NO. ______

In the
Supreme Court of the United States

ESPANOLA JACKSON; PAUL COLVIN; THOMAS BOYER; LARRY BARSETTI; DAVID GOLDEN; NOEMI MARGARET ROBINSON; NATIONAL RIFLE ASSOCIATION OF AMERICA, INC.; SAN FRANCISCO VETERAN POLICE OFFICERS ASSOCIATION,

Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO; EDWIN M. LEE, MAYOR FOR THE CITY AND COUNTY OF SAN FRANCISCO; GREG SUHR, SAN FRANCISCO POLICE CHIEF,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In 2007, San Francisco enacted an ordinance that requires all residents who keep handguns in their homes for self-defense to stow them away in a lock box or disable them with a trigger lock whenever they are not physically carrying them on their persons. The practical effect of this requirement is that law-abiding residents must keep their handguns inoperable or inaccessible precisely when they are needed most for self-defense—in the middle of the night, while the residents are asleep and decidedly not carrying. One year after this ordinance was enacted, this Court issued its landmark opinion in *District of Columbia v. Heller*, 554 U.S. 570 (2008), which struck down both the District of Columbia's flat ban on possessing a handgun in the home as well as its trigger-lock requirement. In doing so, this Court concluded that the Second Amendment entitles law-abiding individuals to keep a handgun in the home in a constitutionally relevant condition, *i.e.*, to keep a handgun that is "operable for the purpose of immediate self-defense." *Id.* at 635. Nonetheless, the decision below upholds an ordinance that requires law-abiding residents of San Francisco to render their handguns either inoperable or inaccessible at the very time when they are most needed for self-defense.

The question presented is:

Is San Francisco's attempt to deprive law-abiding individuals of immediate access to operable handguns in their own homes any more constitutional than the District of Columbia's invalidated effort to do the same?

PARTIES TO THE PROCEEDING

Petitioners, who were plaintiffs and appellants below, are Espanola Jackson, Paul Colvin, Thomas Boyer, Larry Barsetti, David Golden, Noemi Margaret Robinson, the National Rifle Association of America, Inc., and the San Francisco Veteran Police Officers Association.

Respondents, who were defendants and appellees below, are the City and County of San Francisco, Mayor for the City and County of San Francisco Edwin M. Lee, and San Francisco Police Chief Greg Suhr.

CORPORATE DISCLOSURE STATEMENT

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

The San Francisco Veteran Police Officers Association is a California nonprofit public benefit organization. It has no parent corporation and no stock, so no publicly held corporation owns 10 percent or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

This Court's landmark decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), certainly did not purport to answer every conceivable question about the Second Amendment. But there are some things on which *Heller* is pellucidly clear. One is that law-abiding individuals are entitled to keep handguns in their homes that are both operable and immediately accessible for self-defense. *Heller* eliminated any doubt on that score by invalidating not just the District of Columbia's ban on possessing handguns in the home, but also its attempt to force individuals to keep their handguns trigger-locked or stowed away in a lock box. Indeed, at argument, this Court expressly considered the plight of the law-abiding resident who must struggle to find his reading glasses on the nightstand and then disable a trigger lock before confronting an intruder. And yet, the Court of Appeals in this case upheld a San Francisco ordinance that requires individuals to do just that. Under that ordinance, 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.

The decision below is impossible to reconcile with this Court's decision in *Heller*. San Francisco has no more right than the District of Columbia to force its residents to fiddle with lock boxes or fumble with trigger locks when the need to use a handgun for immediate self-defense arises. It certainly makes no difference that San Francisco's trigger lock does not apply around the clock, since it applies during the time

when the need for self-defense is most acute. The Court of Appeals' conclusion that San Francisco may venture where this Court forbade the District of Columbia to go is so patently wrong that summary reversal would be appropriate. But the reasoning of the decision below is powerful evidence that plenary review is needed. Although this is hardly the first time that a lower court has refused to take seriously this Court's watershed Second Amendment decisions, it is the first time that a lower court's machinations concerning core rights and standards of review have permitted it to flout one of *Heller*'s *explicit holdings*. And unless and until this Court provides courts with much-needed guidance in this area, the lower courts will continue to balance away the very Second Amendment rights that this Court has recognized as fundamental. But whether summary reversal or plenary review is the more appropriate course, the decision below cannot stand. This Court should intervene to reaffirm that San Francisco's residents have the same Second Amendment rights as residents of the District of Columbia and the rest of the Nation.

OPINIONS BELOW

The panel opinion of the Court of Appeals is reported at 746 F.3d 953 and reproduced at App.1-28. The order of the District Court denying the petitioners' motion for a preliminary injunction is not reported but is reproduced at App.31-42.

JURISDICTION

The Court of Appeals issued its opinion on March 25, 2014, and denied petitioners' timely petition for rehearing en banc on July 17, 2014. Justice Kennedy

extended the time for filing a petition to and including December 12, 2014. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portions of the Second and Fourteenth Amendments to the United States Constitution and the San Francisco Police Code are reproduced at App.43-52.

STATEMENT OF THE CASE

A. Legal Background

In 2007, San Francisco enacted an ordinance that requires every resident who keeps a handgun in his or her home to render it inoperable whenever it is not physically carried on the person. *See* S.F., Cal., Police Code §4512. Specifically, section 4512 states that "[n]o person" except a peace officer "shall keep a handgun within a residence owned or controlled by that person unless the handgun is stored in a locked container or disabled with a trigger lock" or "is carried on the person of an individual over the age of 18." *Id.* §4512(a), (c). As a practical matter, this requirement precludes San Francisco residents from having ready access to an operable handgun precisely when ready access is most critical. Access is denied at any time when physically carrying the handgun is impossible or impractical—most notably, while residents are asleep during the night, when the need for self-defense in the home is most likely to arise.[1] Violations of this

[1] *See, e.g.*, Bureau of Justice Statistics, U.S. Dep't of Justice, Nat'l Crime Victimization Survey 6 tbl.9 (2010), http://perma.cc/xmu8-e8wy

intrusive ordinance, which quite literally extends into the bedroom, are punishable by six months in jail and a $1,000 fine. *Id.* §4512(e).

In a legal regime where the Second Amendment protected only collective rights, San Francisco's trigger-lock law would be constitutional. But one year after San Francisco enacted section 4512, this Court issued its landmark decision in *Heller*, which not only rejected the collective rights theory of the Second Amendment but also struck down two D.C. laws: a ban on possessing handguns in the home, and a requirement that "firearms in the home be rendered and kept inoperable at all times." *Heller*, 554 U.S. at 630. In doing so, the Court concluded that the District could not preclude law-abiding individuals from keeping a "lawful firearm in the home operable for the purpose of immediate self-defense." *Id.* at 635. Since then, the Court has confirmed that the Second Amendment and its decision in *Heller* are not limited to federal enclaves, but apply with equal force against states and municipalities. *See McDonald v. City of Chicago*, 561 U.S. 742, 779-80 (2010).

Although San Francisco has amended its firearms ordinances on multiple occasions since *Heller* and *McDonald*, it has retained its anomalous trigger-lock requirement. Indeed, in 2011, the city enacted a collection of post-hoc "findings" attempting to justify section 4512 on grounds, *inter alia*, that "[g]uns kept in the home are most often used in suicides and against family and friends rather than in self-

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(reporting that between 2003 to 2007, an estimated 61.3 percent of robberies of occupied dwellings occurred between 6 p.m. and 6 a.m.).

defense." S.F., Cal., Police Code §4511(4). According to those findings, notwithstanding *Heller*, San Francisco may continue to force its residents to lock up their handguns whenever they are not carrying them because "[s]afe storage measures have a demonstrated protective effect in homes with children and teenagers" and may decrease "the risk that a young person's impulsive decision to commit suicide will be carried out." *Id.* §4511(3)(c), (5)(b). The findings conclude by declaring that section 4512 "does not substantially burden the right or ability to use firearms for self-defense in the home." *Id.* §4511(7).

B. Parties and Proceedings Below

1. Petitioners in this case are six law-abiding San Francisco residents who keep handguns in their homes for self-defense, as well as the National Rifle Association of America, Inc., and the San Francisco Veteran Police Officers Association. Shortly after *Heller*, petitioners initiated this lawsuit challenging, *inter alia*, the constitutionality of section 4512. As they explained, just like the trigger-lock provision that this Court struck down in *Heller*, section 4512 unconstitutionally deprives them of immediate access to operable handguns in their homes "for the core lawful purpose of self-defense." *Heller*, 554 U.S. at 630. For instance, Espanola Jackson, who is in her 80s, explained: "[I]f I heard an intruder break into my home in the middle of the night, I would have to turn on the light, find my glasses, find the key to the lockbox, insert the key in the lock and unlock the box (under the stress of the emergency), and then get my gun before being in position to defend myself. That is not an easy task at my age." Doc. 136-3, ¶ 6.

The other petitioners attested to similar burdens on their (or their members') ability to use a handgun for self-defense in the home. One petitioner must keep his handgun locked up in his garage, far away from his bedroom. Doc. 136-6, ¶ 6 (Decl. of Sheldon Paul Colvin). Others use lock boxes with coded locks, which impose a delay if the code is not entered correctly on the first try or require a key if, unbeknownst to the owner, the batteries have drained. Doc. 136-7, ¶ 6 (Decl. of Thomas Boyer); Doc. 143, ¶¶ 17-21 (Decl. of Massad Ayoob). Likewise, many trigger locks can be safely used only on *unloaded* firearms, which imposes an additional burden on the right to use a firearm for immediate self-defense in times of emergency. Doc. 136-10 at 7-8; *see also* John R. Lott, Jr. & John E. Whitley, *Safe-Storage Gun Laws: Accidental Deaths, Suicides, & Crime*, 44 J.L. & Econ. 659, 660 (2001). Petitioners thus attested that, but for section 4512, they or their members would keep their handguns operable and immediately accessible for self-defense not only when carrying them on their persons, but also at times when physically carrying a handgun is impossible or highly impractical, such as when sleeping, showering, or exercising.

2. Petitioners asked the District Court to preliminarily enjoin enforcement of section 4512, but the court denied their request, concluding that they were not likely to succeed on the merits of their constitutional claim. App.31-42.[2] In doing so, the court posited that because "San Franciscans may

[2] The court did not dispute that petitioners would satisfy the other factors for injunctive relief given the constitutional nature of their claims. *See* App.42 n.7.

lawfully possess handguns in their own homes, may carry them in their own homes at any time, and may use them for self-defense without running afoul of any aspect of the ordinance," section 4512 gives them everything to which they are entitled under *Heller*. App.40. The court further concluded that "[e]ven assuming [section 4512] rises to the level of a 'substantial' burden" on Second Amendment rights, "plaintiffs have not shown the regulation to be overreaching or improper in any way, or that it fails to serve a legitimate governmental interest." App.41.

3. Petitioners timely appealed, and the Court of Appeals affirmed, agreeing with the District Court that section 4512 does not violate the Second Amendment. App.1-28. In reaching that conclusion, the court employed the now-prevailing "two-step inquiry," first asking whether the challenged law burdens conduct protected by the Second Amendment and, if so, then choosing a level of scrutiny. App.7. Under this approach, "if a challenged law does not implicate a core Second Amendment right, or does not place a substantial burden on the Second Amendment right, [courts] may apply intermediate scrutiny." App.9.

Applying this approach, the court first recognized that the conduct section 4512 burdens falls within the scope of the Second Amendment. As the court explained, section 4512 "resembles none of" the "'presumptively lawful' regulations" discussed in *Heller* "because it regulates conduct at home, not in 'sensitive places'; applies to all residents of San Francisco, not just 'felons or the mentally ill'; has no impact on the 'commercial sale of arms,' and it

regulates handguns, which *Heller* itself established were not 'dangerous and unusual.'" App.12 (quoting *Heller*, 554 U.S. at 626-27). Nor can section 4512 be analogized to historical "restrictions on the storage of gunpowder, a dangerous and highly flammable substance." App.13. The court further concluded that the conduct section 4512 burdens is not only "within the scope" but at the very "core of the Second Amendment right," as "[h]aving to retrieve handguns from locked containers or removing trigger locks makes it more difficult 'for citizens to use them for the core lawful purpose of self-defense' in the home." App.14-15 (quoting *Heller*, 554 U.S. at 630).

Notwithstanding those conclusions, however, the court still refused to apply strict scrutiny, insisting that the ordinance "does not substantially prevent law-abiding citizens from using firearms to defend themselves in the home" because "[t]he record indicates that a modern gun safe may be opened quickly." App.15. Likening section 4512 to a regulation on "the time, place, or manner of speech," the court also posited that it "leaves open alternative channels for self-defense in the home, because San Franciscans are not required to secure their handguns while carrying them on their person." App.15. The court also emphasized that section 4512 "does not constitute a complete ban … on the exercise of a law-abiding individual's right to self defense." App.16. Instead, the court deemed the requirement to render handguns inoperable or inaccessible whenever they are not physically carried "more similar to … registration requirements." App.16. Accordingly, the court pronounced "section 4512 … not a substantial burden on the Second Amendment right itself," and

thus concluded that it would subject it to only "intermediate scrutiny." App.17.

Purporting to apply intermediate scrutiny, the court first noted that it would "not impose 'an unnecessarily rigid burden of proof … so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.'" App.18 (quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50-52 (1986)). Without identifying any actual evidence on which San Francisco relied, the court then deferred entirely to the city's post-hoc findings in section 4511, and what it described as the city's "reasonable inference that mandating that guns be kept locked when not being carried will increase public safety and reduce firearm casualties." App.19-20. Reiterating its view that "section 4512 imposes only a minimal burden on the right to self-defense in the home," the court also summarily rejected petitioners' contention that the ordinance is not sufficiently tailored to survive any meaningful level of scrutiny. App.20.

REASONS FOR GRANTING THE PETITION

This should have been a very straightforward case. This Court has already held that the Second Amendment entitles law-abiding individuals to keep a handgun in the home in a constitutionally relevant condition. The Second Amendment protects not just a right to possess a handgun, but to possess a handgun that is operable and immediately accessible should the need for self-defense arise. That is why *Heller* struck down *both* D.C's ban on the possession of handguns in the home *and* its separate trigger-lock requirement, which effectively precluded individuals from actually

using their handguns for self-defense. Indeed, at argument, the Court explored the practical difficulties that a trigger lock poses to effective self-defense in the event of a late-night intruder. Accordingly, after *Heller*, it ought to have been crystal clear that the government has no business hamstringing law-abiding individuals who wish to keep handguns in their own homes for the lawful purpose of self-defense, especially in the wee hours of the night.

And yet, the Court of Appeals still managed to uphold a trigger-lock ordinance that has the very same forbidden effect as the one this Court struck down in *Heller*. Just like the District's law, San Francisco's ordinance deprives law-abiding residents of immediate access to operable handguns, the quintessential self-defense weapon, at the place (in their own homes) where and the time (in the middle of the night) when the need for self-defense is most likely to arise. Nonetheless, the court deemed San Francisco's trigger-lock law only a "minimal" burden on Second Amendment rights. Worse still, the court did so even as it openly acknowledged that the ordinance infringes on the core right that the Second Amendment "surely elevates above all other interests": the fundamental "right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635.

That is perhaps the most direct repudiation of this Court's holding in *Heller* since the decision was handed down. While other cases have been unfaithful to *Heller*'s *reasoning*, the decision below endorses a result in direct contradiction with *Heller*'s *holding* that the D.C. trigger-lock law is unconstitutional.

This is not a case that turns on some unresolved question about the historical scope of the Second Amendment right, or the circumstances under which that right may be forfeited. Nor is it a case that turns on some unresolved question about the proper methodology or level of scrutiny for analyzing burdens on the Second Amendment right. Instead, it turns on specifically whether this Court actually meant what it said when it held that law-abiding individuals have a constitutional and fundamental right to keep a handgun in the home that is "*operable* for the purpose of *immediate* self-defense." *Id.* at 635 (emphasis added). Because *Heller* so clearly answers that question, the decision below is so patently wrong as to warrant summary reversal.

At the same time, the very fact that the Court of Appeals could reach a conclusion so flatly inconsistent with *Heller* is powerful evidence that plenary review may be necessary to underscore that *Heller* and *McDonald* are precedents to be followed, not obstacles to be overcome. Indeed, this is just one of the latest in a long line of cases in which lower courts have refused to heed those decisions and the mode of analysis that they employ. With only a few notable exceptions, courts have eschewed the type of analytical rigor that applies in other constitutional contexts in favor of a "two-step" approach that is not materially different from the "interest-balancing" approach that *Heller* and *McDonald* so adamantly rejected. In fact, in every instance in which courts have reached the point of selecting a level of scrutiny under the post-*Heller* two-step, the inevitable result has been to reject the Second Amendment claim. Rather than respect the balance struck by the Framers and embodied in the

Constitution, lower courts have repeatedly deemed the government's generic public safety interests more important than the interests of the individuals whose fundamental constitutional rights are being balanced away.

The decision below is a striking example of the inherent manipulability of the lower courts' post-*Heller* mode of analysis. Perhaps the one thing to be said for a this-far-but-no-further-until-the-Supreme-Court-says-so-expressly approach to the Second Amendment is that at least the actual holdings of *Heller* and *McDonald* would be faithfully applied. But the decision below upholds a trigger-lock law materially indistinguishable from the D.C. law struck down in *Heller*. And perhaps the one thing to be said for a two-step approach to the level of scrutiny is that at least rights at the core of the Second Amendment would be safeguarded. But the decision below applied a watered-down version of scrutiny even after acknowledging that the San Francisco ordinance burdens the very "core" of the Second Amendment right. This case is thus a stark illustration of the reality that, even after this Court's admonishment that the Second Amendment may not "be singled out for special—and specially unfavorable—treatment," *McDonald*, 561 U.S. at 778-79, courts continue to do just that. Whether through summary reversal or plenary review, this Court should use this opportunity to put an end to this disturbing trend.

I. San Francisco's Trigger-Lock Law Is No More Constitutional Than The Trigger-Lock Law That This Court Struck Down In *Heller*.

This is the rare Second Amendment case that does not require this Court to explore the contours of the constitutional right or the manner in which laws that burden that right should be analyzed. That is because the Court has already answered the question that this case presents. *Heller* held unconstitutional two distinct legal provisions: the District's ban on the possession of handguns in the home, and its requirement that "firearms in the home be rendered and kept inoperable at all times." *Heller*, 554 U.S. at 630. In striking down the latter, *Heller* made crystal clear that the Second Amendment protects the right of law-abiding individuals to possess not just a handgun in the abstract or a handgun useful only for brandishing, but a handgun "*operable* for the purpose of *immediate* self-defense," in the home. *Id.* at 635 (emphasis added). Indeed, there is nothing more central to "the right of law-abiding, responsible citizens to use arms in defense of hearth and home," *id.*, than the predicate right to keep arms in a constitutionally relevant condition—*i.e.*, to keep arms that are actually capable of being used, and used immediately, should the need for self-defense arise.

That predicate right is precisely what San Francisco has denied its residents. Under section 4512, law-abiding individuals who wish to keep handguns in their homes must either render them inoperable or store them in a lock box whenever they are not physically carried on the person. In other words, section 4512 prevents law-abiding individuals

from having immediate access to an operable handgun at the very moment when such access is needed most—in the night, when they are asleep and poorly positioned to undertake the rigmarole necessary to render a trigger-locked handgun operable or locate and unlock a lockbox. It is precisely at that point—when an intruder is awake and carrying (unburdened by San Francisco's trigger-lock ordinance) and the home owner is asleep and not carrying—that the right to immediate, unimpeded self-defense is most critical. Yet just like the District's unconstitutional law, San Francisco's ordinance forces an individual, should an emergency arise in the dark of night, to first "turn on the lamp next to [his] bed," "pick up [his] reading glasses," and hope to recall and successfully enter the code in order to gain access to an operable firearm. Tr. of Oral Argument at 83-84, *Heller*, 554 U.S. 570 (No. 07-290).

As these exchanges with the Chief Justice and Justice Scalia at the argument in *Heller* vividly illustrate, the notion that trigger locks and lock boxes impose "only a minimal burden," App.20, on Second Amendment rights is fanciful. To state the obvious, a handgun that is disabled by a trigger lock, or is operable but locked away at the critical moment, is no substitute for a handgun that is both operable and immediately accessible. To the extent there were any doubt on that score, the evidence petitioners presented in this case eliminates it. As one firearms expert attested below, during an emergency, even fractions of a second matter. Doc. 143, ¶ 10; *see also id.* ¶ 11 (explaining that the famed Tueller Drill demonstrates that an attacker 21 feet away can close the distance between him and his victim in 1.5 seconds). That is

why this Court specified that the Second Amendment entitles law-abiding individuals to keep a handgun that is not just "operable," but "operable for the purpose of *immediate* self-defense." *Heller*, 554 U.S. at 635 (emphasis added). In doing so, the Court necessarily foreclosed any suggestion that the rights protected by the Second Amendment exist only in the theoretical realm. The right to keep arms is a right to keep them in a constitutionally and practically relevant manner.

The Court of Appeals nonetheless deemed San Francisco's trigger-lock law consistent with the Constitution, on the theory that it "limits only the *manner* in which a person may exercise Second Amendment rights." App.24. But that ignores the reality that this Court has already established "the manner" in which individuals are entitled to exercise their Second Amendment rights in their homes, which is by keeping a handgun that is "operable for the purpose of immediate self-defense." *Heller*, 554 U.S. at 635. Precluding individuals from exercising that right at the time of day when they are most likely to need it is no more a permissible "time, place, and manner" regulation than precluding them from exercising their core right to political speech *only* during the final days before an election, or restricting the privilege against self-incrimination *only* for capital crimes. Restricting a constitutional right in the time, place, and manner where it matters most is a constitutional vice, not a constitutional virtue.

It is sufficient for summary reversal that the Court of Appeals upheld San Francisco's ordinance even though it imposes the same severe burden on

Second Amendment rights as the District's trigger-lock law. That the court deemed the ordinance subject only to intermediate scrutiny—and a watered-down form of intermediate scrutiny, at that—adds insult to injury. As the court readily conceded, *see* App.14-15, section 4512 explicitly restricts the extent to which "law-abiding, responsible citizens" may use "the quintessential self-defense weapon" in the place "where the need for defense of self, family, and property is most acute." *Heller*, 554 U.S. at 628, 629, 635. The law thus quite consciously "burdens the core," App.15, of the right that the Second Amendment "surely elevates above all other interests." *Heller*, 554 U.S. at 635. To dismiss such a restriction as "only a minimal burden" just because it "does not constitute a *complete ban* … on the exercise of a law-abiding individual's right to self defense," App.16, 20 (emphasis added), is to render the Second Amendment precisely the kind of "second-class right" that this Court has already concluded it is not. *McDonald*, 561 U.S. at 780.

Indeed, the Court of Appeals' approach would not pass muster in any other constitutional context. When the government intrudes upon the "core" of the First Amendment, for instance, by imposing restrictions on political speech or the content of speech, such laws are subject to—and routinely fail—the strictest of scrutiny, regardless of whether they constitute a "complete ban" on the exercise of First Amendment rights (which laws rarely, if ever, do). *See, e.g.*, *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000); *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). Even when it comes to restrictions on forms of speech that many may consider "valueless or

unnecessary," this Court has admonished that there is no place for "ad hoc balancing of relative social costs and benefits" because "[t]he First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs." *United States v. Stevens*, 559 U.S. 460, 470, 471 (2010).

So, too, with the Second Amendment: "The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Heller*, 554 U.S. at 634. That is because the Second Amendment "is the very *product* of an interest-balancing by the people" that neither the courts nor the legislatures may "conduct for them anew." *Id.* at 635. Yet here, the Court of Appeals concluded that individuals may be denied immediate access to an operable handgun at the place and time when they need it most based on San Francisco's simple say-so that its own "interest in preventing firearms from being stolen and in reducing the number of handgun-related suicides and deadly domestic violence incidents," App.20, is more important than the interest that the Second Amendment "surely elevates above all other[s]"—namely, "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635.

That is exactly the kind of "freestanding 'interest-balancing' approach" that "[t]he very enumeration of" the Second Amendment is supposed to foreclose. *Id.* at 634; *see also, e.g.*, *McDonald*, 561 U.S. at 791. Worse still, it is ad hoc interest-balancing in service of

reaching precisely the opposite holding as *Heller* concerning a materially indistinguishable trigger-lock law. Even if this Court prefers to allow issues not directly decided in *Heller* and *McDonald* to percolate, there is no reason to let stand a decision that approves precisely what *Heller* invalidated and denies the central right to possess a handgun that is "operable for the purpose of *immediate* self-defense." *Heller*, 554 U.S. at 635 (emphasis added).

II. The Lower Courts' Continued Resistance To *Heller* And *McDonald* Necessitates This Court's Intervention.

The decision below is so patently incompatible with *Heller* that summary reversal would be appropriate. Indeed, this Court has not hesitated to summarily reverse when courts and legislatures have insisted that laws burdening constitutional rights survive decisions in which this Court invalidated virtually identical restrictions. *See, e.g.*, *Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012) (summarily reversing Montana Supreme Court's refusal to follow *Citizens United*, 558 U.S. 310). Nor has the Court hesitated to summarily reverse when courts attempt to circumvent its decisions by invoking trivial distinctions between the laws they are considering and laws that this Court has invalidated. *See, e.g.*, *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147 (1993) (summarily reversing Puerto Rico Supreme Court decision upholding bar on public access to preliminary criminal proceedings that was nearly identical to law invalidated in *Press-Enterprise Co. v. Superior Court of California, County of Riverside*, 478 U.S. 1 (1986)).

But while the result reached below fully justifies summary reversal, the reasoning employed to arrive at that result is symptomatic of a broader problem that merits plenary review. The decision below is just the latest example of lower court decisions that treat *Heller* and *McDonald* as effectively limited to their narrow facts, rather than as watershed constitutional decisions that reject the notion that the Second Amendment can be brushed aside as a second-class right. Despite the landmark nature of *Heller* and *McDonald*, little has changed in the lower courts. Before *Heller*, nearly every circuit embraced a collective rights view of the Second Amendment. And since *Heller*, those same circuits have rejected virtually every Second Amendment case to come before them.

The principal mechanism for preserving the status quo *ante* is the now-prevailing "two-step" approach, which is so malleable as to allow courts to avoid any meaningful form of scrutiny of burdens on Second Amendment rights. Although the two-step approach begins with the right question—asking whether the conduct being burdened is protected by the Second Amendment—courts have managed to make serious mischief even on that score. For instance, according to one court, law-abiding adults under the age of 21 likely are "unworthy of the Second Amendment guarantee" even though both the federal government and every state required all 18-year-old males to enroll in the militia when our Nation was founded. *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives* ("*BATF*"), 700 F.3d 185, 195 (5th Cir. 2012). *But see* 714 F.3d 334, 339 (5th Cir. 2012) (Jones, J., dissenting from

denial of rehearing en banc) ("[T]he properly relevant historical materials … 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."). And according to another, whether the right to possess a handgun applies with equal force at an individual's summer home is "a serious constitutional question." *Osterweil v. Bartlett*, 706 F.3d 139 (2d Cir. 2013).

But the real possibilities for manipulation come in the second part of the two-part approach, which allows courts to decide what level of scrutiny to apply by examining "how close the law comes to the core of the Second Amendment right and the severity of the law's burden on the right." *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011); *see also, e.g.*, *BATF*, 700 F.3d at 194; *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); App.8. Time and again, courts have used this open-ended inquiry to constrain the scope of the Second Amendment by deeming everything other than the precise conduct at issue in *Heller* outside its "core." And even if laws burden conduct within that core, anything less than a complete ban is deemed "only a minimal burden." App.16, 20.

For instance, three circuits have held that, even assuming the Second Amendment protects a right to carry a handgun outside the home, law-abiding individuals may be categorically foreclosed from exercising that right because it is not at the "core" of the Second Amendment. *See Kachalsky v. Cnty. of Westchester*, 701 F.3d 81 (2d Cir. 2012); *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013). As the Ninth Circuit observed in refusing to follow their lead, these courts

have done so without even "undertak[ing] a complete historical analysis of the scope and nature of the Second Amendment right outside the home." *Peruta v. Cnty. of San Diego*, 742 F.3d 1144, 1173 (9th Cir. 2014). In other words, courts have applied the how-close-to-the-core prong of the second step of the inquiry in such a manner as to render the critical first step of the inquiry irrelevant.

And, of course, once courts deem conduct outside the "core" of the Second Amendment, they engage in nothing more—and often less—than "quick look" review, largely deferring to the legislature's judgment that the public interest lies in precluding, not protecting, the exercise of Second Amendment rights. *See, e.g.*, *Drake*, 724 F.3d at 440 ("[w]e refuse … to intrude upon the sound judgment and discretion of the State of New Jersey" that only "those citizens who can demonstrate a 'justifiable need' to do so" may carry handguns outside the home); *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 100 (deferring to New York's "determin[ation] that limiting handgun possession to persons who have an articulable basis for believing they will need the weapon for self-defense is in the best interest of public safety and outweighs the need to have a handgun for an unexpected confrontation").

As courts and commentators alike have observed, this exceedingly deferential form of scrutiny, under which the government gets deference not just on the importance of its interest, but also on the extent to which its law actually furthers that interest in a sufficiently tailored manner, "is near-identical to the freestanding 'interest-balancing inquiry' that Justice Breyer proposed—and that the majority explicitly rejected—in *Heller*." *Peruta*, 742 F.3d at 1176; *see also, e.g.*, *Heller v. District of Columbia* ("*Heller II*"), 670 F.3d 1244, 1276-80 (2011) (Kavanaugh, J., dissenting); Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 Geo. Wash. L. Rev. 703, 752 (2012) ("An intermediate scrutiny analysis applied in a way that is very deferential to legislative determinations and requires merely some logical and plausible showing of the basis for the law's reasonably expected benefits, is the heart of the emerging standard approach.").

This case starkly illustrates the inherent manipulability of the lower courts' post-*Heller* approach to the Second Amendment. The one thing that could be said in defense of other lower court decisions effectively limiting *Heller* and *McDonald* to their facts is that they were at least nominally consistent with the holdings of those cases. But the decision below upholds an ordinance that is materially indistinguishable from the trigger-lock law invalidated in *Heller*. And the one thing that could be said in defense of the post-*Heller* two-step is that courts at least pledged to employ rigorous scrutiny of laws burdening the core rights protected by the Second Amendment. *See, e.g.*, *BATF*, 700 F.3d at 195 ("[a] regulation that threatens a right at the core of the

Second Amendment—for example, the right of a law-abiding, responsible adult to possess and use a handgun to defend his or her home and family—triggers strict scrutiny") (citation omitted); *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011) ("we assume that any law that would burden the 'fundamental,' core right of self-defense in the home by a law-abiding citizen would be subject to strict scrutiny"). But this case renders that a false promise. Even after candidly recognizing that the San Francisco ordinance "burdens the core of the Second Amendment right," App.15, the Court of Appeals applied a watered-down version of intermediate scrutiny to uphold a trigger-lock law not materially different from the law that this Court struck down in *Heller*.

In doing so, the court confirmed once again that lower courts are bound and determined to continue "singl[ing] out" the Second Amendment "for special—and specially unfavorable—treatment," *McDonald*, 561 U.S. at 778-79, unless and until this Court underscores that *Heller* and *McDonald* were no sport. Strict scrutiny typically applies *whenever* a law burdens "fundamental constitutional rights," no matter how severe the burden. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16 (1973); *see also*, *e.g.*, *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 54 (1983) ("strict scrutiny applie[s] when government action impinges upon a fundamental right"); *Reno v. Flores*, 507 U.S. 292, 302 (1993) (government may not "infringe certain 'fundamental' liberty interests … unless the infringement is narrowly tailored to serve a compelling state interest"); *Clark v. Jeter*, 486 U.S. 456, 461 (1988)

("classifications affecting fundamental rights … are given the most exacting scrutiny"). At a bare minimum, strict scrutiny applies whenever the "core" of a constitutional right is concerned without regard to whether the challenged law "severely burdens" that right. *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 207 (1999) (Thomas, J., concurring). Indeed, to refuse to apply strict scrutiny even to a law that *concededly* burdens the core Second Amendment "right of law-abiding, responsible citizens to use arms in defense of hearth and home," *Heller*, 554 U.S. at 635, is to deny that the amendment protects a fundamental right.

The decision below thus reveals that the two-step inquiry is infinitely manipulable, to the point of permitting the conclusion that the very kind of law invalidated in *Heller* survives a form of constitutional scrutiny that purports to be consistent with *Heller*. Indeed, it should come as little surprise that in the few cases in which a court has struck down a law or policy as foreclosed by the Second Amendment, the court has foresworn a full embrace of the two-step approach and resorted more directly to the reasoning employed in *Heller*. For instance, once the Ninth Circuit concluded that the Second Amendment protects a right to carry arms outside the home in *Peruta*, it saw no need to settle on a level of scrutiny because it recognized that a law that flatly prohibits constitutionally protected conduct is void *ab initio*. *See Peruta*, 742 F.3d at 1170 ("*Heller* teaches that a near-total prohibition on keeping arms (*Heller*) is hardly better than a near-total prohibition on bearing them (this case), and vice versa."). Likewise, the Seventh Circuit recognized that "degrees of scrutiny" were beside the point once it

concluded that Illinois' "flat ban on carrying ready-to-use guns outside the home" burdened conduct protected by the Second Amendment. *Moore v. Madigan*, 702 F.3d 933, 940, 941 (7th Cir. 2012).

While those decisions are faithful to this Court's precedents, they are far too easy for other courts to dismiss in the same way that they dismiss *Heller*, as relevant only to "extreme" or "outlier" laws that "completely destroy" the Second Amendment right. The majority of courts have instead eschewed the rigorous analysis *Heller* demands by employing the two-step analysis, which boils down to one question: whether the law is a complete ban or merely a restriction on the exercise of Second Amendment rights. These circuits pay lip service to the first step of the two-step analysis, and the real action lies in application of the second step. The very fact that a court reaches the second step all but guarantees that the challenged law will survive. This is a case in point: The court below concluded that more rigorous scrutiny was unwarranted notwithstanding the burden on "core" conduct because San Francisco's trigger-lock ordinance "does not constitute a complete ban … on the exercise of a law-abiding individual's right to self defense." App.16. If that were the standard under which burdens on core First Amendment rights were analyzed, it is hard to imagine what restriction short of a complete ban on speech that would not survive. So, too, if meaningful scrutiny were not even an option unless laws burdened the "core" of the First Amendment right.

As the foregoing illustrates, this case is really a symptom of a broader problem that can be cured only

by this Court's re-entry into the Second Amendment fray. Lower courts have had time enough to consider how to implement the Court's watershed decisions in *Heller* and *McDonald*, and with only a few notable exceptions, their efforts have consistently come up short. Worse still, with the decision below, courts have now crossed the Rubicon, moving from confining *Heller* to its precise holdings to circumnavigating even those. Accordingly, while the result reached below merits summary reversal, the reasoning employed below is so typical of lower courts that it merits plenary review. Either way, the decision below cannot stand.

CONCLUSION

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

Respectfully submitted,

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