No. 13-137

IN THE
Supreme Court of the United States

NATIONAL RIFLE ASSOCIATION, *ET AL.*, *Petitioners*,
v.
BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, *ET AL.*, *Respondents*.

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

Brief *Amicus Curiae* of The Lincoln Institute for Research and Education, The Abraham Lincoln Foundation for Public Policy Research, Gun Owners Foundation, Gun Owners of America, Inc., U.S. Justice Foundation, Institute on the Constitution, Downsize DC Foundation, DownsizeDC.org, Conservative Legal Defense and Education Fund, Policy Analysis Center, and Gun Owners of California in Support of Petitioners

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INTEREST OF THE *AMICI CURIAE*[1]

The Lincoln Institute for Research and Education ("Lincoln"), Gun Owners Foundation, U.S. Justice Foundation, Downsize DC Foundation, Conservative Legal Defense and Education Fund, and Policy Analysis Center are nonprofit educational organizations, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"). The Abraham Lincoln Foundation for Public Policy Research ("ALF"), Gun Owners of America, Inc., DownsizeDC.org, and Gun Owners of California are nonprofit social welfare organizations, exempt from federal income tax under IRC section 501(c)(4). Institute on the Constitution is an educational organization.

These organizations were established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research and to inform and educate the public on important issues of national concern, the construction of state and federal constitutions and statutes related to the rights of citizens, and questions related to human and civil rights secured by law, including the rights to own and use firearms, and related issues. Lincoln (www.lincolnreview.com) and ALF are organizations focused on the civil rights and

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to the filing of it; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

liberties of black Americans. Each organization has filed many *amicus curiae* briefs in this and other courts.

Concerning the Second Amendment, various of these *amici* filed *amicus* briefs in the U.S. Supreme Court in District of Columbia v. Heller[2] and McDonald v. Chicago[3]; filed an *amicus* brief in the U.S. Court of Appeals for the Seventh Circuit in United States v. Skoien[4]; filed an *amicus* brief in the U.S. Supreme Court in support of a Petition for Certiorari in Skoien v. United States[5]; filed an *amicus* brief before the U.S. Court of Appeals for the D.C. Circuit in Heller v. District of Columbia ("Heller II");[6] and filed *amicus* briefs in both the Fourth Circuit and this Court in Woollard v. Gallagher.[7]

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[2] U.S. Supreme Court, No. 07-290, Brief *Amicus Curiae* of Gun Owners of America, *et al.*, (Feb. 11, 2008).

[3] U.S. Supreme Court, No. 08-1521, Brief *Amicus Curiae* of Gun Owners of America and Gun Owners Foundation in Support of Petition for Writ of Certiorari (July 6, 2009) and Brief *Amicus Curiae* of Gun Owners of America, *et al.* (Nov. 23, 2009).

[4] USCA 7th Cir., No. 08-3770, Brief *Amicus Curiae* of Gun Owners Foundation and Gun Owners of America (Apr. 2, 2010).

[5] U.S. Supreme Court, No. 10-7005, Brief *Amicus Curiae* of Gun Owners Foundation, *et al.* (Nov. 15, 2010).

[6] USCA DC, No. 10-7036, Brief *Amicus Curiae* of Gun Owners of America, *et al.* (July 30, 2010).

[7] USCA 4th Cir., No. 12-1437, Brief *Amicus Curiae* of Gun Owners Foundation, *et al.* (Aug. 6, 2012); U.S. Supreme Court, No. 13-42, Brief *Amicus Curiae* of Gun Owners Foundation, *et al.* (Aug. 12,

SUMMARY OF ARGUMENT

Just five years ago this Court decided District of Columbia v. Heller. Consistent with its power of judicial review, the Court correctly stated that the law of the Second Amendment is determined solely by the original meaning of the text. Thus, the Court ruled that a District of Columbia ordinance banning possession of handguns in the home violated the people's right to keep and bear arms. The Court refused to weigh interests to determine whether there was any overriding government interest could trump that right of the people as stated in the constitutional text.

Since Heller, the lower federal courts have refused to comply with this Court's textual framework, employing instead a variety of judicial balancing tests patterned after the opinion of the dissenting justices in Heller, to uphold a variety of infringements upon the people's Second Amendment rights. By balancing the interests, these courts, including the court below, have also mistaken the Heller holding as self defense in the home, as if it were a limiting principle, excepting laws governing firearms outside the home.

In lockstep with other courts of appeals, the Fifth Circuit applied "intermediate scrutiny" to the federal ban against adult citizens aged 18-20 purchasing firearms from licensed firearms dealers. Balancing the interests of the citizens against that of the

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2013).

government, the court concluded that, since the ban did not impose a significant burden on the "core" right of self-defense in the home, but protected the public safety allegedly threatened by young adults who are statistically more prone to violence, it was a permissible infringement of 18-20-year-olds' Second Amendment rights.

According to the original text, however, the right to keep and bear arms belongs to "the people," not just to government-favored classes. And that right — because it is necessary to "the security of a free state" — cannot be sacrificed on the altar of public safety, nor overridden by any other condition that may threaten the power of the currently established government. Otherwise, as this Court pointed out in Heller, the Second Amendment will not have served its stated purpose — the protection of the people from government tyranny.

ARGUMENT

I. REJECTING RULE BY JUDGES, HELLER CORRECTLY STATED THE SECOND AMENDMENT RULE OF LAW.

A. Heller Rejected Rule by Judges.

Just five years ago, this Court decided District of Columbia v. Heller, 554 U.S. 570 (2008), ruling that Second Amendment cases would be governed by the rule of law, not by the rule of judges. To that end, the Court painstakingly engaged in a discussion and analysis of the constitutional text, in an effort to

discover the original fixed principles governing "the right of the people to keep and bear arms." *See id.* at 573-619. Additionally, the Court conducted a review of its precedents, concluding that "nothing [in them] foreclose[d] [the] adoption of the original understanding of the Second Amendment." *Id.* at 626.

Having thus concluded that it was not otherwise bound by its own precedents, the Court turned to the D.C. law that "totally bans handgun possession" and, after applying the textual principles that it had previously uncovered, ruled the D.C. ordinance unconstitutional. *Id.* at 628. In conducting this analysis, the Court relied solely upon those textual principles. *See id.* at 628-31. Further, it reinforced its reliance upon those principles by explicitly rejecting, first, Justice Breyer's effort to refute the Court's analysis that the D.C. ordinance violated them (*id.* at 631-634) and, second, Justice Breyer's "critic[ism] [of] us for declining to establish a level of scrutiny for evaluating Second Amendment restrictions." *Id.* at 634-35.

The Court's refusal to adopt some level of judicial scrutiny was, in turn, based upon two grounds. First, the Court rejected what it perceived to be "a judge-empowering 'interest balancing inquiry'" outside "the traditionally expressed levels (strict scrutiny, intermediate scrutiny, rational basis)." *Id.* at 634. Second, the Court rejected the judicial employment of any interest balancing inquiry that would empower "the Third Branch of Government ... to decide on a case-by-case basis whether [an enumerated] right is *really worth* insisting upon." *Id.* The Court then

explained its reason for rejecting both kinds of interest balancing:

> A constitutional guarantee subject to future judges' assessment of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad. [*Id.* at 634-35.]

B. Heller Returned to the First Principles of Judicial Review.

With this explanation, the Heller Court returned to the first principles of judicial review laid down by Chief Justice Marshall 210 years ago:

> That the people have an original right to establish for their future government, such principles, as, in their own opinion, shall most conducive to their own happiness, is the basis, on which the whole American fabric has been erected. [Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).]

Thus, the Heller Court observed that "[t]he Second Amendment ... is the very product of an interest balancing by the people." Heller, 554 U.S. at 635. As Chief Justice Marshall wrote in Marbury:

> The exercise of this original right is a very great exertion; nor can it, nor ought it to be

> frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed is supreme, and can seldom act, they are designed to be permanent. [*Id.* at 176.]

On this great foundational premise, the Marbury Court concluded that both Congress as a legislative body, and also the courts as judicial bodies, are equally bound by the constitution, as it is written. *Id.* at 179-80. Otherwise, as Chief Justice Marshall observed, "written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable." *Id.* at 177.

To be sure, the Chief Justice also stated that "[i]t is emphatically the province and **duty** of the judicial department to say what the law is." *Id.* (emphasis added). However, he did not mean that whatever the courts, even the Supreme Court, says is law.[8] Rather, as Congress and the President are bound by oath to support the Constitution, so are the courts. *See* Article VI, Paragraph 2 of the U.S. Constitution. Thus bound, courts must "faithfully and impartially discharge all duties incumbent upon [them] as according to the best of [their] abilities and understanding, agreeably to *the constitution*...." *Id.* at 180.

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[8] "*[T]he law*, and the *opinion of the judge* are not always convertible terms, or one and the same thing: since it sometimes may happen that the judge may *mistake* the law." I W. Blackstone, Commentaries on the Laws of England 71 (Univ. of Chi. Facsimile ed., 1765).

C. Heller Conforms to the Rule of Law of the Constitution.

True to its judicial oath, the Heller Court began its opinion, quoting the Second Amendment text: "'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.'" *See* Heller, 554 U.S. at 576. The Court in Heller then proceeded to examine "'its words and phrases'" according to the principle that:

> The Constitution was written to be understood by the voters ... in their normal and ordinary as distinguished from technical meaning ... known to ordinary citizens in the founding generation. [*Id.* at 576-77.]

By returning to these foundational limits upon the power of judicial review, the Heller majority stuck to the text, forswearing any discussion or analysis based upon words that were not directly derived from the constitutional text. *See id.* at 577-628.

Although the Court did refer to "standards of scrutiny that we have applied to enumerated constitutional rights," and explained that under any of them the D.C. ordinance "would fail constitutional muster," it refused to measure the D.C. ban on handguns in the home by any such standard. *See id.* at 628-29. First, it dismissed outright "rational-basis scrutiny" as totally irrelevant to the "substance of the constitutional guarantee" in the Second Amendment. Second, it completely ignored Justice Breyer's lengthy

effort to vindicate the D.C. ordinance on the ground that it satisfies both strict scrutiny" and "intermediate scrutiny," because "a legislature could reasonably conclude that the law will advance goals of great public importance, namely, saving lives, preventing injury, and reducing crime [while] tailored to the urban crime problem in that it is local in scope and thus affects only a geographic area both limited in size and entirely urban." *Id.* at 682 (Breyer, J., dissenting).

Had the Heller majority considered such information and argument even possibly relevant, it would have would have found it necessary to provide an appropriate rebuttal. By their silence, Justice Scalia and his four concurring colleagues indicated that the interest balancing approach urged by the dissenters was wholly illegitimate, a departure from the judicial duty to conform their interpretation to the original constitutional text — "the very essence of judicial duty." *See* Marbury, 5 U.S. at 178.

As documented in the Petition for Certiorari, the decision of the court of appeals below not only applied the Heller dissent's interest balancing methodology, but a "watered-down" version of it, to deny petitioners' Second Amendment claim. *See* Petition for Writ of Certiorari ("Pet. Cert.") at 26-33. It did so, not in reliance on Heller, but in defiance of its judicial duty to say what the law is, not carving out policy exceptions to the will of the people as expressed in the Second Amendment. *See* NRA v. ATF, 700 F.3d 185, 205-11 (5th Cir. 2012).

The court of appeals below justified its policy excursion because Heller had failed to "set forth an

analytic framework with which to evaluate firearms regulations," adopting its own framework based upon other like-minded appellate courts. *See* NRA, 700 F.3d at 195-95. For five years this Court has kept silent while the lower federal courts have essentially adopted the analytic framework of Justice Breyer's dissent. *See* A. Rostron, "Justice Breyer's Triumph in the Third Battle over the Second Amendment," 80 GEO. WASH. L. REV. 703 (2012). This Court can remain silent no longer.

II. BY BALANCING THE INTERESTS, THE COURTS BELOW REFUSED TO BE RULED BY THE LAW OF THE SECOND AMENDMENT.

A. The Fifth Circuit Adopted the Analytic Framework that Heller Rejected.

Rarely if ever have federal judges so uniformly and blatantly ignored a clear precedent of the Supreme Court as they have with the Heller decision. *See* Pet. Cert. at 1-3, 15-16, 17-23. Citing as precedent historical regulations which disarmed "law-abiding slaves, free blacks, and Loyalists," the Fifth Circuit announced that "disarming select groups for the sake of public safety" is "compatible with the right to arms." NRA, 700 F.3d at 200-01. The court then compared 18-20-year-olds to felons and the mentally ill, decided them as a class to be "incapable of virtue," and declared that they may be categorically prohibited from purchasing firearms. *Id.*

At best, the lower courts' rejection of Heller represents their inability to break free from the balancing tests that have so heavily dominated many other areas of constitutional law for the last half century.[9] At worst, it represents a deliberate hostility to the actual text of the Second Amendment, and the Supreme Court's careful and thorough instruction as to its meaning.

Like most other lower federal courts, the Fifth Circuit decided that, "[i]n rejecting Justice Breyer's proposed interest-balancing inquiry, we understand the Court to have distinguished that inquiry from the traditional levels of scrutiny; we do not understand the Court to have rejected all heightened scrutiny analysis." *Id*. at 197. But in this case, the court of appeals went further, actually viewing Heller as a **grant of power** to do whatever it wanted, arguing that since Heller did not "expressly foreclose intermediate or strict scrutiny," the Supreme Court had left the lower courts "room to maneuver in crafting a framework." NRA, 700 F.3d at 197. Nothing could be further from the truth.

At oral argument in Heller, Chief Justice Roberts — interrupting the Solicitor General's argument that "Federal firearm statutes can be defended as

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[9] *See* L. Tribe, American Constitutional Law Index, 1756 (balancing of interests),1766 (intermediate scrutiny), 1768 (less restrictive alternatives), 1772 (rational relationship test), and 1775 (strict scrutiny) (2d ed., Foundation Press: 1988).

constitutional [because] they are consistent with [the] intermediate scrutiny standard"[10] — commented:

> these various phrases under the different standards that are proposed, "compelling interest," "significant interest," "narrowly tailored," none of them appear in the Constitution ... these standards ... just kind of developed over the years as sort of baggage that the First Amendment picked up. But I don't know why when we are starting afresh, we would try to articulate a whole standard that would apply in every case. [*Id.* at 44.]

And the Heller Court did start afresh without the baggage of interest balancing precedents. The Court refused to apply any level of scrutiny — not in order to give lower courts "room to maneuver" — but to follow the lead of the Chief Justice to discard all such standards because "none of them appear in the Constitution."

Almost unanimously, however, lower courts have responded that the Supreme Court's rejection of "**interest balancing**" was not a rejection of the "three tiers of scrutiny." *See* A. Rostron, "Justice Breyer's Triumph" at 744. This is an untenable position.

Even Justice Breyer's Heller dissent admitted that "any attempt *in theory* to apply strict scrutiny to gun

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[10] District of Columbia v. Heller, Sup. Ct. No. 07-290, Oral Argument, pp. 43-44 (Mar. 18, 2008). http://www.supremecourt.gov/oral_arguments/argument_transcripts/07-290.pdf.

regulations will *in practice* turn into an interest-balancing inquiry, with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other, the only question being whether the regulation at issue impermissibly burdens the former in the course of advancing the latter." Heller, 554 U.S. at 689 (Breyer, J., dissenting).

Although Justice Breyer said that he would "simply adopt ... an interest-balancing inquiry" (*id.*), he proceeded to conduct that "interest-balancing inquiry" which looks **exactly** like strict scrutiny. After analyzing several studies and a mass of "empirical" data, Justice Breyer determined that "the District's statute properly seeks to further the sort of life-preserving and public-safety **interests** that the Court has called '**compelling**.'" *Id.* at 705 (emphasis added). Next, Justice Breyer noted that the D.C. regulation was narrowly tailored, because it has a "**special focus** on handguns," and it "does not prohibit possession of rifles or shotguns, and the presence of opportunities for sporting activities in nearby States." *Id.* at 696, 710 (emphasis added). Finally, Justice Breyer looked at "the possibility that there are reasonable, but **less restrictive, alternatives**," and determined that "any measure less restrictive in respect to the use of handguns for self-defense will ... prove less effective in preventing the use of handguns for illicit purposes." *Id.* at 710-11 (emphasis added).

In sum, the dissenters in Heller favored an "interest balancing" approach, according to the traditional standards of scrutiny. Although the Heller

majority rejected that approach, the lower federal courts unanimously have adopted it.

B. The Fifth Circuit Mistook the Heller Holding for a Governing Principle.

Ignoring Heller's analytic framework, the lower federal courts have taken it upon themselves to craft various methods by which to measure whether a particular restriction on firearms violates the Second Amendment. The court below adopted an emerging "two step" method whereby the court will "first ... determine whether the challenged law impinges upon a right protected by the Second Amendment" and "second ... determine whether to apply intermediate or strict scrutiny to the law, and then to determine whether the law survives the proper level of scrutiny." NRA, 700 F.3d at194.

Applying this first step, courts have determined that some firearms laws do not burden the Second Amendment at all. Indeed, the court of appeals below determined that the ban on 18-20-year-olds was not even within the scope of the Second Amendment, and thus no "step 2" analysis was necessary. *Id.* at 204. Nevertheless, it undertook a balancing analysis "in an abundance of caution" and determined that the ban was not subject to strict scrutiny because the laws in question "do not prevent 18-to-20-year-olds from possessing and using handguns 'in defense of hearth and home,'" as the D.C. ordinance had in Heller. *See* NRA, 700 F.3d at 203-4, 206. Thus, the age ban was subjected to intermediate scrutiny, having not been directed to the core right of self-defense in the home.

This kind of analysis places the right to keep and bear arms on a "sliding scale,"[11] whereby certain persons and behavior receive different treatment depending on how close they relate to the alleged "core" of self-defense in the home. Laws which implicate "core" Second Amendment principles receive strict scrutiny, while ones that implicate supposedly peripheral principles receive only intermediate scrutiny. *Id.* at 205. This process gives rise to the appearance that, when a specific test does not reach the desired result, the court simply moves to some heightened or diminished version of scrutiny to achieve the desired policy goal. *See* Rostron, "Justice Breyer's Triumph" at 745-49.

Although Heller did hold that 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" (*id.* at 635), it never said that self-defense **within the home** was a "core" principle, thus excluding other behavior (such as carry outside the home) from the same protection, as the lower courts have done. *See, e.g.,* Woollard v. Gallagher, 712 F.3d 865 (4th Cir. 2013).

It was not necessary for Heller to extend its ruling to the "bearing" of arms outside the home, because that and other issues were not before it. Indeed, the Court left these other issues "to future evaluation." *Id.* at 635. But that hardly amounts to the Court having limited self-defense to the home. The lower courts'

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[11] *See* United States v. Masciandaro, 638 F.3d 458, 475 (4th Cir. 2011).

reasonings otherwise constitute nothing more than a thinly-veiled rejection of the principles upon which Heller stands. *See, e.g.,* United States v. Weaver, 2012 U.S. Dist. LEXIS 29613 (S.D. W. Va. Mar. 7, 2012) (applying and denying a challenge to a statute under intermediate scrutiny because, "**as we move outside the home**, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense") (emphasis added).

The lower federal courts have cherry-picked from the language of Heller, and limited the opinion as identifying a single, limited, "core" right protected by the Second Amendment — self defense **within the home**. In doing so, lower courts have freed themselves up to define everything else as either (i) not protected by the Second Amendment at all, and thus deserving of no scrutiny, or else (ii) regulating only "non-core" behavior, and affording only intermediate rather than strict scrutiny, as the Fifth Circuit did in this case.

C. The Fifth Circuit Opinion Reveals the Absurdity of Interest Balancing Tests.

No matter how the interest balancing process is described, any of its devised tests leaves a court free to cite whatever "empirical data," "studies," and "literature" it wishes in order to come to whatever result it deems appropriate. *See* Moore v. Madigan, 702 F.3d 933, 938, 939 (7th Cir. 2012). *See also* United States v. Skoien, 614 F.3d 638, 646-47, 651-52 (7th Cir. 2010) (en banc) (Sykes J., dissenting).

That is precisely what the Fifth Circuit did here. Relying on Congressional determinations that: "'juveniles account for some 49 percent of the arrests for serious crimes in the United States,'" "'minors under the age of 21 years accounted for 35 percent of the arrests for ... serious crimes,'" and "young persons under 21 ... are immature and prone to violence," the court determined that 18-20-year-olds' rights could be overridden by "public safety" justifications. NRA, 700 F.3d at 208.

But if 18-20-year-olds can be denied their Second Amendment rights because they tend to be more immature, then can the rights of those over 65 be denied because that age range tends to be more senile? If 18-20-year-olds are more likely to shoot innocent people because they tend to be more violent, then perhaps Congress could have determined that senior citizens, too, are more likely to shoot innocent people because their eyesight is deteriorating.

Or, instead of disarming 18-20-year-olds, what if Congress had chosen to disarm black Americans? Would the Fifth Circuit have relied on Government studies that show that, while blacks comprise only 12.6 percent of the population, they account for 52.5 percent of the homicide offenders, as "[t]he offending rate for blacks [is] almost 8 times higher than the rate for whites...." A. Cooper and E. Smith, "Homicide Trends in the United States, 1980-2008," U.S. Department of Justice, Bureau of Justice Statistics, Nov., 2011, p. 3.

For obvious reasons, one might object to such an argument, stating, for example, that laws which restrict freedom on the basis of race are suspect because they target a "discrete and insular minority." *See* United States v. Carolene Products Company, 304 U.S. 144, 153 n.4 (1938). Ironically, however, the Fifth Circuit here upheld the ban in part exactly because it has a "narrow ambit" targeting a "discrete category" of persons. NRA, 700 F.3d at 205.

Even so, according to the balancing test governing race discrimination, the government might very well be able to demonstrate a compelling interest. *See* Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2420 (2013) ("*Grutter* made clear that racial 'classifications are constitutional only if they are narrowly tailored to further compelling governmental interests'"). Even Justice Thomas, writing in concurrence, expressed his belief that "'measures the State must take... to prevent violence, will constitute a pressing public necessity' sufficient to satisfy strict scrutiny." *Id.* at 2424 (Thomas, J., concurring).

III. THE SECOND AMENDMENT TEXT IS THE LAW, NOT THE REASON OF JUDGES.

A. Heller Provided Clear Guidance to the Text.

Although Heller refused to employ the "traditional" standards of review, it did not leave the lower courts adrift. Nor did the Court give lower courts "room to maneuver" to craft elaborate, artificial justifications for firearm restrictions. On the contrary, the Heller

Court explained exactly how it reached the result that it did:

> Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad. [Heller, 554 U.S. at 634-5.]

The fact that the lower courts have been unable to recognize or respect Heller's framework "says more about the courts than the Second Amendment." *See* Weaver at 14 n.7. And the fact that a constitutional law professor found Heller "enigmatic," (A. Rostron, "Justice Breyer's Triumph" at 707, 716, 735) speaks less about Heller and more about the legal academy.

As the first step in its analysis, Heller looked to the text of the Second Amendment. Heller, 554 U.S. at 576. The Court then parsed the language of the Amendment, determining that it had a "prefatory" and an "operative" clause. *Id.* at 577. The Court then examined the plain language of each clause, making certain determinations therefrom. *Id.* at 579, *et. seq.* Next, the Court turned to an analysis of the "written documents of the founding era," the statutes and regulations of the colonies and the early states, various treatises, commentaries, and other sources in order to determine what the Second Amendment had meant to those who wrote, debated, and ratified it. *Id.* at 583, *et seq*.

Through this analysis, the Court first determined that the right to "keep and bear arms" is an individual right of "the people," not a collective right of a "militia." *Id.* at 579. "The people," the Court held, comprises "members of the political community," or "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community" — a class to which Mr. Heller belonged. *Id.* at 580, 581 (citing United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990)). Second, the Court found that "the inherent right of self-defense has been central to the Second Amendment right," including both self defense from violent crime but, more importantly, self-defense against tyranny — specifically, "the threat that the new Federal Government would destroy the citizens' militia by taking away their arms...." *Id.* at 598, 599, 628. Finally, the Court determined that "the American people have considered the handgun to be the quintessential self-defense weapon," and that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Id.* at 582, 629. Thus, the handgun is part of the "class of 'arms'" protected by the Second Amendment. *Id.* at 628.

Having engaged in this analysis, the Court had no need to go any further. Mr. Heller was a member of "the people," his handgun was a protected class of "arms," and his activity within his home was one of the protected class of "keep and bear" activities. Thus, his right was absolute — it "shall not be infringed." It did

not matter if the government had a "compelling interest" to the contrary.

B. Heller Conforms to the First Principles of Judicial Review.

"The powers of the legislature are defined, and limited," Chief Justice Marshal wrote in Marbury, "and that those limits may not be mistaken, or forgotten," he continued, "the constitution is written." *Id.*, 5 U.S. at 176. "To what purpose are powers limited, and to what purpose is that limitation committed to writing," the Chief Justice asked, "if these limits may, at any time, be passed by those intended to be restrained?" *Id.* "The distinction, between a government with limited and unlimited powers, is abolished," he concluded, "if those limits do not confine the persons on whom they are imposed...." *Id.* And how are those limits expressed? Chief Justice Marshall's successor, Roger Taney, would answer that question 35 years later in Holmes v. Jennison, 39 U.S. (14 Peters) 540 (1840):

> [By] every word [which] must have its due force and appropriate meaning, for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added.... Every word appears to have been weighed with utmost deliberation, and its force and effect to have been fully understood. No word in the instrument, therefore, can be rejected as superfluous or unmeaning...." [*Id.* at 570-71.]

In keeping with this interpretative principle, the Heller Court expounded the meaning of the Second Amendment word by word, providing explicit guidance to answer the question in this case whether Congress may constitutionally deny to citizens who are 18 years old the same access to legally available arms as is afforded to citizens who are 21 or older. Parsing the operative clause that "codifies a 'right of the people'" (Heller, 554 U.S. at 579), the threshold question to be asked and answered here is whether an 18-20-year-old citizen is a member of the American polity. If he is, then his right to keep and bear arms is secure from government infringement, as Judge Edith Jones convincingly established in her opinion dissenting from the court of appeals decision denying rehearing *en banc*. *See* NRA v. ATF, 714 F.3d 334, 335-44 (5th Cir. 2013). And for good reason. The prefatory clause states that the right to keep and bear arms directly relates to: "A well regulated Militia, being necessary to the security of a free State." As Justice Scalia explained:

> Does the preface fit with an operative clause that creates an individual right to keep and bear arms? It fits perfectly, once one knows the history that the founding generation knew.... That history showed that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people's arms, enabling a select militia or standing army to suppress political opponents. This is what had occurred in England that prompted codification of the right to have arms

> in the English Bill of Rights. [Heller, 554 U.S. at 598.]

C. English in Origin, Distinctly American.

Indeed, 40 years before the ratification of the English Bill of Rights, the English people had taken up arms to depose the tyrannical king, Charles I, putting him to death for having breached his covenant to rule the people according to law. In justification of this action, English barrister, Geoffrey Robertson — a leading human rights lawyer, and a U.N. war crimes judge — has recounted Puritan lawyer John Cooke's words as they appear in the official annals of the English state trials:

> When any man is entrusted with the sword for the protection and preservation of the people, if this man shall employ to their destruction that which was put into his hand for their safety, then by the law of that land he becomes an enemy to that people and deserves the most exemplary and severe punishment. This law — *if the King become a tyrant he shall die for it* — is the law of nature and the law of God, written in the fleshly tablets of men's hearts. [Quoted in G. Robertson, The Tyrannicide Brief at 192 (Pantheon Books, New York: 2005).]

On July 6, 1775, 126 years later, America's founding generation declared that "[t]he legislature of Great-Britain ... have at length ... attempted to effect their cruel and impolitic purpose of enslaving these

colonies by violence ... have thereby rendered it necessary for us to close with their last appeal from reason to arms." "Declarations of the Causes and Necessity of Taking Up Arms," reprinted in Sources of Our Liberties at 295 (R. Perry & J. Cooper, eds., rev'd ed. ABA Found.: 1978) ("Sources"). In support of this claim, the representatives of the united colonies recounted the royal governor's seizure of arms from the people of Boston "in open violation of honour, in defiance of the obligation of treaties, which even savage nations esteemed sacred." *Id.* at 298. Pronouncing their resolve to fight for their freedoms they declared:

> Our cause is just. Our union is perfect.... We gratefully acknowledge, as signal instances of the Divine favour towards us, that his Providence would not permit us to be called into this severe controversy, until we ... possessed ... the means of defending ourselves. [W]e most solemnly, before God and the world, *declare*, that, exerting the utmost energy of those powers, which our beneficent Creator hath graciously bestowed upon us, the arms we have been compelled by our enemies to assume, we will ... employ for the preservation of our liberties; being with one mind resolved to die freemen rather than to live slaves. [*Id.* at 299.]

In light of such historical origins, it is no wonder that, in constituting a new government after fighting and winning their independence by taking up arms against tyrannical king George III, the Bill of Rights of

the U.S. Constitution would secure to the people the right to keep and bear arms from any act of the federal government that would infringe that right.

Unwittingly, the Fifth Circuit began its analysis of "whether the challenged federal laws burden conduct protected by the Second Amendment" by analogizing the Second Amendment to the gun rights of "our English ancestors," concluding that the "right to keep and bear arms has never been unlimited" but rather is "subject to certain well-recognized exceptions, arising from the necessities of the case." NRA, 700 F.3d at 200. The court's analogy falsely assumes that the Second Amendment was intended to have the same scope as the rights of Englishmen.

The 1689 English Bill of Rights, "asserting the ancient rights and liberties" of Englishmen, declares "[t]hat the **subjects,** which are **protestants, may** have arms for their **defense**, **suitable** to their **conditions,** and as **allowed by law."** English Bill of Rights, reprinted in Sources at 246 (emphasis added). The 1791 American Bill of Rights declares that 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.**" U.S. Constitution, Second Amendment (emphasis added).

The textual differences are self-evident, and need not be detailed here other than to note that, while the English right was measured by its "suitab[ility] to [one's] conditions," the American right is fixed, having been found "necessary to the security of a free State,"

not subject to denial by civil authorities out of concern for public safety at the expense of a free people.

CONCLUSION

For the reasons above, the petition should be granted.

Respectfully submitted,

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