No. 12-845

IN THE

# Supreme Court of the United States

ALAN KACHALSKY, ET AL.,

*Petitioners*,

v.

SUSAN CACACE, ET AL.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## BRIEF OF *AMICUS CURIAE* CATO INSTITUTE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI


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## STATEMENT OF INTEREST[1]

Established in 1977, the Cato Institute is a non-partisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of constitutional government that are the foundation of liberty. To those ends, Cato holds conferences and publishes books, studies, and the annual Cato Supreme Court Review. This case is of central concern to Cato because it involves the natural right to armed self-defense, which the Constitution protects through the Second and Fourteenth Amendments.

## SUMMARY OF ARGUMENT

In its opinion below, the Second Circuit lamented that this Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), applied to the States in *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), "raises more questions than it answers." *Kachalsky v. County of Westchester*, 701 F.3d 81, 88 (2d Cir. 2012). Whether or not that cry is warranted, many lower courts have joined it. *E.g.*, *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011) ("The whole matter [of an arms right beyond the home] strikes us as a vast *terra incognita* . . . .").

There is widespread—and growing—disagreement in the lower courts regarding the breadth and depth of the individual right enumerated in the Second

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[1] No party or counsel for a party authored or contributed monetarily to the preparation or submission of any portion of this brief. Counsel of record for all parties received notice of the Cato Institute's intention to file this brief more than 10 days before it was due, and all parties have consented to its filing.

Amendment. This disagreement extends far beyond divergent outcomes, to the basic question of how to analyze and decide Second Amendment claims. Some have endorsed combining an historical approach to determining the scope of the right with rigorous scrutiny of restrictions on that right, akin to the doctrines used in the First Amendment context. Others have employed approaches that, however labeled, amount to little more than deferential rational-basis review, including a presumption of constitutionality. Still others have advocated developing a body of rules based on, or derived from history.

The Second Amendment's scope and the means of assessing restrictions on that right thus remain largely undefined. No other constitutional right has been so left to fend for itself in the lower courts. This Court has not hesitated to seize opportunities to ensure the protection of other constitutional rights—recognizing historically based categorical rules, developing comprehensive methodologies, and announcing robust standards. The Second Amendment merits, and now needs, the same solicitude.

Whatever analytical approach the Court ultimately employs, the time has come to begin filling in the picture that the Court outlined in *Heller*, and to bring some harmony to the cacophony below. This case provides an excellent vehicle for starting that process. This Court should therefore grant the petition for certiorari.

## ARGUMENT

### I. THERE IS VAST DISAGREEMENT IN THE LOWER COURTS REGARDING THE PROPER ANALYSIS OF THE RIGHT ENUMERATED IN THE SECOND AMENDMENT

Petitioners amply catalogue the divergences in the lower courts in applying the Second Amendment. *See* Cert. Pet. at 11-27. Some courts have essentially limited *Heller* to its facts, while others have given it a more muscular construction. But even beyond divergent outcomes, there is broad methodological disagreement concerning the fundamental issue of how to approach questions involving the Second Amendment, which has led to widespread confusion and, in some instances, toothless protection of the Second Amendment right. Although variations abound, the methodologies adopted thus far largely fall into three camps—(A) historically based scope combined with robust intermediate scrutiny; (B) nominal intermediate scrutiny; and (C) historically based analogical reasoning.

#### A. Historically Based Determination of the Right's Scope, With Robust Intermediate Scrutiny.

The Seventh Circuit Court of Appeals has expounded the most robust method of analyzing Second Amendment claims, which it articulated primarily in a suit challenging Chicago's post-*McDonald* firearms scheme that required range training yet banned firing ranges in the city. *See Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011). In *Ezell*, the Seventh Circuit developed a two-step analysis for Second Amendment questions that it rooted in *Heller*, which the Seventh Circuit viewed as

providing "general direction" for analysis by employing an "instructive" "decision method." 651 F.3d at 700.

"First, the threshold inquiry in some Second Amendment cases will be a 'scope' question: Is the restricted activity protected by the Second Amendment in the first place?" *Id.* at 701. This foundational inquiry, which was the basic question in *Heller* itself, "requires a textual and historical inquiry into original meaning." *Id.* At this step, the question is primarily whether the government can clearly establish, based on history and legal tradition, that a regulated activity is categorically unprotected—much as this Court has concluded under the First Amendment regarding some categories of speech. *Id.* at 702-03; *see id.* at 704-06 (analyzing history bearing on firing ranges); *see also Moore v. Madigan*, 702 F.3d 933, 935 (7th Cir. 2012) (finding unpersuasive Illinois's "historical evidence that there was no generally recognized private right to carry arms in public in 1791").

If the government fails to make that showing, then the second step of the Second Amendment analysis—which has been the primary point of divergence in the lower courts—is an "inquiry into the strength of the government's justification for restricting or regulating the exercise of Second Amendment rights." *Ezell*, 651 F.3d at 703. Again, as with the First Amendment, the court explained, the nature of the inquiry depends on the nature of the burden on the right: "[T]he rigor of this judicial review will depend on how close the law comes to the core of the Second Amendment right and the severity of the law's burden on the right." *Id.*

Some regulations will be at the extreme, flatly banning that which the Second Amendment protects. These will be categorically unconstitutional, much like the handgun bans at issue in *Heller* and *McDonald*. *Id.* at 703.

Otherwise, the Seventh Circuit requires a heightened form of review akin to intermediate scrutiny. For "a severe burden on the core Second Amendment right of armed self-defense," the government must provide "an extremely strong public-interest justification and a close fit between the government's means and its end." *Id.* at 708; *see also Moore*, 702 F.3d at 940 (holding that Illinois had failed to make even a "strong showing" that its ban on carrying guns outside the home was "vital to public safety," and that, to prevail, "it would have to make a stronger showing than" that, given the "blanket prohibition") (internal quotation marks omitted). For "laws restricting activity lying closer to the margins of the Second Amendment right" and "laws that merely regulate rather than restrict," however, "modest burdens on the right may be more easily justified." 651 F.3d at 708. To illustrate its approach, the court pointed to doctrines developed for the First Amendment, including the treatment of content-based regulation, political speech, time-place-and-manner regulations, forums, and commercial speech. *Id.* at 707-08. And of course, in these areas too—such as the higher protection of political speech and skepticism of prior restraints—history still plays a part. *See id.* at 707 ("In free-speech cases, the applicable standard of review" sometimes depends "on the specific iteration of the right.").

Finally, the court emphasized that, in all events, the government "bears the burden of justifying its action under" the applicable standard of review. *Id.* at 706; *see also id.* at 703 (inquiry is "into the strength of the government's justification"). As with the First Amendment, meeting this burden requires the government to "supply actual, reliable evidence" to justify its public-safety claims for a regulation. *Id.* at 709.

### B. Nominal Intermediate Scrutiny.

The Second Circuit, in the case at issue here, took a different path, one that other courts also have taken. These courts adopt intermediate scrutiny in name but apply a more deferential review in fact. This approach often includes placing the burden on the challenger rather than the government, at least in practice, and (in what amounts to the same thing) employing a presumption of constitutionality even for regulations that directly burden activity within the scope of the right.

1. In the decision below, the court held that "intermediate scrutiny is appropriate in this case," such that the challenged "requirement passes constitutional muster if it is substantially related to the achievement of an important governmental interest." *Kachalsky*, 701 F.3d at 96. But rather than require the State of New York to prove that its blanket restriction on carrying firearms—according to which the interest in personal self-defense is by definition insufficient to justify a permit—was specifically tailored to advancing its interest in public safety and crime prevention, the Second Circuit applied what was, in effect, rational-basis review.

For example, the Second Circuit brushed aside arguments that the New York regulation restricts far more gun possession than necessary to protect the state's interests. The court explained that "[a] perfect fit between the means and the governmental objective is not required," such that New York's assessment of "the risks and benefits of handgun possession and shaping a licensing scheme to maximize the competing public-policy objectives" was "precisely the type of discretionary judgment that officials in the legislative and executive branches of state government regularly make." *Id.* at 98-99; *cf. Heller*, 554 U.S. at 690, 705 (Breyer, J., dissenting) (advocating "deference to legislative judgment" on "empirical" questions). In addition to deferring to legislative discretion, the Second Circuit also embraced a "'general reticence to invalidate the acts of our elected leaders.'" 701 F.3d at 100 (quoting *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579 (2012)).[2] In doing so, the Second Circuit thus gave far more deference to state legislative judgments than intermediate scrutiny typically provides.

2. The D.C. Circuit's opinion in *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011) ("*Heller II*"), deployed a similar analysis. There, the court

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[2] Even though this case involves both a state law rather than an Act of Congress and a substantive right rather than a constitutional limit on the federal government's legislative power, the Second Circuit also invoked the maxim that "[p]roper respect for a coordinate branch of government requires that we strike down legislation only if the lack of constitutional authority to pass the act in question is clearly demonstrated." *Kachalsky*, 701 F.3d at 100-01 (quoting *Nat'l Fed'n*, 132 S. Ct. at 2579).

likewise purported to be applying "intermediate scrutiny" in evaluating two restrictions that the District of Columbia had imposed, on the purchase of certain types of firearms and ammunition magazines. But in application, its review was permissive. Rather than scrutinize the tightness of the means-ends fit between the District's regulations and the District's regulatory interest, the court simply noted that there was some evidence showing that the bans were "likely" to promote the District's interests. *Id.* at 1262-64. It then concluded that the regulations therefore passed constitutional muster. *Id.* at 1264.

As the dissent pointed out, however: The law "bans certain semi-automatic rifles but not others," in a "haphazard" list void of any "explanation or rationale for why some made the list and some did not." *Id.* at 1290 (Kavanaugh, J., dissenting). The District's unexplained list did "not reflect the kind of tailoring that is necessary to justify infringement of a fundamental right, even under the more relaxed intermediate scrutiny test." *Id.*

More recently, the D.C. Circuit barely paused over the overbreadth of a federal firearms disability for all common-law misdemeanants. *See Schrader v. Holder*, No. 11-5352, _ F.3d _, 2013 WL 135246 (D.C. Cir. Jan. 11, 2013). The court conceded that "*some* common-law misdemeanants . . . may well present no . . . risk" of future violence—the plaintiff had been convicted of simple assault and battery forty years earlier and served no jail time—yet the court did not require the government to justify this substantial imprecision. *Id.* at *10. The court deferred to the legislature (citing the Second Circuit's decision in this case) and dismissed the plaintiff's argument with

the truism that "Congress is not limited to case-by-case exclusions." *Id.* (internal quotation marks omitted).

3. The Fourth Circuit has likewise employed this approach. That court "conclude[d] that a lesser showing is necessary with respect to laws that burden the right to keep and bear arms outside of the home," such that "intermediate scrutiny" applies. *Masciandaro*, 638 F.3d at 471. But after nominally adopting intermediate scrutiny, the Fourth Circuit summarily concluded that the federal prohibition on possessing loaded weapons inside motor vehicles in national parks was "reasonably adapted to" the Government's "substantial interest" in public safety. *Id.* at 473. The court reasoned that the Secretary of the Interior "could have reasonably concluded that, when concealed within a motor vehicle, a loaded weapon becomes even more dangerous." *Id.* Because, the court reasoned, "intermediate scrutiny does not require that a regulation be the least intrusive means of achieving the relevant government objective, or that there be no burden whatsoever on the individual right in question," the prohibition was constitutionally valid. *Id.* at 474.

4. Many of the decisions in this category further lighten the load of "intermediate scrutiny" by placing the burden of proving a law's invalidity on the person invoking the Second Amendment, contrary to the approach in the Seventh Circuit. The D.C. Circuit in *Schrader*, for example, in upholding a ban on possession by those convicted of common-law misdemeanors, explained: "[A]lthough the category of common-law misdemeanors has since been narrowed through codification, *plaintiffs have offered*

*no evidence* that individuals convicted of such offenses pose an insignificant risk of future armed violence." *Schrader*, 2013 WL 135246, at *10 (emphasis added).

A variation (or complement) of placing the burden on the challenger rather than the government, in evaluating a law that restricts activity within the historical scope of the right, is to create a presumption, on the basis of alleged history, that the restriction is constitutional—a presumption that the challenger must then rebut. Although history no doubt should bear on the analysis, the effect is to relieve the government of any serious assessment of its justification. "This is how judges repeal constitutional provisions they dislike." Nelson Lund, *The Second Amendment,* Heller*, and Originalist Jurisprudence*, 56 UCLA L. Rev. 1343, 1374 (2009).

The Second Circuit did this in the decision below. In considering the scope of the right, it briefly mentioned pre-Civil War decisions of state supreme courts on which this Court relied in *Heller*, all of which endorsed a robust right to carry arms outside the home, and one of which unanimously struck down a ban on open carrying of pistols as violating the right secured in the Second Amendment. *See Kachalsky*, 701 F.3d at 89-93. But in actually evaluating the New York law, the Court ignored those decisions and emphasized that "New York's legislative judgment concerning handgun possession was made one-hundred years ago" (even though New York has not had an arms right in its constitution). *Id.* at 97. And it concluded that its review of "the history and tradition of firearm regulation *does not clearly demonstrate* that limiting handgun

possession in public to those who show a special need for self-protection is *inconsistent* with the Second Amendment." *Id.* at 101 (emphases added).

Another example of this analytical twist is in the D.C. Circuit's opinion in *Heller II*. The court analyzed, among other things, the District of Columbia's registration requirement for handguns. Because an individual must register a handgun to lawfully possess it, this requirement directly burdens the core Second Amendment right to possess a handgun for self-defense in one's home. Yet rather than evaluate the basic registration requirement using intermediate scrutiny—as the D.C. Circuit purported to do with other parts of the District's registration law—the court gave this requirement a "presumption" of constitutionality and, in effect, exempted it from scrutiny. *See Heller II*, 670 F.3d at 1254 ("[T]he basic requirement to register a handgun is longstanding in American law . . . [t]herefore, we presume the District's basic registration requirement . . . does not impinge upon the right protected by the Second Amendment.").[3]

Alternatively (or in addition), a court may bypass the historical analysis required to determine whether

[3] On this issue, too, there is conflict among the circuits. For example (and setting aside the Seventh Circuit's more rigorous approach), the Fourth Circuit has suggested that it would apply strict scrutiny to any regulation burdening the core Second Amendment right to possess a firearm in one's home for self defense. *See Masciandaro*, 638 F.3d at 470 ("[W]e 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."). Simple registration requirements may generally survive heightened scrutiny. But analyzing these burdens and finding that they survive review is a far cry from, in effect, categorically exempting them from review.

regulated conduct is within the scope of the Second Amendment right. Without the benefit of that analysis, the court may then simply assert that the regulation requires only mild scrutiny. In *Schrader*, for example, the D.C. Circuit first concluded that it "need not resolve" the scope of the right, and then, even after recognizing that the level of scrutiny should depend on "the nature of the conduct being regulated," confidently held that a lifetime ban on certain persons' owning any firearms "falls on individuals who cannot be said to be exercising the core of the Second Amendment right." *Schrader*, 2013 WL 135246, at *8.

### C. Historically Founded Analogical Reasoning.

A third methodology that has been proposed for assessing Second Amendment claims is essentially a historical-analogical approach. Under this framework, courts would decide modern cases by reference to historical practice and precedent, particularly at or near the Founding, and seek to analogize modern regulations (such as the licensing law at issue here) to what was considered acceptable (or not) then. This methodology is perhaps best articulated by Judge Kavanaugh in his *Heller II* dissent. *See also Gowder v. City of Chicago*, No. 11 C 1304, 2012 WL 2325826, at *8-10 (N.D. Ill. June 19, 2012) (evaluating a Chicago gun ordinance using Judge Kavanaugh's historically based approach).

There, Judge Kavanaugh explained that "*Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny." *Heller II*, 670 F.3d at 1271. To assess the "scope of the right," courts

must look to "historical justification," as well as "tradition (that is, post-ratification history) . . . because 'examination of a variety of legal and other sources to determine the public understanding of a legal text in the period after its enactment or ratification' is a 'critical tool of constitutional interpretation.'" *Id.* at 1272. This analysis likewise applies, Judge Kavanaugh reasoned, in assessing the permissibility of a particular regulation. *See id.* ("The Court stated that analysis of whether other gun regulations are permissible must be based on their 'historical justifications.'").

Judge Kavanaugh then explained why a historical-categorical approach to interpreting the Second Amendment makes sense, giving two specific reasons. *First*, such a methodology gives governments "*more* flexibility and power to impose gun regulations," because "history and tradition show that a variety of gun regulations have co-existed with the Second Amendment right and are consistent with that right, as the Court said in *Heller*," whereas "if courts applied strict scrutiny, then presumably very few gun regulations would be upheld." *Id.* at 1274. Because "the range of potential answers will be far more focused under an approach based on text, history, and tradition than under an interest-balancing test such as intermediate scrutiny," Judge Kavanaugh reasoned that basic values of stability and certainty will be enhanced. *Id.* at 1275.

*Second*, this approach enables the Constitution to adapt to new technologies and new regulations through "reason[ing] by analogy from history and tradition." *Id.* In sum, Judge Kavanaugh concluded, "[t]he constitutional principles do not change (absent

amendment), but the relevant principles must be faithfully applied not only to circumstances as they existed in 1787, 1791, and 1868, for example, but also to modern situations that were unknown to the Constitution's Framers." *Id.*

## II. THIS COURT SHOULD BEGIN CLARIFYING THE PROPER ANALYSIS OF THE SECOND AMENDMENT

If this Court's decisions in *Heller* and *McDonald* stand for anything, it is that the Second Amendment is just as important as its constitutional neighbors. "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. The Court reiterated this point in *McDonald*, when it "reject[ed]" the suggestion "that the Second Amendment should be singled out for special—and specially unfavorable—treatment." *McDonald*, 130 S. Ct. at 3043.

Like any constitutional right, the Second Amendment has no force absent a clear doctrine that ensures its enforcement. The materials for developing that doctrine are at hand, in the various approaches of the lower courts discussed above. And both the importance and the feasibility of developing a clear doctrine are confirmed by this Court's extensive jurisprudence protecting other constitutional rights.

### A. The Proper Analysis of The Second Amendment Right Is An Important And Recurring Issue.

Lax scrutiny or freewheeling interest-balancing tests cannot effectively protect fundamental rights:

"A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." *Heller*, 554 U.S. at 634. Thus, until this Court articulates a methodology for analyzing Second Amendment claims, the lower courts will continue to apply a variety of tests, many of which will fail to protect the Second Amendment. Gun ownership is widespread, and Second Amendment claims are increasingly common. The conflicts will only grow deeper and more widespread in the absence of guidance.

Such guidance could take a number of forms, several of which would likely ensure robust protection of Second Amendment rights. Although that is ultimately a question for the merits stage, the point for present purposes is that the materials and options for developing the necessary doctrine are at hand and well developed in the lower courts, as well as in the accompanying academic literature. *See*, *e.g.*, *Ezell*, 651 F.3d at 701-03, 707 (looking to academic literature, among other sources); Lund, *supra*, 56 UCLA L. Rev. at 1372-76, 1356-58 (articulating an approach of "conscientious originalism" and describing such an approach as applied to one type of restriction). For example, the Court could adopt the approach that the Seventh Circuit follows, particularly in *Ezell*; or adopt the more historical approach of Judge Kavanaugh in his dissent in *Heller II*; or adopt some combination or variation of the two. Under any approach, however, the Court would presumably at least clarify that, as is the norm with other constitutional rights, governments bear the burden of proving that their laws and regulations burdening the exercise of a constitutional right pass constitutional muster. In

any event, there is no reason to wait, and let the Second Amendment languish.

### B. This Court's Jurisprudence Protecting Other Fundamental Rights Shows the Importance and Feasibility of Properly Protecting the Right to Keep and Bear Arms.

*Heller* emphasized that there is "no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach." *Heller*, 554 U.S. at 634. And an examination of how the Court approaches these "other enumerated constitutional right[s]" confirms both the *importance* of the Court's clarifying the proper analysis of the Second Amendment and the *ability* of the Court to do so, including by borrowing from these sources as appropriate, just as the Court has borrowed among them. *See id.* at 634-35 ("We would not apply an 'interest-balancing' approach to the prohibition of a peaceful neo-Nazi march through Skokie." (quoting *National Socialist Party of America v. Skokie*, 432 U.S. 43 (1977) (per curiam).

1. For example, there is a rich doctrine preserving the First Amendment's protection of freedom of speech. In that context, this Court has enforced a framework similar to that which the Seventh Circuit adopted for the Second Amendment in *Ezell*. The Court has held that regulations burdening the core of the First Amendment (e.g., political speech) are subject to strict scrutiny, while regulations that burden conduct further from the core of the First Amendment (e.g., content-neutral restrictions or commercial speech) are subject to intermediate scrutiny. *See, e.g.*, *Turner Broad. Sys.,*

*Inc. v. FCC*, 512 U.S. 622, 642 (1994) ("Our precedents [] apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content . . . [whereas] regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny.") (citations omitted).

In the First Amendment context—unlike in many of the lower court decisions interpreting the Second Amendment—heightened scrutiny has teeth. In just the past five years, for example, large majorities of this Court have deployed the First Amendment to strike down content-based regulations notwithstanding serious governmental interests: that is, (1) to prevent the aggrieved parent of a soldier killed in battle from suing individuals who intentionally inflicted emotional distress on him by vulgarly disrupting his son's funeral, *Snyder v. Phelps*, 131 S. Ct. 1207 (2011); (2) to bar the State of California from restricting the sale of violent and gore-laden video games to adults only, *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729 (2011); and (3) to strike down a federal law banning shocking depictions of animal cruelty, *United States v. Stevens*, 130 S. Ct. 1577 (2010). Indeed, even in the context of commercial speech—which has historically been governed by intermediate scrutiny—this Court has consistently invalidated statutes and regulations that are insufficiently solicitous of speech regardless of whether they were supported by important public interests. *See, e.g.*, *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2669 (2011) ("Rules that burden protected expression may not be sustained when the options provided by the State are too

narrow to advance legitimate interests or too broad to protect speech.").

Further, this Court frequently draws on historical analogy in interpreting the First Amendment, even when such analogies require the invalidation of longstanding regulations. An excellent recent example is *Citizens United v. Federal Election Commission*, 130 S. Ct. 876, 898 (2010). There, the Court struck down limitations on corporate expenditures for political speech despite the fact that those limitations dated back to 1947. *See id.* ("[N]ot until 1947 did Congress first prohibit independent expenditures by corporations and labor unions . . . ."). In invalidating limitations on corporate speech, the Court analogized directly to history:

> The Framers may have been unaware of certain types of speakers or forms of communication, but that does not mean that those speakers and media are entitled to less First Amendment protection than those types of speakers and media that provided the means of communicating political ideas when the Bill of Rights was adopted.

*Id.* at 906.

2. Nor is the Court's constitutional vigilance limited to the First Amendment. An equally robust doctrinal framework ensures the vindication of, for instance, the Equal Protection Clause. In that context, "[c]lassifications based on race or national origin . . . and classifications affecting fundamental rights . . . are given the most exacting scrutiny." *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (citations omitted). For "discriminatory classifications based on

sex or illegitimacy," however, the Court applies "intermediate scrutiny." *Id.* These robust standards of review have likewise led the Court to invalidate governmental actions despite longstanding historical pedigrees and important interests on the other side. For example, in *United States v. Virginia*, this Court applied intermediate scrutiny and invalidated the Virginia Military Institute's male-only admissions policy. 518 U.S. 515 (1996). The Court invalidated that policy despite extensive evidence showing that "single-sex education provides important educational benefits" and that "the unique VMI method of character development and leadership training, the school's adversative approach, would have to be modified were VMI to admit women." *Id.* at 535. As the Court concluded, Virginia's justifications fell "far short of establishing the 'exceedingly persuasive justification,' . . . that must be the solid base for any gender-defined classification." *Id.* at 546 (quotation omitted).

3. Or consider the exclusionary rules by which this Court enforces fundamental constitutional protections enshrined in the Fourth, Fifth, and Sixth Amendments. *See, e.g.*, *Mapp v. Ohio*, 367 U.S. 643, 652 (1961) (discussing the "obvious futility of relegating the Fourth Amendment to the protection of other remedies"); *Oregon v. Elstad*, 470 U.S. 298, 306 (1985) ("The *Miranda* exclusionary rule [ ] serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself."); *Maine v. Moulton*, 474 U.S. 159, 180 (1985) ("[I]ncriminating statements pertaining to pending charges are inadmissible at the trial of those charges, notwithstanding the fact that the police were also investigating other crimes, if, in obtaining this evidence, the State violated the Sixth

Amendment . . . ."). Each of these rights is protected by a comprehensive framework of essentially categorical rules that *per se* balance the interests at issue.

It is difficult to overstate the social costs that these rules impose, as they routinely allow "guilty and possibly dangerous criminals" to "go free." *Montejo v. Louisiana*, 556 U.S. 778, 796 (2009) (quotation omitted); *see also, e.g.*, *Duckworth v. Eagan*, 492 U.S. 195, 208 (1989) (O'Connor, J. concurring) ("The costs of such a rule are high . . . ."). Yet, to vindicate the importance of the Fourth, Fifth, and Sixth Amendment rights, this Court for years has enforced exclusionary rules despite the resulting unpunished crimes and unconfined criminals—and the concomitant harm to public safety.

The exclusion-backed doctrines protecting the Fourth, Fifth, and Sixth Amendment rights vary, but, critically, each is comprehensive enough to ensure adequate protection of the underlying constitutional rights in the lower courts. Some of these doctrines (such as the rules governing searches and seizures) are longstanding, while others are of relatively recent vintage. And in that regard, the doctrine most instructive here may be this Court's developing jurisprudence for the Sixth Amendment's Confrontation Clause. Like *Heller* and *McDonald*, the Court's Confrontation Clause decisions now turn largely on historical analogy and founding-era practices. *See, e.g.*, *Crawford v. Washington*, 541 U.S. 36, 43 (2004) ("We must [ ] turn to the historical background of the Clause to understand its meaning."). And despite the indeterminacy of history, this Court has been able to provide robust

protection of the confrontation right—categorically excluding testamentary evidence from criminal trials in the absence of confrontation, no matter how probative the evidence—in order to protect the Sixth Amendment. *See, e.g.*, *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2718 (2011) ("The constitutional requirement [of confrontation] . . . 'may not be disregarded at our convenience,' . . . .").[4]

4. Further, beyond expounding comprehensive and robust doctrines, this Court protects constitutional rights by consistently holding that governments bear the burden of justifying intrusions on those rights. *See, e.g.*, *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002) ("The municipality's evidence must fairly support the municipality's rationale for its ordinance.") (freedom of speech); *Burdick v. Takushi*, 504 U.S. 428, 439 (1992) (evaluating "the interests asserted by Hawaii to justify the burden imposed by its prohibition of write-in voting") (right to vote); *Dolan v. City of Tigard*, 512 U.S. 374, 391 n.8 (1994) ("In this situation, the burden properly rests on the city.") (unconstitutional conditions). In other words, it is not individuals who must justify to the government the exercise of their rights, but the government that must satisfy the courts that its restrictions are constitutionally warranted.

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[4] Another example of robust, bright-line, historically based rules in this area is the Court's quickly developed jurisprudence, since 2000, protecting the right to a jury trial—notwithstanding that the rule directly results in reduced prison sentences and fines, vacated death sentences, and more variable sentencing. *E.g.*, *Southern Union Co. v. United States*, 132 S. Ct. 2344 (2012); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

Indeed, in the First Amendment context, this Court has placed the burden on the government regardless of whether the case involves political speech and strict scrutiny, *e.g.*, *Citizens United*, 130 S. Ct. at 898 ("Laws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" (quotation omitted)), or merely commercial speech and intermediate scrutiny, *e.g.*, *Sorrell*, 131 S. Ct. at 2667 ("Under a commercial speech inquiry, it is the State's burden to justify its content-based law as consistent with the First Amendment.").

The allocation of the burden matters, of course, because it directly affects the substantive protection given to the underlying right. As this Court has long recognized, "[w]here the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive to the outcome of the litigation or application." *Lavine v. Milne*, 424 U.S. 577, 585 (1976). It is thus imperative that the government bear the burden of justifying infringements on fundamental constitutional rights, and that it be a true burden, not evaded or reversed by presumptions. The Second Amendment "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home," *Heller*, 554 U.S. at 635, and surely that elevation includes the requirement that the government justify actions that take those rights away.

## III. THIS CASE PROVIDES AN EXCELLENT VEHICLE TO BEGIN CLARIFYING THE SECOND AMENDMENT, PARTICULARLY ITS RIGHT TO BEAR ARMS

Finally, this case provides an excellent vehicle for the Court to begin clarifying the proper analysis of the Second Amendment, particularly the right to bear arms, on which *Heller* and *McDonald* had no occasion to directly rule.

As discussed above in Part I, the Second Circuit applied intermediate scrutiny in name only, and in a way inconsistent with the approach of the Seventh Circuit. The extreme deference the Second Circuit gave to the State of New York provided insufficient protection to Petitioners' rights. *Cf. Moore*, 702 F.3d at 941 (describing broad restriction in New York's law as "the inverse of laws that forbid dangerous persons to have handguns"). Presumptions of constitutionality for regulations when those regulations plainly burden constitutional rights would be unique to the Second Amendment. Given that this Court has already rejected "specially unfavorable" treatment for Second Amendment claims, the Second Circuit's dismissive treatment of Petitioners' Second Amendment claims must be rejected too.

Further, the Second Circuit's opinion adopted a selective reading of history, using it as a one-way ratchet to limit the Second Amendment's scope and avoid actual scrutiny of New York's law. The court first surveyed a selection of old state-court decisions that reached varying results, with some "read[ing] restrictions on the public carrying of weapons as [being] entirely consistent with constitutional

protections of the right to keep and bear arms." *Kachalsky*, 701 F.3d at 90. But despite finding the history "highly ambiguous," *id.* at 91, the court confidently held that New York's licensing requirement "falls outside the core Second Amendment protections identified in *Heller*," such that the State's power to regulate was heightened. *Id.* at 93. And then, having so moved Petitioners' claims outside the "core" of the Second Amendment, the court further invoked history to support the sweeping conclusion that "extensive state regulation of handguns has never been considered incompatible with the Second Amendment or, for that matter, the common-law right to self-defense." *Id.* at 100. Once the court was done, selective use of history had left the enumerated right to "bear arms" effectively hollow. *Cf. Moore*, 702 F.3d at 941 (questioning both the Second Circuit's historical analysis and its conclusion regarding the scope of the right to bear arms). The errors in the Second Circuit's historical analysis provide an excellent platform for review and clarification by this Court.

This case also squarely presents the question of who bears the burden of showing whether a challenged restriction runs afoul of the Second Amendment. The Second Circuit effectively placed that burden on Petitioners. Indeed, it went a step further, holding that the Second Amendment was not violated because the court's "review of the history and tradition of firearm regulation does not 'clearly demonstrate[;]' that limiting handgun possession in public to those who show a special need for self-protection is inconsistent with the Second Amendment." *Kachalsky*, 701 F.3d at 101.

Finally, this case provides an excellent vehicle to clarify the scope of the Second Amendment's right to "bear" arms. Petitioners challenge the State of New York's limitation on their right to possess firearms outside of their homes. Both *Heller* and *McDonald*, by contrast, involved categorical bans on any possession of certain types of weapons, and thus arguably turned on the Second Amendment right to possess such weapons inside the home. This case would therefore enable the Court to address the as-yet-unresolved question of whether—and, if so, to what extent—the Second Amendment protects the right to possess a firearm for self-defense outside of one's home.

## CONCLUSION

For the forgoing reasons, *amicus* supports Petitioners' petition for certiorari, and respectfully requests that the petition be granted.

Respectfully submitted,

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