cited Revolutionary War provisions disarming those who refused to swear loyalty to the new Nation and laws denying arms to "law-abiding slaves" and "free blacks." App. 31. Although the court did not identify any founding-era laws that denied arms to individuals between the ages of 18 and 20, it insisted "it stands to reason" that they likewise were considered "unworthy of the Second Amendment guarantee" because the age of majority at common law was 21, not 18. App. 34. The court dismissed in a footnote the undisputed fact that, at the time of the Second Amendment's ratification, both the federal government and every state not only permitted but required all 18-year-old males to enroll in the militia. App. 39 n.17. Instead, the court placed great weight on late 19th and early 20th century laws restricting the ability of "'minors' to purchase or use particular firearms while the age of majority was set at age 21." App. 34.

In the court's view, this evidence was sufficient to prove the challenged laws "consistent with a long-standing, historical tradition … [a]t a high level of generality … of targeting select groups' ability to access and to use arms for the sake of public safety," and "[m]ore specifically, … of age- and safety-based

restrictions on the ability to access arms." App. 37. Accordingly, the court noted that it was "inclined to uphold the challenged federal laws at step one" but, "in an abundance of caution," proceeded to analyze whether the laws "pass constitutional muster even if they implicate the Second Amendment." App. 39.

As to that inquiry, the court declared it "[u]nquestionabl[e]" that "the challenged federal laws trigger nothing more than 'intermediate' scrutiny." App. 41. "Like the federal bans targeting felons and the mentally ill," the court reasoned, "federal laws targeting minors under 21 are an outgrowth of an American tradition of regulating certain groups' access to arms for the sake of public safety." App. 41. Such laws do not "violate the central concern of the Second Amendment," moreover, because the Amendment only "protects 'law-abiding, *responsible*' citizens," and "Congress found that persons under 21 tend to be relatively irresponsible." App. 43 (quoting *Heller*, 554 U.S. at 635; emphasis added by Court of Appeals). The court further posited that because the challenged laws "resemble 'laws imposing conditions and qualifications on the commercial sale of arms,'" "they must not trigger strict scrutiny." App. 44 (quoting *Heller*, 554 U.S. at 626–27). Applying its version of intermediate scrutiny, the court upheld the federal scheme. App. 45–55. It also rejected petitioners' equal protection challenge, concluding, like the District Court, that the scheme need satisfy only rational-basis review. App. 55–56.

4. Petitioners sought rehearing en banc, and the court denied the petition by an 8-7 vote. App. 57–58. In a dissenting opinion joined by Judges Jolly, Smith,

Clement, Owen, and Elrod, Judge Jones warned of the "far-reaching" implications of the panel's conclusion "that a whole class of adult citizens, who are not as a class felons or mentally ill, can have its constitutional rights truncated because Congress considers the class 'irresponsible.'" App. 59. "Never in the modern era," she emphasized, "has the Supreme Court held that a fundamental constitutional right could be abridged for a law-abiding adult class of citizens." App. 61.

In her view, "a government entity that seeks significantly to interfere with the Second Amendment rights of an entire class of citizens bears a heavy burden to show, with relevant historical materials, that the class was originally outside the scope of the Amendment." App. 66. Reviewing "the properly relevant historical materials," Judge Jones concluded that "they couldn't be clearer: the right to keep and bear arms belonged to citizens 18 to 20 years old at the crucial period in our nation's history." App. 67. The panel's approach of "rummaging through random 'gun safety regulations' of the 18th century," by contrast, would "justify virtually any limit on gun ownership" and "render *Heller* valueless against most class-based legislative assaults on the right to keep and bear arms." App. 67.

Judge Jones also criticized the majority for the "very weak sort" of "intermediate scrutiny" it applied, and for proceeding "as if any class-based limitation on the possession of firearms justifies any other, so long as the legislature finds the suspect 'discrete' class to be 'dangerous' or 'irresponsible.'" App. 80.

As she pointed out, the same "circular reasoning" would justify class-based restrictions on, "*e.g.* aliens, or military veterans with PTSD"—particularly given uncontested evidence that only 0.58% of 18-to-20-year-olds were arrested for violent crimes in 2010. App. 80. Judge Jones also noted that the challenged ban not only has done little to advance the government's proffered interest over the past 40 years, but also "perversely assures that when such young adults obtain handguns, they do not do so through licensed firearms dealers, where background checks are required." App. 83. In short, she concluded, "banning young adults from the commercial and federally regulated market for 'the quintessential self-defense weapon' is class-based invidious discrimination against a group of largely law-abiding citizens." App. 85.

REASONS FOR GRANTING CERTIORARI

This case is part 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*. As six judges who dissented from the denial of rehearing en banc recognized, it cannot seriously be contended that the panel's decision is reconcilable with that holding. There is no other fundamental right that could be effectively denied to an entire class of law-abiding citizens on the theory that they are too near the age of legal majority or too "irresponsible" to exercise it. Indeed, there is no other fundamental right that an entire class of law-abiding adult citizens has been denied for any reason *at all*.

The panel's effort to identify a historical analog to the age-based restrictions challenged here reveals how incompatible its decision is with this Court's precedents. It is undisputed that 18-to-20-year-olds were not only permitted but *required* to keep and bear arms when the Second Amendment was ratified. The panel not only dismissed that compelling evidence of the Amendment's full applicability to individuals who have reached the age of 18, but identified purported analogs in founding-era laws denying Second Amendment rights to "law-abiding slaves" and "free blacks." While those laws are powerful evidence of the need for the Reconstruction Amendments, reliance on such precedents to deny present-day constitutional rights is nothing short of astonishing. That reliance alone is proof enough that courts are not "tak[ing] seriously *Heller*'s methodology and reasoning," App. 61, and that this Court's intervention in this area of critical importance is sorely needed.

The categorical denial of the quintessential means of exercising the core Second Amendment right to an entire class of legal adults is reminiscent of the complete ban invalidated in *Heller*. This kind of broad restriction flunks any level of meaningful constitutional scrutiny because such a categorical approach is antithetical to the core right the Second Amendment protects. That the courts below could uphold such a blunderbuss approach while purporting to apply heightened scrutiny underscores the need for this Court's intercession. Indeed, the decision below is illustrative of the efforts of lower courts to limit *Heller* and *McDonald* to their facts while ignoring the clear import of their reasoning.

For instance, although the panel purported to presume that adults under age 21 have Second Amendment rights, it then concluded that these law-abiding citizens could be denied those rights because they do not fall within the "core" of the Amendment's protection. Ipse dixit about what constitutes the Amendment's core cannot justify ignoring the Amendment's protections. The core of the First Amendment's free speech guarantee may be political speech critical of the government, but the protection the Amendment provides has never been so limited. And by giving lip service to application of the Second Amendment only to deny any protection to activity deemed to fall outside the Amendment's core, the panel neatly excised from its analysis the very right it purported to presume exists. The Fifth Circuit is not alone in applying this two-step technique to narrow the scope of the right to keep and bear arms. The Second and Fourth Circuits have relied on reasoning every bit as circular to effectively eliminate any right to keep and bear arms outside the home. What is more, these courts have insisted that the restrictions they upheld are constitutional not in spite of but *because of* the burden they impose on the very constitutional rights the courts purported to presume exist.

None of this is remotely consistent with this Court's decisions in *Heller* and *McDonald*. It is too late in the day to argue that the right to keep and bear arms is less fundamental than the other individual rights enumerated in the Constitution. Yet that is the inevitable consequence of the method of analysis that is pervading the lower courts. Because that result is irreconcilable with this Court's

precedents, and more fundamentally, with our Constitution, the Court should grant this petition and put an end to this troubling trend.

I. The Decision Below Is Part Of A Recurring Trend Of Obstinate Resistance To This Court's Holding That The Second Amendment Secures A *Fundamental* Right.

Heller marked a watershed moment in Second Amendment jurisprudence. Resolving a debate that had been ongoing for the better part of a century, this Court concluded that the text, structure, and history of the Second Amendment confirm that it "confer[s] an individual right to keep and bear arms." *Heller*, 554 U.S. at 595. Two years later, the Court concluded in *McDonald* that this individual right is a fundamental one that applies with full force to the states as well. *McDonald*, 130 S. Ct. at 3026 (plurality opinion); *id.* at 3058 (Thomas, J., concurring in part and concurring in the judgment).

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 respond to this landmark decision by reexamining their laws to determine whether they are consistent with the fundamental individual right this Court recognized. It simply could not be that hundreds of jurisdictions operating on the assumption that the Second Amendment protected only collective rights nonetheless uniformly passed laws that were fully compatible with an individual right subject to some form of heightened scrutiny. Some degree of reexamination clearly was necessary. And to the

extent governments failed to undertake that reexamination, one would have expected to see courts engage in serious scrutiny of stringent firearms regulations that pre-date *Heller*.

Instead, the five years since *Heller* was decided have been marked by intransigence by governments and courts that at best have simply been unable to break habits formed during pre-*Heller* days and at worst are engaged in massive resistance to this Court's decisions. While *Heller*'s detractors have begrudgingly accepted that laws *identical* to those invalidated in *Heller* and *McDonald* must fall, many at the same time have endeavored to render both decisions as narrow as possible, limiting the scope of the Second Amendment to the precise circumstances at issue in those cases.

For instance, in what one judge described as "a thumbing of the municipal nose at the Supreme Court," shortly after *McDonald* the City of Chicago attempted to circumvent this Court's decision by imposing a new requirement that all firearms owners obtain training at live shooting ranges, but simultaneously banning live shooting ranges within city limits. *See Ezell v. City of Chicago*, 651 F.3d 684, 712 (7th Cir. 2011) (Rovner, J., concurring in the judgment). Seemingly adopting Chicago's exceedingly minimalist view of *Heller* and *McDonald*, numerous courts have concluded that because those cases involved firearms restrictions *inside* the home, restrictions *outside* the home do not implicate the Second Amendment at all. *See, e.g.*, *Little v. United States*, 989 A.2d 1096, 1101 (D.C. 2010); *Williams v. Maryland*, 10 A.3d 1167, 1169 (Md. 2011);

Commonwealth v. Perez, 952 N.E.2d 441, 451 (Mass. App. Ct. 2011); *cf. United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011) ("On the question of *Heller*'s applicability outside the home environment, we think it prudent to await direction from the [Supreme] Court itself."). Indeed, the Second Circuit would not even make a definitive ruling on whether the Second Amendment applies to a summer home. *See Osterweil v. Bartlett*, 706 F.3d 139 (2d Cir. 2013) (certifying question to New York Court of Appeals rather than giving immediate relief to individual denied permit to possess a handgun in his summer residence).

The decision below is of a piece with this pattern of dogged resistance. Seizing on *Heller*'s reference to the "right of law-abiding, *responsible* citizens to use arms in defense of hearth and home," *Heller*, 554 U.S. at 635 (emphasis added), the panel posited that law-abiding citizens do not possess Second Amendment rights *at all* unless the legislature deems them sufficiently "responsible" to keep and bear arms. Comparing young adults to convicted felons, domestic-violence misdemeanants, and the mentally ill, the court deemed it doubtful that they even possess Second Amendment rights, but held that if they do, they may be stripped of those rights based on a showing that *less than 1%* of people in their age group commit violent crimes (with or without handguns). App. 43, 84–85.

That conclusion is irreconcilable with this Court's holding that the Second Amendment right is a fundamental one that may not be "singled out for special—and specially unfavorable—treatment."

McDonald, 130 S. Ct. at 3043 (plurality opinion). Whatever room for debate *Heller* may have left on the matter, *McDonald* definitively foreclosed any suggestion that the right to keep and bear arms is not fundamental. *See, e.g.*, *id.* at 3037 ("the right to bear arms was fundamental to the newly formed system of government"); *id.* at 3059 (Thomas, J., concurring in part and concurring in the judgment) ("the right to keep and bear arms … is 'fundamental' to the American 'scheme of ordered liberty'").[2] And *McDonald* makes equally clear that courts may not "treat the right recognized in *Heller* as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *Id.* at 3044 (plurality opinion). Indeed, that should have been obvious even before *McDonald*, as this Court has long admonished that no fundamental right may be deemed "less 'fundamental' than" others, and reiterated that there is "no principled basis on which

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[2] Among the many examples of *McDonald*'s explicit recognition that the right to keep and bear arms is fundamental, *see, e.g.*, 130 S. Ct. at 3041 ("Evidence from the period immediately following the ratification of the Fourteenth Amendment only confirms that the right to keep and bear arms was considered fundamental."); *id.* at 3037 ("The right to keep and bear arms was considered no less fundamental by those who drafted and ratified the Bill of Rights."); *id.* at 3042 ("[T]he 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 3040 (39th Congress' "efforts to safeguard the right to keep and bear arms demonstrate that the right was still recognized to be fundamental"); *id.* at 3041 ("In debating the Fourteenth Amendment, the 39th Congress referred to the right to keep and bear arms as a fundamental right deserving of protection.").

to create a hierarchy of constitutional values." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982); *accord Ullmann v. United States*, 350 U.S. 422, 428–29 (1956) ("To view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted application of it. This is to disrespect the Constitution.").

Whether adults under the age of 21 are entitled to the protection of the Second Amendment therefore should have been an easy question. No court today would accept for one moment the notion that Congress could declare 19-year-olds too "irresponsible" to buy books with violent content—let alone do so based on evidence that reading violent books might lead less than 1% of 19-year-olds to engage in violent crimes. In fact, as Judge Jones and five of her colleagues emphasized in dissenting from denial of rehearing en banc, "[*n*]*ever* in the modern era has th[is] Court held that a fundamental constitutional right could be abridged for a law-abiding adult class of citizens." App. 61 (emphasis added). The panel's holding that the Second Amendment rights of young adults may be abridged with impunity therefore renders the right to keep and bear arms precisely the kind of "second-class right" that this Court has unequivocally instructed it is not.

That conclusion is further underscored by the palpable conflict between the decision below and this Court's decisions dealing with age-based restrictions on other fundamental rights. As the Court has emphasized in many contexts, "[m]inors, as well as adults, are protected by the Constitution and possess

constitutional rights." *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976); *see also*, *e.g.*, *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (considering Fourth Amendment rights of 14-year-old); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (considering First Amendment rights of 15- and 16-year-olds). The typical question thus is whether restrictions on the fundamental rights of *minors* are compatible with the Constitution—and they often are not. *See, e.g.*, *Danforth*, 428 U.S. at 74 (holding unconstitutional provision that granted parents an absolute veto over decision of women under the age of 18 to obtain an abortion); *McConnell v. FEC*, 540 U.S. 93, 231 (2003) (holding unconstitutional provision that prohibited individuals "17 years old or younger" from making contributions to candidates or political party committees). There are *no* modern decisions, by contrast, denying fundamental constitutional rights to those who have reached the age of majority on the theory that they are too young to possess them. So long as the Second Amendment protects a right as fundamental as all others, *see McDonald*, 130 S. Ct. at 3044, it simply cannot be the case that other rights—even unenumerated ones—extend to individuals who *have not* reached the age of majority, yet the Second Amendment does not even protect individuals who *have*.

Not only is the decision below flatly inconsistent with *McDonald's* holding that the right to keep and bears arms is a fundamental one; it also "does not take seriously *Heller's* methodology and reasoning." App. 61. As this Court reiterated at the conclusion of its painstakingly detailed historical analysis in *Heller*, "[c]onstitutional rights are enshrined with the

scope they were understood to have when the people adopted them." 554 U.S. at 634–35. Had the panel considered "the properly relevant historical materials," rather than "rummaging through random 'gun safety regulations' of the 18th century," it would have found that the answer "couldn't be clearer: the right to keep and bear arms belonged to citizens 18 to 20 years old at the crucial period in our nation's history." App. 67.

Most obviously, mere months after the Second Amendment was ratified, Congress in its very first effort to "provide for organizing, arming, and disciplining, the Militia," U.S. Const. art. I, § 8, enacted a law requiring that "each and every free able-bodied white male citizen of the respective states, resident therein, *who is or shall be of the age of eighteen years*, and under the age of forty-five years (except as herein after excepted) shall severally and respectively be enrolled in the militia.'" Militia Act, 1 Stat. 271 (emphasis added). Every state in the Nation likewise required able-bodied men to enroll in the militia at no later than age 18. App. 69–74 (collecting laws). These individuals not only were entrusted with the responsibility of bearing arms in defense of their country, but also were required by law to keep their own arms to do so. Militia Act, 1 Stat. 271 (requiring each enrollee, regardless of age, to "provide himself with a good musket or firelock"); *see also United States v. Miller*, 307 U.S. 174, 179 (1939) ("when called for service these men were expected to appear bearing arms supplied by themselves").

Heller and *McDonald* may not have "clarif[ied] the entire field" of Second Amendment analysis, *Heller*, 554 U.S. at 634, but surely they foreclose any suggestion that the Amendment does not protect individuals who, at the time of its ratification, were required by both state and federal law to keep and bear arms in service of the militia. While the right protected by the Second Amendment is by no means limited to militia service, "the threat that the new Federal Government would destroy the citizens' militia by taking away their arms was the reason that the right … was codified in a written Constitution." *Heller*, 554 U.S. at 599; *see also id.* ("[i]t was understood across the political spectrum that the right helped to secure the ideal of a citizen militia"). It is therefore unthinkable that the Second Amendment was not intended to protect at a bare minimum the rights of those who were universally understood to be part of the very militia the Amendment was codified to help secure.

Unsurprisingly, the panel identified not a single founding-era law suggesting otherwise. Instead, the panel deemed it sufficient that, "[i]n the view of at least some members of the founding generation, disarming select groups for the sake of public safety was compatible with the right to arms specifically and with the idea of liberty generally." App. 30–31. The "select groups" it identified include not 18-to-20-year-olds, but rather "law-abiding slaves," "free blacks," and "persons who refused to swear an oath of allegiance to the state or to the nation." App. 31. Hypothesizing that "[t]hese categorical restrictions may have been animated by a classical republican notion that only those with adequate civic 'virtue'

could claim the right to arms," the panel concluded—without identifying a shred of supporting evidence—that "it stands to reason that" "a representative citizen of the founding era" also "would have supported restricting an 18-to-20-year-old's right to keep and bear arms." App. 32, 34. In other words, the panel reasoned that because *some* law-abiding adults were (unjustly) denied *all* constitutional rights at the founding, *other* law-abiding adults may be denied *some* (or, more aptly, *one*) of their constitutional rights today.

When the best that can be said in defense of a law that abridges a fundamental right is that it is "compatible with" the invidious racial discrimination that our Nation fought a civil war and amended the Constitution to rectify, it should be obvious that something has gone seriously wrong. The Reconstruction Amendments were necessary precisely to ensure that fundamental rights could not be denied to an entire class of law-abiding individuals. *McDonald's* conclusion that Second Amendment rights are fundamental for purposes of, *inter alia*, the Reconstruction Amendments should have foreclosed the Court of Appeals' misguided reliance on this unhappy historical chapter. The decision below squarely conflicts with the reasoning and conclusion of both *Heller* and *McDonald*. Moreover, it leaves little room for doubt that unless and until this Court confirms that its decisions in *Heller* and *McDonald* have real consequences for the regulation of firearms, governments and courts are bound to continue attempting to evade them.

II. This Court's Intervention Is Needed To Stem The Tide Of Decisions Applying A Diluted Form Of Scrutiny To Artificially Cabin The Scope Of The Second Amendment.

The decision below is also a prime example of how lower courts are manipulating the constitutional analysis to chip away at the scope of the Second Amendment. As noted, this case, like *Heller*, necessitates no extended discussion of the standard of review. A categorical denial of any meaningful ability to purchase the quintessential self-defense weapon to an entire class of law-abiding adults is just as antithetical to the right enshrined in the Second Amendment as the possession ban invalidated in *Heller*. Nonetheless, both lower courts upheld the ban while purporting to apply some form of heightened scrutiny to "protect" the constitutional right. This Court's intervention is needed to reverse the tide of case law that strangles the Second Amendment right while purporting to apply a form of "heightened scrutiny" to "protect" it. This form of right-denying scrutiny would not be remotely tolerable in the context of any other constitutional right, and this Court should make clear that its recognition of an individual right to keep and bear arms in *Heller* and *McDonald*—and the majority's rejection of Justice Breyer's argument for a diluted form of intermediate scrutiny—were meant to be taken seriously.

Although many courts have adopted the same basic "two-step inquiry" the panel adopted here, they have varied in the degree to which they use that analysis to eviscerate meaningful protection for the

right protected by the Second Amendment. In many (if not most) instances, courts have purported to assume without deciding that "the conduct at issue falls within the scope of the Second Amendment right." App 60; *see, e.g.*, App. 39. Yet they then proceed to apply a watered-down form of "intermediate" (or sometimes even rational-basis) scrutiny, on the theory that the conduct at issue is not within some ill-defined "core" of the Second Amendment right. In other words, they eliminate meaningful protection for conduct they claim to treat as protected by the Constitution by deeming it outside the core of the right.

This is a case in point. Here, the panel purported to proceed on the assumption that adults under age 21 have Second Amendment rights. Yet it then reasoned that, "as with felons and the mentally ill, categorically restricting the presumptive Second Amendment rights of 18-to-20-year-olds does not violate the central concern of the Second Amendment" because the "Amendment, at its core, protects 'law-abiding, *responsible*' citizens." App. 43 (quoting *Heller*, 554 U.S. at 635; emphasis added by Court of Appeals). Likewise, the panel asserted that Congress has an "important" interest in solving the "problem" of "the ease with which young persons—including 18-to-20-year-olds—[a]re getting their hands on handguns." App. 46. (How exactly a regulatory scheme that precludes young adults from purchasing handguns through the most common and heavily regulated channels but leaves them free to obtain handguns from casual sellers at garage sales even achieves that dubious goal remains a mystery.) In effect, then, the panel upheld the challenged laws

on the logic that Congress has an important interest in eliminating the very right the court purported to presume exists.

In that respect, the Fifth Circuit took its cue from the Second Circuit, which applied much the same approach to uphold New York's near-total ban on carrying handguns outside the home. *See Kachalsky v. Cnty. of Westchester*, 701 F.3d 81 (2d Cir. 2012), *cert. denied*, No. 12-845. There, the court likewise purported to assume that the Second Amendment "must have *some* application" outside the home. *Id.* at 89. Yet when it came to determining what level of scrutiny to apply, the court settled on a similarly diluted form of intermediate scrutiny, reasoning that the presumed right to carry a handgun outside the home "falls outside the core Second Amendment protections identified in *Heller*." *Id.* at 94. The court then concluded that New York may deny most law-abiding citizens this presumed right because it has a "substantial, indeed compelling," interest in preventing them from exercising it. *Id.* at 97.

The Fourth Circuit relied on the same dubious logic when upholding Maryland's functional ban on carrying handguns outside the home. *See Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013), *petition for cert. pending*, No. 13-42. Like the Second Circuit, the court purported to "assume that the *Heller* right exists outside the home and … has been infringed." *Id.* at 876. Yet it then relied on the broad generalization that "'public safety interests often outweigh individual interests in self-defense'" outside the home to apply a weak form of intermediate

scrutiny. *Id.* (quoting *Masciandaro*, 638 F.3d at 470). Having declared the right it purported to presume not "*really worth* insisting upon" in most instances, *Heller*, 554 U.S. at 634, the court then concluded that Maryland's scheme is constitutional *precisely because* it restricts the ability to exercise that presumed right. *See Woollard*, 712 F.3d at 879 (holding scheme constitutional "because it reduces the number of handguns carried in public").

Even assuming intermediate scrutiny is appropriate when a law burdens fundamental rights, *but see, e.g.*, *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 54 (1983) ("strict scrutiny [is] applied when government action impinges upon a fundamental right protected by the Constitution"); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16 (1973) (same), the approach these courts have applied bears no resemblance to any legitimate form of intermediate scrutiny. Such a right-denying two-step would not be tolerated in any other context. Commercial speech may lie outside the core protection of the First Amendment, but no court would uphold a commercial speech restriction not because it prevents unlawful or misleading speech, but simply because it reduces the amount of commercial speech. Because such circular reasoning denies the activity in question the constitutional protection that warrants heightened scrutiny in the first place, it is utterly alien to this Court's decisions. To deem firearms restrictions constitutional not in spite of but *because of* the burdens they impose on Second Amendment rights is therefore just another variation on the same theme that the fundamental right to keep and bear arms should be "singled out

for special—and specially unfavorable—treatment." *McDonald*, 130 S. Ct. at 3043 (plurality opinion).

The problems with the toothless form of scrutiny pervading the lower courts do not end there. Rather than engage in any serious examination of whether restrictions on Second Amendment rights are sufficiently tailored to serve an important interest, courts have largely just deferred to the legislatures' self-serving judgments that they are. *See, e.g.*, *Woollard*, 712 F.3d at 881 (deferring to "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"); *Kachalsky*, 701 F.3d at 97 (same). As this Court recently reiterated, it is one thing to defer to a legislature's judgment that a challenged law advances an important interest, but it is another thing entirely to defer to its judgment that a law does so in a manner consistent with the Constitution. *See Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013).

The same undue deference is on full display in the decision below. In upholding the federal age-based restrictions, the panel relied almost exclusively on evidence not that young adults are relatively likely to commit violent crimes, but that those who commit violent crimes are relatively likely to be young adults. App. 47. That is unsurprising since undisputed evidence showed that *only 0.58%* of young adults were arrested for violent crimes in 2010. App. 83. That pales in comparison even to the

2% correlation this Court deemed "unduly tenuous" to allow "maleness … to serve as a proxy for drinking and driving" when it rejected Oklahoma's gender-based restriction on the purchase of 3.2% beer. *See Craig v. Boren*, 429 U.S. 190, 201–02 (1976). If a 2% correlation cannot satisfy intermediate scrutiny when fundamental rights are *not* at stake, *id.* at 202, then surely a paltry 0.58% correlation is manifestly insufficient to justify an age-based restriction on the fundamental right to keep and bear arms. Yet rather than even attempt to distinguish *Craig*, the panel ignored this glaring evidentiary problem in favor of deferring to Congress' "predictive judgments" that young adults "are prone to violent crime." App. 54 & n.21.

And that just scratches the surface of the flaws in the decision below. The court also posited, for instance, that because *Heller* deemed "laws imposing conditions and qualifications on the commercial sale of arms" "presumptively lawful," *Heller*, 554 U.S. at 626–27 & n.26, *every* law imposing *any* kind of restriction on handgun purchases—even, as here, a near-total ban—is "presumptively lawful," no matter its impact on Second Amendment rights. App. 44. (The panel begrudgingly conceded, with considerable understatement, that "[i]t is not clear that the Court had an age qualification in mind when it penned that sentence." App. 44.) The court maintained that an age-based restriction does not seriously burden constitutional rights because those to whom it applies "will soon grow up and out of its reach." App. 45. The court suggested that the government's case for justifying the ban as a crime-prevention measure was *bolstered* by the fact that it achieves the utterly

irrational result of precluding young adults from engaging in the most common and closely regulated handgun transactions, but leaves them free to obtain handguns at garage sales. App. 47–50. The court even deemed lesser scrutiny particularly appropriate because, "unlike the D.C. ban in *Heller*, this ban does not disarm an entire community, but instead prohibits commercial handgun sales to 18-to-20-year-olds—a discrete category." App. 41. That a law abridges the constitutional rights of a discrete minority is typically cause for consternation, not commendation.

It would be one thing if this remarkable decision were the exception to the post-*Heller* norm. But this case is no outlier. It is paradigmatic of the lengths to which lower courts have gone to avoid the necessary implications of *Heller* and *McDonald*. Indeed, the prevailing methodology has led one commentator to observe that it is Justice Breyer's dissent in *Heller*, not Justice Scalia's majority's opinion, that has become the touchstone of Second Amendment analysis. *See* Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 Geo. Wash. L. Rev. 703 (2012). As the *Heller* majority correctly predicted, that "interest-balancing" approach has proven so malleable as to provide "no constitutional guarantee at all." *Heller*, 554 U.S. at 634.

In stark contrast to that approach, a minority of courts and judges have recognized that *Heller* and *McDonald* demand a much more stringent analysis of burdens on Second Amendment rights. For instance, Judge Posner concluded for the court in holding

unconstitutional Illinois' ban on carrying handguns outside the home that any attempt to limit the Second Amendment to the confines of the home amounts to an attempt "to repudiate th[is] Court's historical analysis" in *Heller*. *Moore v. Madigan*, 702 F.3d 933, 935 (7th Cir. 2012). Similarly acknowledging that "it is not our role to re-litigate *Heller* or to bend it in any particular direction," Judge Kavanaugh rejected any form of "judicial interest balancing" in favor of an approach that focuses, as *Heller* and *McDonald* did, on the "history and tradition" of the right to keep and bear arms. *Heller v. District of Columbia*, 670 F.3d 1244, 1269, 1280, 1284 (D.C. Cir. 2011) (Kavanaugh, J. dissenting). Judge Sykes likewise has reiterated that the approach courts are applying merely "pay[s] lip service" to the burden that *Heller* and *McDonald* place on the government to "justif[y] the application of laws that criminalize the exercise of enumerated rights." *United States v. Skoien*, 614 F.3d 638, 654 (7th Cir. 2010) (en banc) (Sykes, J., dissenting). Like the six judges dissenting from the denial of rehearing en banc on this case, those of this minority view have recognized that the prevailing mode of Second Amendment analysis "does not take seriously *Heller*'s methodology and reasoning." App. 61.

This case provides a compelling vehicle for this Court to correct the pervasive errors in the approach that has become so common in the lower courts. As a result of the federal ban and the decision below, law-abiding young adults throughout the Nation are being denied access to the quintessential means for exercising the fundamental right this Court recognized in *Heller* and *McDonald*. And the Fifth

Circuit has already relied on this erroneous decision to justify another equally categorical restriction on the Second Amendment rights of young adults. *See Nat'l Rifle Ass'n of Am., Inc. v. McCraw*, --- F.3d ----, 2013 WL 2156571 (5th Cir. May 20, 2013) (upholding state law that prohibits 18-to-20-year-olds from carrying handguns in public). Significant procedural hurdles also make further percolation of this particular issue impractical, as the very individuals whose rights are denied by the federal ban often age out of the restrictions before litigation can conclude. Here, the temporal problem has been alleviated by, among other things, the participation of the NRA, which seeks to vindicate the rights of its young adult members throughout the Nation. But the NRA likely will face collateral estoppel challenges should it attempt to help facilitate similar litigation in other forums.

Indeed, quite remarkably, the government has consistently insisted throughout this litigation that *no one* has standing to challenge the federal ban. In its view, law-abiding adults under the age of 21 are not injured by the ban *at all* because, among other things, it does not foreclose *every conceivable* means by which they might obtain handguns. *See* App. 12, 94. Relying on the same dubious logic, the government has likewise maintained that the NRA's young adult members have no legally cognizable interest for the NRA to represent on their behalf. *See* App. 10–13, 95–99. The government has even insisted that the vendors who are precluded from selling handguns to young adults have no legally cognizable interest in the constitutionality of this direct restriction on their businesses. *But see Craig*,

429 U.S. at 195 (concluding that vendor not only has standing to challenge age-based restriction on sales, but also to assert rights of third parties affected by restriction). The government's extraordinary efforts to prevent law-abiding adults from even asserting—let alone vindicating—their Second Amendment rights confirm the need for this Court to grant certiorari to hold this nationwide, categorical ban on meaningful access to the quintessential means to exercise the right to keep and bear arms unconstitutional and restore the Second Amendment to the fundamental status to which it is entitled.

CONCLUSION

For the reasons set forth above, this Court should grant the petition for certiorari.

Respectfully submitted,

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