No. 20-843

In the Supreme Court of the United States

NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC., ET AL.,

Petitioners

v.

KEVIN P. BRUEN, ET AL.,

Respondents

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

BRIEF OF CALIFORNIA GUN RIGHTS FOUNDATION AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the State's denial of petitioners' applications for concealed-carry licenses for self-defense violated the Second Amendment?

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INTERESTS OF *AMICUS*[1]

California Guns Rights Foundation ("CGF") is a nonprofit organization that serves its members, supporters, and the public through educational, cultural, and judicial efforts to advance Second Amendment and related rights. CGF conducts research, promotes constitutionally-sound public policy, engages in litigation, educates the public about federal, state, and local laws, and performs other charitable programs. This Court's interpretation of statutes and administrative law principles directly impacts CGF's organizational interests and the rights of CGF's members and supporters.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Amicus CGF agrees with Petitioners that New York's "may-issue" licensing scheme demanding that law abiding citizens demonstrate rarely accepted "proper cause" to obtain a license to carry a firearm for self-defense violates the Second and Fourteenth Amendments. Pet. Br. at 22. That conclusion follows from either the text of those Amendments, as informed by history and tradition, or the application of any form of genuinely heightened scrutiny. *Id*. at 22-25. *Amicus* writes separately, however, to encourage the Court to adopt a text-based categorical framework for

[1] All parties have consented to the filing of this brief. No counsel for a party authored it in whole or in part, nor did any person or entity, other than *Amicus* and its counsel, make a monetary contribution to fund its preparation or submission. *Amicus* is not publicly traded and has no parent corporations. No publicly traded corporation owns 10% or more of *Amicus*.

analyzing Second Amendment challenges, reject the free-wheeling and deferential balancing used in the lower courts to dilute Second Amendment rights, and, if tiered scrutiny is deemed necessary in some small subset of cases, to confirm that such scrutiny should be strict or, at the very least, exacting, with all the rigor such scrutiny has in other constitutional contexts.

1. As this Court did in *District of Columbia* v. *Heller*, 554 U.S. 570, 624-625 (2008), the proper way to analyze potential infringements of the right to keep and bear arms is to use a categorical approach based on the original public meaning of the constitutional text, as informed by history and tradition. Such a test does not depend on interest balancing, is faithful to both the Constitution and *Heller*, would provide straight-forward answers in the overwhelming majority of cases, and would avoid the improper manipulation of the malleable balancing tests now common in the lower courts. *Heller* v. *District of Columbia*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) ("*Heller II*") (Kavanaugh, J., dissenting) (courts should "assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny.").

As applied to this case, such a categorical approach would readily dispose of the challenge in this case, as Petitioners correctly explain. Pet. Br. 25-44; see also *infra* at 5-14. Indeed, most of the arguments raised by New York and the Second Circuit in support of the licensing restrictions are merely an attempt to rebalance the self-same risks and rewards of bearing arms for self-defense that were balanced and resolved

by the Framers and ratifiers of the Second and Fourteenth Amendments. *McDonald* v. *City of Chicago*, 561 U.S. 742, 750 (2010) (Second Amendment incorporated by Fourteenth Amendment).

In applying such a categorical approach, this Court should also set appropriate guard rails to cabin the likely recalcitrance of many lower courts. Emphasizing the proper role of history and tradition—as informing original public meaning, not overriding it—will avoid many efforts to use historic or post-ratification *derogations* of the right to keep and bear arms as a roadmap for limiting the pre-existing right memorialized in the Second Amendment and extended in the Fourteenth Amendment.

2. Although the categorical approach described above is the appropriate means of addressing Second Amendment challenges, *Amicus* recognizes that some Justices nonetheless may prefer tiered scrutiny in at least some cases involving incidental or indirect burdens on the right to keep and bear arms. If tiered scrutiny is to continue to play a role in Second Amendment jurisprudence, this Court should frame its holding so as to avoid the woeful failures of such scrutiny in the lower courts since *Heller*.

First, it should hold that for all direct restrictions on the right to keep and bear arms, strict scrutiny is the minimum appropriate level of protection. And for indirect or incidental burdens, again the level of scrutiny should be strict or, at very least, "exacting," as this Court recently applied to indirect burdens on the freedom of association in the First Amendment

context. *Americans for Prosperity Found.* v. *Bonta*, 141 S. Ct. 2373, 2383 (2021) ("*AFPF*").

Second, it should require that the government bear the burden of establishing a specific and important interest, that its restriction materially advances that interest, and both proven with meaningful evidence, without deference to legislative speculation or conjecture.

Third, this Court analyze at the outset whether the restrictions are narrowly tailored to serve the government's claimed interest, as it does in the First Amendment context well before any potential balancing of legislative against constitutional interests. An underinclusive or broadly prophylactic rule not closely tailored to any valid and specific interest asserted would not be valid under any level of genuinely heightened scrutiny.

Finally, if a restriction or burden on the right to keep and bear arms survives those steps, only then should any evaluation of the constitutional and legislative interests come into play. And even then, such inquiry would be to ensure that the resulting burden on individual rights is not "undue" or excessive relative to any supposed benefit even from a narrowly tailored law. Such interest analysis thus should act only as a backstop to protect constitutional rights, not an excuse to ignore them.

ARGUMENT

I. THE CONSTITUTION'S TEXT, AS INFORMED BY HISTORY AND TRADITION, SUPPORTS CATEGORICAL PROTECTION THAT DOES NOT DEPEND ON INTEREST BALANCING.

While categorically rejecting the District of Columbia's ban on handguns, this Court in *Heller* did not expressly specify the proper test to be used when reviewing restrictions on Second Amendment rights, other than to note that it must necessarily use a heightened standard relative to baseline due process protection and may not involve "freestanding 'interest-balancing'" of Second Amendment rights against any other interests conceived by legislators or jurists. 554 U.S. at 628 n.27, 634. Unfortunately, *Heller*'s lack of greater specificity has led lower courts to do precisely what this Court forbade, offering lip service to the thinnest veneer of supposedly heightened scrutiny while balancing away Second Amendment rights at every turn. See *infra*, Part II.A.

To properly implement and enforce *Heller*'s central holding that the Second Amendment protects an individual right to keep and bear arms that are in common use for lawful purposes, a clearer and less malleable test is needed. *Amicus* agrees with the various jurists and commentators who have explained that a categorical test based on the Constitution's text, as it is informed by history and tradition, is the proper mode of analysis, is consistent with *Heller*, and would resolve the vast majority of cases involving direct restrictions on the keeping or bearing of arms, including this one. *Heller* v. *District of Columbia*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) ("*Heller II*")

(Kavanaugh, J., dissenting) (courts should "assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny."); *Ezell* v. *City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011) ("Both *Heller* and *McDonald* suggest that broadly prohibitory laws restricting the core Second Amendment right—like the handgun bans at issue in those cases, which prohibited handgun possession even in the home—are categorically unconstitutional."); *Wrenn* v. *District of Columbia*, 864 F.3d 650, 666 (D.C. Cir. 2017) ("*Heller I*'s categorical approach is appropriate here even though our previous cases have always applied tiers of scrutiny to gun laws."); cf. Nicholas Griepsma, Note, *Concealed Carry Through Common Use: Extending Heller's Constitutional Construction*, 85 GEO. WASH. L. REV. 284, 310-311 (2017) (discussing categorical approach based on text, history, and tradition).

Applying such a categorical approach also would be consistent with this Court's treatment of other constitutional rights. The Sixth Amendment right to an attorney, for example, is not subjected to an inquiry into the necessity of the government's interests. *Luis* v. *United States*, 136 S. Ct. 1083, 1101 (2016) (Thomas, J., concurring in the judgement). Similarly, the Free Exercise Clause "categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such." *McDaniel* v. *Paty,* 435 U.S. 618, 626 (1978) (plurality opinion). The Fifth Amendment *always* prohibits a second trial following an acquittal, *Arizona* v. *Washington*, 434 U.S. 497, 503 (1979). The Eighth Amendment *always* prohibits capital punishment for crimes not causing death or committed by minors, *Kennedy* v. *Louisiana*, 554 U.S.

407, 412, 447 (2008); *Roper* v. *Simmons*, 543 U.S. 551, 578 (2005). A categorical approach to the Second Amendment thus would fit well in the constitutional firmament. See David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 ST. LOUIS U. L.J. 193, 303-304 (2017) (making a similar argument).

Whatever policy arguments Respondents may have for limiting the right to bear arms in New York to a select and governmentally-privileged few, "[t]he 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; *id*. at 634-635 ("We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach"; "[t]he Second Amendment * * * is the very *product* of an interest balancing by the people").

A clear-cut categorical rejection of New York's "may-issue" licensing scheme—which requires a showing of "proper cause" beyond the assertion of the right itself and results in a near absolute prohibition of the "people" bearing arms for self-defense—is consistent with the language of the Second and Fourteenth Amendments, with a long history and tradition of individuals carrying arms for such defense, and with *Heller*. And such a test is quite easy to apply in this case. When asking whether a general prohibition on carrying arms for self-defense violates the right to bear arms, the Second Amendment's text,

as informed by history and tradition, neatly resolves the issue.

First, handguns are plainly "arms" within the meaning and protection of the Second and Fourteenth Amendments, as has already been determined by this Court in *Heller* and *McDonald*. That right "extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding," *Heller*, 554 U.S. at 582, and "is fully applicable to the States," *McDonald*, 561 U.S. at 750. And nothing about handguns suggests that they are somehow uniquely dangerous and unusual as compared to the broad range of arms commonly used for lawful purposes. *Caetano* v. *Massachusetts*, 577 U.S. 411, 417 (2016) (Alito, J., concurring) ("A weapon may not be banned unless it is *both* dangerous *and* unusual"; it "is a conjunctive test.").[2]

Second, restricting the ability to bear such common arms to a narrow class of persons granted a discretionary privilege by government functionaries squarely contradicts the text of the Second Amendment recognizing the existence of a "right" to

[2] Because all arms are dangerous, even when used precisely as intended, any notion of dangerousness as part of the test to limit the right to keep and bear arms must necessarily focus on a type of danger that is meaningfully different from the intrinsic dangerousness of the overall classes of "arms" in common use for lawful purposes. *Amicus* suggests that looking to questions of excess collateral damage might be the appropriate measure of such differentiated danger. Rocket launchers, mines, flamethrowers, and nuclear weapons are some obvious examples presenting a meaningfully differentiated danger of collateral damage.

bear arms. A right is not mere precatory guidance, and the choice whether and how to exercise a pre-existing right belongs to the right-holder, and most emphatically not to the government. See, *e.g.*, *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 575 (1995) ("[T]he choice of a speaker not to propound a particular point of view * * * is presumed to lie beyond the government's power to control."); *Riley* v. *National Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 790-91 (1988) ("The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it."); cf. *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) ("But the choice among these alternative approaches is not ours to make * * *. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us."). Rights are not a matter of governmental grace; they trump any claimed authority by the government. That is their very point.

Furthermore, that New York's licensing scheme tasks its gatekeepers with finding some special and distinguishing need to justify deigning to allow individuals to bear arms in public for self-defense also contradicts the text recognizing the right to bear arms as belonging to the undifferentiated "people." Indeed, that New York requires a potential licensee to *distinguish* themselves from the people to the satisfaction of such functionaries gets it exactly backwards. Pet. Br. 48. It is the government that must bear any burden of distinguishing individuals from

"the people" generally if it seeks to claim they are not entitled to the full benefit of a right belonging to the people. History and tradition similarly confirm that the people exercised their right to defend themselves through carrying arms without need to go abegging to the government or other prior restraint on that right. Pet. Br. 2.[3]

In short, New York's restriction on the bearing of arms for self-defense could not be a more direct infringement of the right to bear arms, violates the express text of the Second Amendment, flouts history and tradition regarding the understanding of the right to bear arms, and should be categorically rejected.

Finally, a few observations on the proper approach to categorical protections are in order. Initially, text is always paramount. *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 338-339 (1816) ("If the text be clear

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[3] Although there is some historical evidence discussing the difference between open and concealed carry of arms, see *Nunn* v. *State*, 1 Ga. 243, 248-251 (Ga. 1846) (distinguishing between concealed and open carry for constitutional purposes), this case should not be framed in that overly limited fashion. New York bans open carry in its entirety. Pet. Br. 1-2; N.Y. Penal Law § 265.03 (McKinney 2006). The only slim option for *any* defensive carry of a firearm thus is through concealed carry, which New York apparently deems less problematic, perhaps for reasons involving potential public reaction to open carry of a firearm. But if New York would flip any historical concern with concealed carry on its head by elevating concealed carry above open carry, then it cannot rely on the very history it rejected as a basis for restricting concealed carry as well. In effect, New York law is restricting virtually all bearing of arms and should be analyzed from that perspective. While a case seeking to match historic concerns by allowing open carry while limiting concealed carry would require more historical analysis, this is not such a case.

and distinct, no restriction upon its plain and obvious import ought to be admitted, unless the inference be irresistible."). We are applying a written Constitution, after all, and thus it is only through the enacted and ratified language of the document that we can be confident of what was ultimately decided in the face of potentially competing views, concerns, and historical precedents. While there may be room for historical debate on the margins, in most cases the test is clear enough to resolve the issues. Is the object in question a protected "arm"? Does the restriction apply broadly to the "people"? Does it diminish a guaranteed "right" to a mere privilege? The answer is found here: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed." Those are the ratified words of the Constitution, and no amount of quibbling can alter their original public (and still today core) meaning.

Next, even where history and tradition come into play, they do not alone set the parameters of the right guaranteed in the Constitution, but rather they inform contemporaneous understanding of the words used to recognize the right, as it developed, waned, and waxed through the time of the Framing and ratification. Although examples of English or American governments narrowing or abusing the right to bear arms might be found, they are just as readily potential counterpoints or abuses the Constitution was designed to correct, not necessarily exemplars of the limited scope of the right as

understood by the Framers and ratifiers.[4] That England occasionally failed to respect the rights of Englishmen does not mean that failing carried forward. History is used to inform the meaning of the Amendment, not to limit its application. Constitutional meaning may be intentionally broader than the narrowest examples of historic practice. Indeed, the incorporation of the Bill of Rights into the Fourteenth Amendment was in large part a reaction to the narrowing and abuse of individual rights by many States. Pet.Br. 2. As a counter to such past abuses, the scope of the right that carried forward thereafter must necessarily be understood as broader than any narrower practice that may have preceded the corrective Fourteenth Amendment.[5]

Jurists also need to be careful with restrictive examples from the States, particularly as to their context and timing. State interpretations of their own Constitutions will often be useful, but only indirectly to inform the language used in the federal Constitution. Similarly, some States had more limited

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[4] That England occasionally failed to respect the rights of Englishmen does not mean that failing was endorsed going forward in the United States. Historical examples can inform the meaning of the Amendment, but they do not invariably set an upper limit on its application. Rights are often recognized in broadly worded text that is intentionally less limited than historic practices in derogation of such rights.

[5] That Amendment not only applies to State infringement, but also helps frame the constitutional history of the document as a whole. Just as all parts of a statute or contract must be read together, amendments in one place necessarily impact the reading and contemporaneous understanding of other parts of the document to which they relate.

protections, and restrictions permitted under such laws do not support restrictions under the more broadly worded federal guarantee.

Lastly, when considering *Heller*'s discussion, in *dicta*, of longstanding limits that are presumptively constitutional, 554 U.S. at 626-627 & n. 26, this Court should clarify that any presumption is certainly rebuttable by the core of text as informed by relevant history and tradition from the time of the Framings and ratifications of the relevant Amendments. Post-adoption limits, particularly those coming long after the Fourteenth Amendment, are of little utility when interpreting the Constitution.[6] Indeed, they are likely of negative utility—mere examples of the political branches pushing against the limits of the Constitution to see what they could get away with. The notion that subsequent, or even contemporary, legislators against whom the Constitution operates can provide a genuine understanding of meaning, as opposed to a self-serving narrowing of the restraints on their power, is poor history, even poorer law, and conflicts with the very point of a written Constitution designed to cabin the desires and excesses of those self-same pretenders to power. No restriction enacted well after the relevant Amendments thus can even

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[6] This Court has frequently criticized the use of post-enactment legislative "history" as a means of interpreting statutes, and it should be no different when for interpreting the Constitution. *Weinberger* v. *Rossi*, 456 U.S. 25, 35-36 (1982) ("[*P*]*osthoc*" congressional statements are "not entitled to much weight."); *Bread Political Action Comm.* v. *FEC*, 455 U.S. 577, 582 n.3 (1982) ("[*P*]*ost hoc* observations * * * carry little if any weight.").

remotely be considered presumptively valid and, to the extent *dicta* in *Heller* preserved the option to find otherwise out of an abundance of caution, it was wrong and should be recognized as such.

II. IF TIERED SCRUTINY IS USED, IT SHOULD BE STRICT OR, AT THE VERY LEAST, EXACTING AND INSULATED FROM LEGISLATIVE AND JUDICIAL MANIPULATION.

While *Amicus* firmly maintains that the categorical approach is the most faithful implementation of the Second Amendment's guarantees in the overwhelming majority of cases, it recognizes that not all Justices may agree or might think that some cases involving incidental or indirect burdens on the right to keep and bear arms may require a different approach.[7] To the extent that any tiered-scrutiny approach is to be applied, it should hew closely to the protective approaches used in First Amendment cases. While most circuits have adopted such an approach in name, they rarely apply it in fact. Accordingly, if this Court endorses such an approach, lower courts need considerable clarification and guidance about the guardrails they must respect when applying tiered scrutiny.

[7] *Amicus* would note that even for indirect burdens or close calls, resort to text, history, and tradition remains a better "single, neutral principle," *McDonald*, 561 U.S. at 788, than inherently malleable and manipulable tiers of scrutiny.

A. Tiered Scrutiny Has Been an Abject Failure in Second Amendment Cases in the Lower Courts.

In the years since *Heller*, the circuits have nominally recognized that infringements on the right to keep and bear arms requires some form of heightened scrutiny. Despite paying lip service to applying heightened scrutiny, however, the reality is much different.

To begin, in many circuits, the level of scrutiny applied is malleable. *United States* v. *Chovan*, 735 F.3d 1127, 1134-1136 (9th Cir. 2013) (collecting cases); *National Rifle Ass'n of Am., Inc.* v. *ATF*, 700 F.3d 185, 195 (5th Cir. 2012) (noting that the appropriate level of scrutiny is variable). Although the level of scrutiny to be applied is purportedly "guided by First Amendment principles," *Jackson* v. *City and Cnty. of San Fransisco*, 746 F.3d 953, 961 (9th Cir. 2014), it invariably depends on the manipulable perceived closeness of the challenged restriction to what courts characterize as the "core" right of "law-abiding, responsible citizens to use arms in defense of hearth and home" and "the severity of the law's burden" on the right to bear arms. *Chovan*, 735 F.3d at 1138. Unsurprisingly, hostile courts almost never find a restriction to substantially impact core Second Amendment rights.

Where a burden on gun possession does not impact the "core" right, these courts purport to apply "the test for intermediate scrutiny from First Amendment cases," *Silvester* v. *Harris*, 843 F.3d 816, 821 (9th Cir. 2016), *cert. denied*, *Silvester* v. *Becerra*, 138 S. Ct. 945 (2018), or something weaker still. *Kachalsky* v. *Cnty.*

of Westchester, 701 F.3d 81, 89, 96 (2d Cir. 2012) (intermediate scrutiny when Second Amendment right not at its "zenith"); *Heller II*, 670 F.3d at 1257 ("[A] regulation * * * that imposes a less substantial burden should be proportionately easier to justify."); *United States* v. *Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010) ("less stringent standard" where "burden imposed by the law does not severely limit the possession of firearms"). Unsurprisingly, hostile courts almost never find a restriction to substantially impact core Second Amendment rights.

The malleable articulation of the levels of scrutiny to be applied (or, more often *not* applied), while bad enough, is compounded by the completely empty and anchorless standards typically applied under the guise of "intermediate" scrutiny. This Court has recently recognized that tests based on such repeated judgment calls are "'altogether malleable'" and "'no[t] principled,'" and that such "amorphous standard[s] would invite 'perpetua[l] give-it-a-try litigation.'" *Janus* v. *AFSCME, Council 31*, 138 S. Ct. 2448, 2481 (2018) (quoting opinions by Scalia and Kennedy, JJ., citations omitted). That is precisely what has happened and succeeded in Second Amendment cases.

Multiple Justices and Judges have repeatedly recognized that the standard of review applied in the Second, Ninth, and other Circuits is largely "indistinguishable" from rational basis. See, *e.g.*, *Silvester* v. *Becerra*, 138 S. Ct. 945, 945 (2018) (Thomas, J., dissenting from the denial of cert.); *Peruta* v. *California*, 137 S. Ct. 1995, 1997, 1999 (2017) (Thomas, J., dissenting from denial of cert.) ("The approach taken by the *en banc* court is

indefensible[.]"); *Voisine* v. *United States*, 136 S. Ct. 2272, 2291 (2016) (Thomas, J., dissenting) ("We treat no other constitutional right so cavalierly."); *Folajtar* v. *Attorney Gen. of the United States*, 980 F.3d 897, 922 (3d Cir. 2020) (Bibas, J., dissenting) ("The majority's near-blanket rule is also far from narrowly tailored. *Heller* mandates heightened scrutiny, not rational-basis review."); *Drake* v. *Filko,* 724 F.3d 426, 457 (3d Cir. 2013) (Hardiman, J., dissenting) ("By deferring absolutely to the New Jersey legislature, the majority abdicates its duty to apply intermediate scrutiny and effectively applies the rational basis test[.]"); cf. *Caetano* v. *Massachusetts*, 577 U.S. 411 (2016) (GVR of State court opinion that did not attend to *Heller*); *id*. at 415, 421 (Alito, J., concurring) ("Although the Supreme Judicial Court [of Massachusetts] professed to apply *Heller*, each step of its analysis defied *Heller*'s reasoning."; "The lower court's ill treatment of *Heller* cannot stand.").

In so many Second Amendment cases, courts have done what they would never do when applying heightened First Amendment scrutiny—blindly deferred to the legislature. See *Rogers* v. *Grewal*, 140 S. Ct. 1865, 1867 n.1 (2020) (Thomas, J., dissenting from the denial of cert.) (criticizing courts' deference to legislatures in *Kachalsky*, 701 F.3d at 100, and other circuit cases); *Pena* v. *Lindley*, 898 F.3d 969, 979 (9th Cir. 2018) (claiming that the court "owe[d] the legislature's findings deference"). Such deference is the antithesis of heightened scrutiny.

The lower courts need a course correction. Direct restrictions on the right to keep and bear arms—as are at issue in this case—should be subject to strict

scrutiny or, at worst, exacting scrutiny. Indirect restrictions that impose a substantial burden on Second Amendment rights, should be subject to actual heightened—not deferential—scrutiny, generally still strict or exacting scrutiny, as is the case with indirect burdens on the exercise of First Amendment rights. *AFPF*, 141 S. Ct. at 2383 (exacting scrutiny the minimum to be applied to indirect burden on the freedom of association imposed through a donor disclosure requirement that would chill association). Short of adopting the categorical approach addressed in Part I, this is the only way to "afford the Second Amendment the respect due an enumerated constitutional right." *Silvester*, 138 S. Ct. at 945 (Thomas, J., dissenting from the denial of cert.).

B. Heightened Scrutiny Should Be Strict or Exacting at Worst.

While the approach taken in many circuits is rife with flaws, an initial and recurring problem is the selection of supposedly "intermediate" scrutiny when reviewing virtually any limitation on the right to keep and bear arms. That error initially stems from a false dichotomy between core and non-core aspects of Second Amendment rights, then limiting the "core" to the bare minimum exercise possible in service of self-defense within the home. That flaw is then compounded by a hostile evaluation of whether a restriction "substantially burdens" the narrowed core right, with any burden short of a complete ban of firearms within the home deemed insubstantial. The final step in the paradigm of dilution is then to claim that the smaller the burden the more lenient the standard of review, thus downgrading both the

selected test at the front end and then its mode of application thereafter. Suffice it to say, every step in that chain is flawed and should be rejected by this Court as it analyzes the restriction in this case.

First, the very attempt to distinguish core from non-core rights within the Second Amendment is non-textual and invites abuse. Asking whether a particular exercise of rights is worthy of being at the "core" of a right merely incorporates freestanding balancing and judicial preference into the choice of a standard of review. Judges thus have tended to determine the core of the Second Amendment according to their own like or dislike of the Amendment in general, with the most hostile limiting it to the narrow facts of *Heller* itself, or worse still, to the still narrower views of the dissent.

To the extent one seeks the "core" of an enumerated right, the place to look is in the text itself. Thus, any direct restriction on the right to "keep" or "bear" arms, such as the express denial to most people of the ability to carry arms for self-defense or to purchase and possess modern firearms in common use for lawful purposes, falls squarely into the "core" of the protected right. Such restrictions, precisely like direct restrictions on speech, should be subject to strict scrutiny. See, *e.g.*, *Reed* v. *Town of Gilbert*, 576 U.S. 155, 159 (2015) (content-based sign regulation subject to strict scrutiny); *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 382 (1992) (content-based speech regulations presumptively invalid); *Riley*, 487 U.S. at 790 (law regulating statements made when soliciting charitable contributions subject to strict scrutiny).

If some restrictions might be deemed to operate outside the "core" of the Second Amendment, it should only be where they are incidental or indirect and attenuated, rather than acting directly upon, or targeted at, who may keep and bear arms or what arms they may keep and bear. But even for indirect restrictions, significantly heightened scrutiny is appropriate, as this Court's recent decision in *AFPF* illustrates. *See* 141 S. Ct. at 2384.[8]

Second, questioning the *substantiality* of a burden on Second Amendment rights is inappropriate for direct restrictions on those rights and even for most indirect restrictions. This court would not downgrade the scrutiny of a content or viewpoint-based tax on speech simply because it was a very *small* tax. It is the direct conflict with the constitutional Amendment that matters when selecting strict scrutiny, not the magnitude of the penalty imposed. And even for indirect burdens on speech, such as attempts to breach the associational privacy of membership or donor lists,

[8] If intermediate scrutiny ever should apply, it should only be in cases of minor indirect or incidental burdens, not directed to the keeping or bearing of arms, but affecting them in a way that would discourage or make it more difficult to keep and bear arms. See, *e.g.*, *Rumsfeld* v. *Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 67 (2006) (intermediate scrutiny for condition on receipt of federal funds requiring colleges mot to discriminate against military recruiters); *United States* v. *O'Brien*, 391 U.S. 367, 376-377, 382 (1968) (functionally intermediate scrutiny for prohibition on destruction of draft cards that was not directed at speech but incidentally burdened expressive conduct of publicly destroying such cards). And even where intermediate scrutiny is applied, it should be genuine, as in numerous First Amendment cases, not rational basis scrutiny in disguise, as has been by far the norm in the lower courts.

the substantiality of the chill on First Amendment rights is not weighed when selecting an exacting standard of scrutiny, but at most comes into play, if at all, only after a narrow tailoring analysis to see if any narrowly tailored restriction *still* imposes an excessive burden on speech and association. *AFPF*, 141 S. Ct. at 2385-2389.

Third, applying a continuously sliding scale of scrutiny within any "tier" of scrutiny, based on the perceived burden imposed or benefit sought, is not at all appropriate. Such a variable test is precisely the type of free-standing interest-balancing approach that the *Heller* dissent proposed, and that the *Heller* majority expressly rejected. Compare 554 U.S. at 689 (Breyer, J., dissenting), with 554 U.S. at 634 (majority opinion). And it all but ensures circumvention of any constitutional right that is or becomes unpopular with hostile legislatures or courts. Cf. *Tandon* v. *Newsom*, 141 S. Ct. 1294, 1297 (2021) (per curiam) ("This is the fifth time the Court has summarily rejected the Ninth Circuit's analysis of California's COVID restrictions on religious exercise. It is unsurprising that such litigants are entitled to relief.") (internal citations omitted); *Pavan* v. *Smith*, 137 S. Ct. 2075, 2077 (2017) (critiquing Arkansas Supreme Court for ignoring this Court's promise in *Obergefell* v. *Hodges*, 135 S. Ct. 2584 (2015), that same-sex couples get the same marital benefits as heterosexual couples).

To provide genuine teeth to the Second Amendment, this Court should reject the various tactics used by the courts to weaken the standard of scrutiny and confirm that heightened scrutiny should

be strict or, at the very least, exacting in all cases where *Heller*'s categorical approach does not apply.

C. Any Claimed Government Interests Must Be Specific and Proven To Be Real.

Whatever level of heightened scrutiny is ultimately applied in any particular case, there are certain bare minima that apply in all circumstances and that are routinely ignored by courts in Second Amendment cases. The first and most obvious minimum requirement is that the government bears the burden of proving that its claimed interests—the problem it supposedly seeks to remedy—is in fact real, not merely assumed or speculative. See *Edenfield*, 507 U.S. at 770-771. Deference to legislative "findings" made in service of narrowing a constitutional right is inappropriate under any formulation of heightened scrutiny. See, *e.g.*, *Moore* v. *City of E. Cleveland*, 431 U.S. 494, 499 (1977) (Deference in the issues of marriage and family life are protected by the Due Process Clause and therefore "the usual judicial deference to the legislature is inappropriate."); *Landmark Commc'ns, Inc.* v. *Virginia*, 435 U.S. 829, 843 (1978) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.").

In the First Amendment context, even using intermediate scrutiny, the government's burden of justifying its restriction on constitutional rights "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real." *Edenfield*, 507 U.S. at 770-771; *id.*

at 776 (the State retains "the obligation to demonstrate that it is regulating [protected activity] in order to address what is in fact a serious problem"). And such burden must be carried by real proof, not bare assertion. In *Edenfield*, for example, the regulatory body presented "no studies that suggest personal solicitation of prospective business clients by CPAs creates the dangers of fraud, overreaching, or compromised independence that the Board claims to fear." 507 U.S. at 771. The lack of comparative data from other States also was significant in *Edenfield*, *id*., and is likewise significant here.

Assuming *arguendo* the importance of the State's highly generalized claimed interests in public safety and reducing "gun violence," those interests must "rely on * * * hard facts and reasonable inferences drawn from convincing analysis amounting to substantial evidence based on relevant and accurate data sets." *Duncan* v. *Becerra*, 366 F. Supp.3d 1131, 1161 (S.D. Cal. 2019).

Second, the interest must be described at a level of generality that is neither meaninglessly self-referential nor so broad as to be useless in the remainder of the heightened scrutiny analysis. A claimed interest in stopping any deaths from guns that are black in color in order to ban all black guns is an example of a an overly narrow description that definitionally begs the question of narrow tailoring. By contrast, a sweeping interest in preventing gun-

violence overall is too broadly defined and is typically taken for granted. [9]

In most cases, the actual interest behind any proposed restriction is more specific—preventing mass shootings, preventing impulse suicides, or preventing the use of guns in public conflicts. Those interests are sufficiently defined to be tested for the validity of the proposed interest, the actual existence of any genuine problem, and the effectiveness and appropriate breadth of any proposed solution. In many instances, a specific articulation of the claimed interest will show it to be illegitimate on its face – making guns more difficult to use or control; reducing the number of guns people can afford to buy; reducing the number of guns available in general; deterring people from buying guns by recording their purchases.[10] In other instances, the interest may be consistent with history—preventing convicted dangerous criminals from buying guns, for example.

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[9] The top-level concern of reducing gun violence, for example, is overbroad because, in appropriate circumstances, gun violence is the precise point of having a firearm. Defense of self, family, state, and nation is not a pillow-fight. Unfortunate as it may be, there is an undeniable need for the ability to use, and occasional actual use of, just violence for higher purposes.

[10] Observing the obvious, that guns can be dangerous, is by itself no justification for abridging a fundamental right. The drafters and ratifiers of the Second and Fourteenth Amendments knew guns were dangerous and already struck the risk-benefit balance on behalf of the country and the generations inheriting its constitutional rights. *Heller*, U.S. at 635. Under even genuine intermediate scrutiny, if a government wishes to limit the right to keep and bear arms, it must show a compelling interest that rises above the non-unique finding that guns are dangerous.

But having a specific interest rather than a broad platitude will help frame the remaining parts of heightened scrutiny.

Finally, the government must demonstrate that it actually accomplishes its claimed interest—that it solves the claimed problem—to a material degree. Whatever the reality of a problem, if the proposed solution does not meaningfully solve it, then the true interest may be something else entirely, or the minor gain is simply not enough to justify the squeeze on constitutional rights. Once again, even under First Amendment intermediate scrutiny, the government bears the burden of proving "that its restriction will in fact alleviate [real harms] to a *material degree*." *Edenfield*, 507 U.S. at 770-771 (emphasis added); *id.* at 776 (state must demonstrate "that the preventative measure it proposes will contribute in a material way to solving" what is "in fact a serious problem"). In *Greater New Orleans Broadcasting Ass'n* v. *United States*, 527 U.S. 173, 185-195 (1999), this Court assumed the accuracy of a causal chain from casino advertising to the social ills resulting from increased gambling, but still found the government regulation failed intermediate scrutiny because the government's inconsistent policies towards gambling failed to distinguish between the advertising it allowed and the advertising it restricted. Accordingly, it could not demonstrate that its policy had "directly and materially furthered the asserted interest," *id.* at 189, thus casting doubt on its genuine importance.

In the gun context, for example, if the government sought to limit the number of carry licenses issued in order to reduce gun crimes, it would need to prove that

permitting such carry has resulted in increased crime, that permit-holders engage in substantial amounts of crime, or some other set of facts suggesting that its law is targeting a genuine problem. If the only demonstrable problem with gun crime is that criminals who illegally own firearms are committing crimes, then it is difficult to imagine that the claimed interest is either real or is the *actual* interest the state seeks to advance.

D. Narrow Tailoring Must Be Tested at the Outset and Must Involve at Least a Close Fit.

The next essential step of any genuinely heightened scrutiny is to require the government to prove that its proposed restriction is narrowly tailored to any genuine interest it has proven. Often, the lack of tailoring will be apparent, as when a law restricts far more activity than implicates the genuine interest asserted. *See AFPF*, 141 S. Ct. at 2389. In such cases the poor fit demonstrates either a disingenuous asserted interest and something else is going on, or it reflects a broadly prophylactic rule seeking to address a few cases of genuine concern by banning all instances of protected behavior. Neither alternative can survive even the most lenient level of genuinely heightened scrutiny.

Where an over- or under-broad restriction suggests an actual interest different than the one claimed, the real interest is typically improper in its entirety. Thus, an overbroad restriction on keeping or bearing arms is more likely just a direct effort to suppress the right itself, rather than a genuine effort to deal with a

narrower, and more defensible, claimed interest. Furthermore, under-broad restrictions cast doubt on whether the government genuinely weighs the interest as heavily as it claims or whether it is merely making an incremental assault on the right itself.[11]

An underinclusive law suggests the value of the government's interest is not as weighty as claimed. *City of Ladue* v. *Gilleo,* 512 U.S. 43, 52–53 (1994); *Republican Party of Minnesota* v. *White*, 536 U.S. 765, 780 (2002). Laws "leav[ing] appreciable damage" to an alleged vital interest unprotected "cannot be regarded as protecting an interest of the highest order." *Florida Star* v. *B.J. F.,* 491 U.S. 524, 541–542 (1989) (Scalia, J., concurring in judgment). In *Republican Party of Minnesota*, the Court noted that a statute forbidding judicial candidates from expressing views—but allowing such expression before declaring candidacy or after being elected—was so "woefully underinclusive" of the stated goal of advancing judicial open-mindedness "as to render belief in that purpose a challenge to the credulous." 536 U.S. at 779-780.

The doubt inspired by underinclusive laws has particular applicability in this case. New York asserts an interest in "public safety and crime prevention." App-11 (citing *Kachalsky*, 701 F.3d at 97). Despite

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[11] Any suggestion that banning only a small subset of firearms is no burden because there are other classes of firearms available is foreclosed by *Heller*. 554 U.S. at 629; *see also Parker* v. *District of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007) ("frivolous" to suggest that banning one type of firearm while allowing others "does not implicate the Second Amendment * * *. It could be similarly contended that all firearms may be banned so long as sabers were permitted."), *aff'd sub nom. Heller*, 554 U.S. 570.

that interest, firearm applicants who "demonstrate a special need for self-protection distinguishable from that of the general community" can be licensed to carry their weapons outside of the home. App-6 (citations omitted). It also allows New Yorkers to "transport firearms to a second home or shooting range outside of the city." *New York State Rifle & Pistol Ass'n, Inc.* v. *City of New York, New York*, 140 S. Ct. 1525, 1526 (2020). In the process, they can freely stop for "coffee, gas, food, or restroom breaks." *Ibid.* As in the First Amendment context, these exemptions to the general rule undermine New York's asserted interest and demonstrate a poor fit between the claimed interest and the challenged law.

Alternatively, seeking to address a genuine concern with broad prophylactic rules devalues the notion of a constitutional right and are contrary to the demands of heightened scrutiny in the First Amendment context and elsewhere. *See NAACP* v. *Button*, 371 U.S. 415, 438 (1963) ("Broad prophylactic rules in the area of free expression are suspect."); *Ibid.* ("Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms."); *Turner Broadcasting System, Inc.* v. *FCC*, 512 U.S. 622, 682-83 (1994) (O'Connor, J., concurring in part and dissenting in part) ("A regulation is not 'narrowly tailored'—even under the more lenient [standard applicable to content-neutral restrictions]—where * * * a substantial portion of the burden on speech does not serve to advance [the State's content-neutral] goals * * *. Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone[.]") (brackets in original) (citations and quotations omitted); *In re Primus*, 436 U.S. 412,

432–33 (1978) (because First Amendment rights require "breathing space to survive, government may regulate in [this] area only with narrow specificity." (cleaned up)).

Constitutionally protected rights cannot be restricted merely because criminals might abuse the rights. See *Southeastern Promotions Ltd.* v. *Conrad*, 420 U.S. 546, 559 (1975); accord *Vincenty* v. *Bloomberg*, 476 F.3d 74, 84-85 (2d Cir. 2007); *Robb* v. *Hungerbeeler*, 370 F.3d 735, 743 (8th Cir. 2004); *Ashcroft* v. *Free Speech Coal.*, 535 U.S. 234, 245 (2002); *Stanley* v. *Georgia*, 394 U.S. 557, 567 (1969). Indeed, computing devices connected to the Internet are now the most common tool for engaging in lawful, protected First Amendment activities, but undoubtedly also the most common tool for engaging in many unprotected and sometimes illegal forms of speech (*e.g.*, defamation, true threats) and other illegal conduct (*e.g.*, child pornography, hacking, and identity theft) as well. The latter hardly can justify restricting *lawful* use of computers connected to the Internet by law-abiding people who wish to publish their protected content and viewpoints.

Generalized risk does not warrant restrictions as to all persons, and "a preventative rule" aimed at such generic hazards is "justified only in situations 'inherently conducive to'" the specific dangers identified. *Edenfield*, 507 U.S. at 774 (quoting *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 464 (1978)). By prohibiting even citizens who pass a government background check from carrying a common and effective class of firearms, the law imposes considerably more burden on law-abiding citizens

than is warranted by the rare instances of criminal violence using such firearms.

E. Any Burden on Second Amendment Rights, Even if Narrowly Tailored, Still May Not Impose an Excessive Burden on the Rights.

If a proposed restriction on Second Amendment rights survives the prior steps and requirements of proof, the final constitutional safeguard is then a genuine evaluation to determine whether the restriction nonetheless impacts too much protected activity. See *O'Brien*,391 U.S. at 377 ("incidental restriction on alleged First Amendment freedoms is no greater than is essential" to further the government's important interests); *McCutcheon* v. *FEC*, 134 S. Ct. 1434, 1456-1457 (2014) (chosen means must be "'closely drawn'" to achieve genuine interest without "'unnecessary abridgment'" of constitutionally protected conduct (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 25 (1976)). To the extent a law imposes an undue burden on protected rights it should be declared unconstitutional and enjoined regardless whether it accomplishes some other salutary purpose.

In the First Amendment context, it is inconceivable that government could ban private use of the printing press, restrict the Internet, or limit the capacity of personal computers in order to reduce the speed, reach, and effectiveness of speech simply because such qualities could be (and are) used by slanderers as well as by persons engaging in lawful and protected public debate. Regardless whether such extreme measures would genuinely reduce harmful speech, their impact

on protected rights is too great. In the Second Amendment context, it is likewise inconceivable that government could simply ban a category of guns or the carriage of them outright, even if that might prevent accidents, reduce the effectiveness of suicides, or reduce mass or impulse shootings. Nor could government simply ban all *men* from owning firearms, regardless whether most gun crimes are committed by men. While such proposals likely would fail the narrow tailoring requirement as well, even if they did not they would excessively burden Second Amendment rights.

CONCLUSION

In the many years since *Heller* and *McDonald*, the lower courts have engaged in near-constant destruction of the right to keep and bear arms. To prevent more such malfeasance, this Court should adopt a less manipulable categorical approach to protecting Second Amendment rights. And to the extent it preserves tiered scrutiny for some subset of cases, it should hold that strict or, at the very least, exacting scrutiny is the proper test and should firmly remind the lower courts what such scrutiny entails in the Second Amendment context as elsewhere. The decision below should be reversed and New York's restrictive carry licensing scheme declared unconstitutional.

Respectfully submitted,

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July 20, 2021