No. 14-704

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

REPLY BRIEF FOR PETITIONER

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March 31, 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authority

REPLY BRIEF

As respondents' brief in opposition confirms, the decision below is an extreme outlier even among Second Amendment cases. San Francisco stands alone in insisting that it may deny its residents immediate access to operable handguns in their own homes under the guise of regulating the manner in which they store them. And the decision below stands alone in insisting that San Francisco may do so notwithstanding this Court's holding in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that the Second Amendment protects the right not just to keep a handgun in the home, but to keep a handgun in the home in a constitutionally and practically relevant manner. In short, the Court of Appeals engaged in one of the most extreme departures from *Heller* to date, in service of sanctioning one of the most extreme laws in the land.

Those circumstances readily warrant summary reversal or plenary review. Respondents' efforts to avoid that conclusion succeed only in underscoring what an outlier San Francisco's law really is. The approach of other jurisdictions is less draconian, and the effect of the San Francisco law—that a law-abiding homeowner cannot have a readily useable handgun on the nightstand, but instead must fumble for the reading glasses and the lockbox while an intruder roams the premises—is indistinguishable from that of the law struck down in *Heller*. Indeed, even San Francisco's arguments in defense of its ordinance are the same as those found unavailing in *Heller*. That the Court of Appeals nonetheless was able to uphold the ordinance applying the prevailing "two-step

approach" to Second Amendment claims only underscores the pressing need for this Court to provide the lower courts with much-needed guidance in this area. But in all events, whether through summary reversal or plenary review, neither the decision below nor the outlier law that it upholds should be left standing.

I. *Heller* Forecloses San Francisco's Attempt To Deny Its Residents Immediate Access To Operable Handguns For Self-Defense.

This case represents one of the most direct repudiations yet of this Court's landmark Second Amendment precedents. To be sure, many a court has refused to faithfully apply the reasoning of *Heller* and *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (plurality op.). But at least since *McDonald* confirmed that the Second Amendment applies with equal force against state and local governments, no court had concluded that a law materially indistinguishable from those invalidated in *Heller* nonetheless could withstand constitutional scrutiny. The decision below destroys even that minimal protection for Second Amendment rights, upholding a law that has the same forbidden effect as the District of Columbia's invalidated trigger-lock law of denying individuals their core right to keep a handgun in the home in a constitutionally and practically relevant condition—*i.e.*, "operable for the purpose of immediate self-defense." *Heller*, 554 U.S. at 635.

Indeed, respondents' efforts to defend San Francisco's law are strikingly similar to the District's arguments that did not carry the day in *Heller*. Respondents contend, for instance, that the burden

the law imposes on Second Amendment rights is "insubstantial" because "guns stored in modern lockboxes can be easily accessed." Resp.Br.11, 6. That is precisely the argument that the District advanced at oral argument in *Heller*, only to be met with incredulous questions from the Court about the realities of needing to "turn on the lamp next to your bed," "pick up your reading glasses," and then hope to successfully disable a lock box or trigger lock—all under the stress of attempting to defend against an unanticipated home intrusion. Tr. of Oral Argument at 83-84, *Heller*, 554 U.S. 570 (No. 07-290). This Court necessarily rejected the argument that such a burden is consistent with the Constitution when it concluded that the Second Amendment entitles individuals to keep handguns in their homes that are actually capable of being used—and used *immediately*—should the need for self-defense arise.

Heller likewise unambiguously rejected the argument recycled by respondents here, *see* Resp.Br.10, that restrictions on access to handguns are constitutional because long guns are not similarly fettered. As the Court explained, "[i]t is no answer to say … that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed." *Heller*, 554 U.S. at 629. Instead, any burden on the fundamental right to keep and bear *handguns* in the home must stand or fall based on its effect on *that* right. Respondents are thus flatly wrong to insist that San Francisco's attempt to deny its residents immediate access to operable handguns in the home is more permissible because it is confined to "the quintessential self-defense weapon." *Id.* If anything, that only makes the burden

all the more acute, as "handguns are the most popular weapon chosen by Americans for self-defense in the home." *Id.*

Respondents fare no better with their effort to characterize San Francisco's law as "regulating only the manner of storing guns and not their use." Resp.Br.2-3. Section 4512 does not simply regulate *how* individuals must store their handguns; it dictates *when* individuals must store their handguns, forcing them to lock up or disable them even at times when they want them immediately accessible for self-defense, such as while they are sleeping, showering, exercising, or engaging in other activities that make physically carrying a handgun impractical. That is no more a "safe-storage law" than the District's invalidated effort to force its residents to keep their handguns locked away or disabled all the time. The manifest purpose of both laws is not to regulate how handguns are stored, but to deny individuals access to handguns that are "operable for the purpose of immediate self-defense," *Heller*, 554 U.S. at 635—*i.e.*, to deny them the very right that *Heller* confirms the Second Amendment guarantees.

That much is clear from the readily distinguishable "safe-storage laws" to which respondents attempt to analogize San Francisco's outlier ordinance. Those laws require individuals to lock up or disable firearms only when they are not in their "immediate possession *or control*," language that section 4512 clearly does not contain. N.Y.C. Admin. Code §10-312(a) (emphasis added); *see also* Mass. Gen. Laws Ann. ch. 140, §131L(a) (requiring locked storage when firearm is not "carried by *or under the control* of

the owner or other lawfully authorized user" (emphasis added)). As the same state court decisions respondents invoke explain, those laws do not compel individuals to lock up their firearms any time they are not literally carrying them on their persons. Instead, they require individuals to do so only when they have "placed [a firearm] where it could not be quickly reached." *Commonwealth v. Patterson*, 946 N.E.2d 130, 133 (Mass. App. Ct. 2011); *see also, e.g.*, *Commonwealth v. McGowan*, 982 N.E.2d 495, 496 (Mass. 2013) ("§131L(a) allows the owner of a firearm to carry *or otherwise keep* the firearm under the owner's immediate control within the home" (emphasis added)); *Tessler v. City of New York*, 952 N.Y.S.2d 703, 716 (N.Y. Sup. Ct. 2012) (same). In other words, they simply say that *if* an individual chooses to store a firearm rather than keep it immediately accessible, then he or she must store it in a particular manner.

That is fundamentally different from San Francisco's law, which compels individuals to lock up their handguns or render them inoperable even at times when they *most* want them readily accessible "to use … in defense of hearth and home." *Heller*, 554 U.S. at 635. Respondents do not and cannot point to any other jurisdiction with a law that actually compels storage rather than regulates it. Nor can they point to any decision from any other court holding such a restriction compatible with the Second Amendment—and for good reason, as *Heller* plainly forecloses that result.

Respondents attempt to distinguish *Heller* by noting that, unlike the District's trigger-lock law, "San

Francisco's ordinance allows citizens to carry loaded and unlocked handguns on their person at any time, including in a holster." Resp.Br.10. But respondents cannot seriously mean to suggest that San Francisco's residents are supposed to sleep with loaded handguns holstered to their bodies, a fanciful and dangerous scenario. Nor have they ever disputed that San Francisco's ordinance has the effect of preventing an individual from keeping a loaded, operable handgun on the nightstand. Respondents also cannot seriously mean to suggest that San Francisco is free to deny its residents immediate access to operable handguns in their homes *some* of the time so long as it does not do so *all* the time. Just as this Court reaffirmed in *McDonald* that the Second Amendment is not a "second-class right," 561 U.S. at 780, it likewise is not a right that protects only insomniacs. The right to "be[] armed and ready for offensive or defense action in a case of conflict," *Heller*, 554 U.S. at 584, applies around the clock and would be meaningless if the government could pick and choose when it may be exercised.

And, of course, the problem is all the more acute here because San Francisco has denied its residents ready access to operable handguns at the time when the need for self-defense is most likely to arise—when they are asleep in their homes in the dark of night. In that respect, section 4512 is not meaningfully different from a law that precludes individuals from engaging in political speech *only* in the final days before an election, or from exercising their privilege against self-incrimination *only* for capital crimes. A law that denies a fundamental right at the very moment when it is needed most does not become any

more compatible with the Constitution just because it does not preclude individuals from exercising that right at less critical junctures.

In short, there is no escaping the conclusion that San Francisco's ordinance has the same forbidden effect as the District's trigger-lock law invalidated in *Heller*. Section 4512 denies law-abiding individuals their fundamental right to keep a handgun in the home in a constitutionally and practically relevant manner. Worse still, it does so precisely when the need for the right to be armed and ready for self-defense is most acute. "Whatever else" the Second Amendment or *Heller* "leaves to future evaluation," both plainly foreclose San Francisco's attempt to impede the fundamental right of its residents to keep a handgun "in the home operable for the purpose of immediate self-defense." *Id.* at 635.

II. The Decision Below And The Law It Upholds Are Extreme Outliers That Should Not Be Left Standing.

Respondents attempt to dissuade this Court from summarily reversing or granting plenary review by contending that invalidating San Francisco's ordinance would call into question a host of locked-storage laws. *See* Resp.Br.11-12, 15-17. But their efforts succeed only in underscoring just how extreme an outlier San Francisco's law is. In fact, San Francisco stands alone in denying law-abiding individuals *access* to operable handguns in their own homes under the guise of regulating the manner in which handguns are stored.

Respondents first attempt to analogize San Francisco's law to Massachusetts and New York City

laws that require locked storage when a firearm is not under the "control" of the owner or an authorized user. *See* Resp.Br.11-12 (citing Mass. Gen. Laws Ann. ch. 140, §131L(a) & N.Y.C. Admin. Code §10-312(a)). But as already explained, *see supra* p. 4-5, those laws apply only when the owner chooses to "stor[e], plac[e], or leav[e] the weapon out of the owner's possession or control," *Tessler*, 952 N.Y.S.2d at 716 (emphasis omitted), such as leaving a firearm upstairs while downstairs, *Patterson*, 946 N.E.2d at 132-33, or in the car while at work, *Commonwealth v. Reyes*, 982 N.E.2d 504, 507 (Mass. 2013). Courts have emphasized that those laws, unlike San Francisco's, do not preclude an individual from keeping an operable firearm "readily at hand," such as on the nightstand, when carrying it is impossible or impractical. *Patterson*, 946 N.E.2d at 133; *see also, e.g.*, *Tessler*, 952 N.Y.S.2d at 716. In attempting to portray these decisions as "consistent with the decision here," Resp.Br.11, respondents simply ignore that critical difference.

The various other "safe storage" laws respondents cite undermine their case even further. Unlike San Francisco's effort to mandate that residents stow away their handguns even when the need for self-defense is acute, those laws simply incentivize safe storage by creating defenses to liability should a minor gain access to a firearm if that firearm was properly stored.[1] All but one of these laws also immunizes

[1] *See, e.g.*, Conn. Gen. Stat. Ann. §29-37i; Del. Code Ann. tit. 11, §1456(b)(1); Fla. Stat. Ann. §790.174(1); Haw. Rev. Stat. §134-10.5(1); 720 Ill. Comp. Stat. §5/24-9(a)(3); Iowa Code

owners who have reason to believe a child would not be present where the firearm is kept, such as in a childless home.[2] And like the Massachusetts and New York City laws, most also create an affirmative defense if the owner keeps the firearm "within such close proximity" that he or she can readily retrieve it.[3] And, of course, these laws result in liability only when a minor (or in some cases a person otherwise ineligible to possess a firearm) gains access to the firearm. They do not flatly bar individuals from setting their firearms next to them—let alone do so without regard to whether children or prohibited persons are even present.[4]

As these concededly "narrower" approaches confirm, Resp.Br.17, it is little surprise that there is no division of authority on laws like San Francisco's,

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§724.22(7); N.H. Rev. Stat. §650-C:1(V)(b); N.J. Stat. Ann. §2C:58-15(a)(2); R.I. Gen. Laws §11-47-60.1(c)(2); Tex. Penal Code Ann. §46.13(a)(3); Wis. Stat. Ann. §948.55(4)(a).

[2] *See* Conn. Gen. Stat. Ann. §29-37i; Fla. Stat. Ann. §790.174(1); Haw. Rev. Stat. §134-10.5; 720 Ill. Comp. Stat. §5/24-9(a); Iowa Code §724.22(7); N.H. Rev. Stat. §650-C:1(V)(e); N.J. Stat. Ann. §2C:58-15(a); R.I. Gen. Laws §11-47-60.1(c)(6); Tex. Penal Code Ann. §46.13(b)(2); Wis. Stat. Ann. §948.55(4)(g); *see also* Del. Code Ann. tit. 11, §1456(a) (requiring owner to act "intentionally or recklessly").

[3] *See* Conn. Gen. Stat. Ann. §29-37i; Fla. Stat. Ann. §790.174(1); Haw. Rev. Stat. §134-10.5(2); N.H. Rev. Stat. §650-C:1(V)(c); R.I. Gen. Laws §11047-60.1(c)(3); Wis. Stat. Ann. §948.55(4)(c).

[4] Five of these laws also safeguard minors' rights by expressly providing an exception to liability if a minor uses a firearm in self-defense. *See* 720 Ill. Comp. Stat. §5/24-9(c)(1); N.H. Rev. Stat. §650-C:1(V)(d); R.I. Gen. Laws §11-47-60.1(c)(5); Tex. Penal Code Ann. §46.13(c)(2); Wis. Stat. Ann. §948.55(4)(f).

as there simply *are* no other laws like San Francisco's. In that regard, San Francisco's law is not only indistinguishable from the District's outlier trigger-lock law in *Heller*, but more broadly analogous to the laws reviewed in *Heller* and *McDonald*. Just as the District and Chicago had the most onerous handguns restrictions in the land when this Court reviewed their laws, San Francisco now has taken the pole position. Its law preventing law-abiding residents from having an operable handgun on the nightstand for self-defense purposes is both a complete outlier and completely incompatible with this Court's holdings in *McDonald* and *Heller*.

Accordingly, summary reversal would be appropriate. But if there is any doubt on that score, the answer is not to leave the ordinance and decision below standing, but to grant plenary review. The very fact that the Court of Appeals could uphold a law that is indistinguishable from the one invalidated in *Heller*—and that concededly burdens the very "core of the Second Amendment right," Pet.App.14-15—by applying the prevailing "two-step approach" is proof positive of the fundamental flaws and inherent manipulability of that approach. It is bad enough that the two-step approach routinely leads lower courts to conclude that the only "policy choices" the Second Amendment "takes … off the table," *Heller*, 554 U.S. at 636, are those specifically invalidated by *Heller* itself. *See* Pet.19-23. If lower courts are allowed to continue applying an approach that puts even those limited choices back on the table, then the Second Amendment will cease to be the individual and fundamental right that this Court has held it is.

CONCLUSION

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

Respectfully submitted,

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