No. 20-1507

In the Supreme Court of the United States

ASSOCIATION OF NEW JERSEY RIFLE & PISTOL CLUBS, INC.; and BLAKE ELLMAN,

Petitioners,

v.

GURBIR S. GREWAL, in his Official Capacity as Attorney General of New Jersey, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF *AMICUS CURIAE* MOUNTAIN STATES LEGAL FOUNDATION'S CENTER TO KEEP AND BEAR ARMS IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether a blanket, retrospective, and confiscatory law prohibiting ordinary law-abiding citizens from possessing magazines in common use violates the Second Amendment.

2. Whether a law dispossessing citizens without compensation of property that was lawfully acquired and long possessed without incident violates the Takings Clause.*

**Amicus* will not address the second question presented in the Petition, instead *Amicus* will limit its discussion to the Second Amendment issue presented by Petitioners.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The **Center to Keep and Bear Arms ("CKBA")** is a project of **Mountain States Legal Foundation ("MSLF")**, a Colorado-based nonprofit, public interest legal foundation. MSLF was founded in 1977 to defend the Constitution, protect private property rights, and advance economic liberty. CKBA was established in 2020 to advance MSLF's litigation in protection of Americans' natural and fundamental right to self-defense. CKBA represents individuals and organizations challenging infringements on the constitutionally protected right to keep and bear arms. *See, e.g.*, *Caldara v. City of Boulder*, No. 20-416 (*certiorari* denied Nov. 16, 2020). MSLF's history of involvement also includes filing *amicus curiae* briefs with this Court. *See, e.g.*, *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (representing *amici* Rocky Mountain Gun Owners and National Association for Gun Rights); *District of Columbia v. Heller*, 554 U.S. 570 (2008) (representing MSLF). MSLF's *amici curiae* brief was cited in this Court's *McDonald* opinion. 561 U.S. 742, 777 n.27 (2010). The Court's decision in this case will directly impact CKBA's clients and litigation.

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[1] The parties were timely notified and have consented to the filing of this *amicus curiae* brief. *See* Supreme Court Rule 37.2(a). Pursuant to Supreme Court Rule 37.6, the undersigned affirms that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

STATEMENT OF THE CASE

I. HISTORICAL BACKGROUND

"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. CONST. Amend. II.

The Second Amendment derives from the Founders and Framers' deep respect for natural rights and their intent to preserve the rights of the individual against the expansive government they were establishing. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("WE hold these truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."); 1 ANNALS OF CONG. 451 (1789) (Joseph Gales ed., 1834) (Madison began the process of proposing the first constitutional amendments in 1789 with: "First, That there be prefixed to the constitution a declaration, that all power is originally vested in, and consequently derived from, the people.").

In so doing, the Founders and Framers drew on their knowledge of history, particularly the longstanding tradition for private persons to keep and bear arms, as well as their recent need for the exercise of such a right in successfully fighting the American Revolution. *See* 13 Edw. 1, st. 2, c. 5 (1285) ("It is

likewise commanded that every man have in his house arms for keeping the peace in accordance with the ancient assize . . . ."); 1 W. & M., 2d sess., c. 2 (1689) ("English Bill of Rights") ("That the subjects . . . , may have arms for their defence suitable to their conditions, and as allowed by law."); THE FEDERALIST NO. 46 (James Madison) ("It may well be doubted, whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops. Those who are best acquainted with the last successful resistance of this country against the British arms, will be most inclined to deny the possibility of it."); James Lindgren & Justin L. Heather, *Counting Guns in Early America*, 43 WM. & MARY L. REV. 1777, 1780 (2002) ("[I]n 1774, we can estimate that at least 50% of all wealth owners (both males and females) owned guns.").

George Washington and James Madison, among other Framers, "firmly believed that the character and spirit of the republic rested on the freeman's possession of arms as well as his ability and willingness to defend himself and his society." Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599, 614 (1982). The colonial experience and American Revolution strengthened the notion that an armed populace is essential to liberty. Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 327 (1991).

In 2008, this Court decided the landmark case of *District of Columbia v. Heller*, 554 U.S. 570 (2008),

and, shortly thereafter, *McDonald v. City of Chicago*, 561 U.S. 742 (2010). *Heller* was this Court's first in-depth analysis of the Second Amendment, the rights it protects, and how courts must examine challenges brought thereunder. *Heller*, 554 U.S. at 635 ("[S]ince this case represents the Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field . . . ."). *McDonald* reinforced and expanded *Heller*, incorporating the Second Amendment against the states via the Fourteenth Amendment. *McDonald*, 561 U.S. at 791. The *Heller* and *McDonald* Courts relied on the text of the Second Amendment and the history and tradition of regulation of the right, to reject infringements imposed on Americans' right to keep and bear arms.

Despite these decisions, states and cities continue to violate their residents' natural, fundamental, unalienable rights to keep and bear arms and to self-defense.

II. LEGAL BACKGROUND

The state of New Jersey passed its first magazine prohibition in 1990, banning the possession of magazines capable of holding more than 15 rounds of ammunition. N.J. Stat. § 2C:39-1(y) (1990). That law—passed prior to *Heller* and *McDonald*—stood unamended for nearly 30 years.

Then, in 2018, New Jersey passed Assembly Bill No. 2761, which bans possession of firearm magazines with a capacity of more than 10 rounds of

ammunition, with few and limited exceptions. Pet.App.2; N.J. Stat. §§ 2C:39-1(w)(4), 2C:39-1(y), 2C:39-3(j), 2C:39-5(f). Owners of these newly-illegal magazines were required to:

> (1) modify their [magazines] "to accept ten rounds or less," [N.J. Stat. §] 2C:39-19(b); (2) render firearms with [these magazines] or the [magazine] itself inoperable, *id.*; (3) register firearms with [magazines] that c[ould not] be "modified to accommodate ten or less rounds," *id.* at 2C:39-20(a); (4) transfer the firearm or [magazine] to an individual or entity entitled to own or possess it, *id.* at 2C:39-19(a); or (5) surrender the firearm or [magazine] to law enforcement, *id.* at 2C:39-19(c).

Pet.App.3 (quoting *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Attorney Gen. of N.J.*, 910 F.3d 106, 111 (3d Cir. 2018) (reproduced at Pet.App.63–117)).

III. PROCEDURAL BACKGROUND

Petitioners filed the underlying lawsuit in the United States District Court for the District of New Jersey alleging that New Jersey's magazine prohibition violates, *inter alia*, the Second Amendment. Pet.App.4.

Petitioners sought a preliminary injunction, which the district court denied. Pet.App.4. To address the Second Amendment claim, the district court applied a two-step analysis outlined in the Third

Circuit case *United States v. Marzzarella*—asking first whether the law imposes a burden on conduct within the scope of the Second Amendment; and, if so, applying some degree of means-end scrutiny, with the exact degree depending on whether the law burdens what the Third Circuit regards as the "core" of the Second Amendment. Pet.App.4–5.

Purporting to apply *Heller*, the Third Circuit defines this "core" of the Second Amendment as "the right of law-abiding citizens to possess non-dangerous weapons for self-defense in the home." Pet.App.5. Under the Third Circuit's test, laws that burden this "core" receive strict scrutiny. Pet.App.5. Laws that otherwise burden the exercise of Second Amendment protected rights receive intermediate scrutiny. Pet.App.5–6.

Applying this two-step analysis, the district court found that New Jersey's ban imposed a burden on "non-core" conduct within the scope of the Second Amendment and upheld the ban under intermediate scrutiny. Pet.App.6–7, 5 n.2.

Petitioners appealed to the United States Court of Appeals for the Third Circuit. Pet.App.8. A divided Third Circuit panel upheld the denial—again applying *Marzzarella*—over a dissent that accused the majority of applying a rational-basis standard disguised as intermediate scrutiny and noting that "people commonly possess large magazines to defend themselves and their families in their homes." Pet.App.8–11; Pet.App.103–07 (Bibas, J., dissenting).

Back on the merits, the district court granted summary judgment in favor of Defendants, determining that the Third Circuit had resolved all legal issues on consideration of the preliminary injunction and that no disputes of material fact remained. Pet.App.11.

Once again before the Third Circuit, Petitioners argued that the prior Third Circuit panel's ruling did not bind the new panel, and that the earlier ruling was manifestly in error. Pet.App.12. The new panel rejected Petitioners' arguments. Pet.App.12.

Petitioners moved for rehearing *en banc*, which motion was denied on an 8-6 vote. Pet.App.53–54.

SUMMARY OF THE ARGUMENT

This Court should grant *certiorari* to vindicate text, history, and tradition as the appropriate test for assessing challenges brought pursuant to the Second Amendment. Additionally, granting *certiorari* would allow this Court to review New Jersey's prohibition on commonly owned magazines and establish whether the Second Amendment's protections extend to magazines. At minimum, this Court should hold this matter over until it decides *New York State Rifle & Pistol Association v. Corlett*, and remand to the lower court to apply the test elucidated by this Court in that case. No. 20-843 (U.S., *cert.* granted Apr. 26, 2021).

Not only did *Heller* affirmatively establish the text, history, and tradition test, but both *Heller* and *McDonald* operate as guides on how to navigate the analysis. First, a court must examine the text of the Second Amendment through the lens of its historical meaning at the time it was enacted and ratified. Once the court has thus established the scope of the right, it must then look to historical and traditional regulations to determine what regulation of arms was considered appropriate. Finally, the court must parse the challenged statute or regulation to determine if it is consistent with, or the modern analogue of, historical and traditional regulations.

Lower courts across the nation, however, have ignored text, history, and tradition and opted instead to employ a two-step, interest-balancing test to assess regulations challenged under the Second Amendment. This two-step test is based on a fundamental misinterpretation of a single paragraph in *Heller*, has allowed courts to inappropriately narrow Second Amendment protected rights, and ignores this Court's explicit prohibition of the use of interest-balancing tests for Second Amendment challenges.

If the district court and Third Circuit had applied the text, history, and tradition test, those courts would have held New Jersey's magazine prohibition unconstitutional.

ARGUMENT

I. *HELLER* AND *MCDONALD* SET FORTH THE APPROPRIATE TEST TO ANALYZE SECOND AMENDMENT CHALLENGES

Courts must analyze the text, history, and tradition of the Second Amendment when determining whether a modern firearm regulation is constitutional.

Employing this Court's precedent, courts must first look to the text and history of the Second Amendment to determine the "scope of the right." *Heller*, 554 U.S. at 652. While the pure textual analysis allows the court to partially determine the scope, looking to the historical landscape is necessary because "the Second Amendment was not intended to lay down a 'novel principl[e]' but rather codified a right 'inherited from our English ancestors.'" *Id.* at 599 (alterations in original) (citation omitted). Once the scope is established, the court should then look to traditional regulation, which clarified "the public understanding of [the] legal text in the period after its enactment or ratification." *Id.* at 605. Finally, the court must parse the challenged regulation to determine if it fits within the history and tradition of arms regulation. *See id.* at 631–35 (analyzing traditional regulation of firearms against D.C.'s handgun regulations).

Restrictions that comport with early historical and traditional regulation of arms are constitutionally sound. A court may draw analogues between modern arms and traditional regulations, just as courts regularly do when evaluating First Amendment protections for electronic speech. *See Heller v. District of Columbia*, 670 F.3d 1244, 1275 (D.C. Cir. 2011) ("*Heller II*") (Kavanaugh, J., dissenting) ("Nor does it mean that the government is powerless to address those new weapons or modern circumstances. Rather, in such cases, the proper interpretive approach is to reason by analogy from history and tradition.") (citing *Heller*, 554 U.S. 570, Tr. of Oral Arg., at 77 (Chief Justice Roberts: "[Y]ou would define 'reasonable' in light of the restrictions that existed at the time the amendment was adopted . . . . [Y]ou can't take it into the marketplace was one restriction. So that would be—we are talking about lineal descendents (*sic*) of the arms but presumably there are lineal descendents (*sic*) of the restrictions as well.")).

Sections II and III of the *Heller* opinion operate as a roadmap of how to undertake this analysis. 554 U.S. at 576–628. Section IV then applies the analysis to the underlying facts of that case. *Id.* at 628–36. First, the *Heller* Court engaged in a thorough analysis of the text of the Second Amendment "guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" *Id.* at 576 (citations omitted). After analyzing the grammar, diction, syntax, and punctuation of the text, the Court then looked to contemporaneous and analogous state

constitutional provisions. *Id.* at 600–03. The Court next turned to the historical and traditional interpretation of the Second Amendment, specifically the period "immediately after its ratification through the end of the 19th century." *Id.* at 605. Finally, the *Heller* Court specified that certain longstanding limitations on the right to keep and bear arms are presumptively lawful. *Id.* at 626 ("Like most rights, the right secured by the Second Amendment is not unlimited."). The *Heller* Court, however, did not fully elaborate on the extent of those "longstanding prohibitions." *Id.* at 626–27.

The *McDonald* Court engaged in a similar examination: first, looking to *Heller*'s textual analysis, 561 U.S. at 767–68; then to the historical scope, *id.* at 768–69; and eventually to traditional treatment and regulation, *id.* at 769–78.[2]

Then-Judge Kavanaugh recited this analysis in his dissent in *Heller II*:

> "Constitutional rights," the [*Heller*] Court said, "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 634–35. The scope of the right is thus determined by "historical

[2] Given this Court was considering incorporation under the Fourteenth Amendment, the Court also looked to historical and traditional regulation surrounding the ratification of that Amendment. *McDonald*, 561 U.S. at 770–78.

> justifications." *Id.* at 635. And tradition (that is, post-ratification history) also matters 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 605 (emphasis omitted).

670 F.3d at 1271–72 (Kavanaugh, J., dissenting). "*Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition . . . ." *Id.* at 1271 (Kavanaugh, J., dissenting).

Despite the guidance in *Heller* and *McDonald*, including the complete absence of a balancing approach by those Courts, many lower courts have taken the opposite approach—attempting to balance natural, fundamental, constitutionally protected rights against modern assertions of state interest. *Heller*, 554 U.S. at 634 ("We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach.").

II. COURTS ACROSS THE NATION APPLY A TWO-STEP, INTEREST-BALANCING TEST, IN CONTRAVENTION OF THIS COURT'S MANDATE

Subsequent to *Heller* and *McDonald*, circuits across the United States have eschewed history and

tradition and instead apply a two-step test to review Second Amendment challenges. Pet.App.8–9; *see, e.g.*, *Gould v. Morgan*, 907 F.3d 659, 669 (1st Cir. 2018) ("Although we have not yet explicitly adopted this two-step approach, we do so today."); *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 254 (2d Cir. 2015) ("Lacking more detailed guidance from the Supreme Court, this Circuit has begun to develop a framework for determining the constitutionality of firearm restrictions. It requires a two-step inquiry."); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010) ("As we read *Heller*, it suggests a two-pronged approach to Second Amendment challenges.") (citation omitted); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010) (same) (citation omitted); *NRA v. BATFE*, 700 F.3d 185, 194 (5th Cir. 2012) (same); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012) (same); *Ezell v. City of Chicago*, 651 F.3d 684, 701–03 (7th Cir. 2011) (same); *United States v. Chovan*, 735 F.3d 1127, 1136–37 (9th Cir. 2013) (same) (citations omitted); *United States v. Reese*, 627 F.3d 792, 800–01 (10th Cir. 2010) (same); *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1261 n.34 (11th Cir. 2012) (same); *Heller II*, 670 F.3d at 1252 (same).[3]

This improper, but now widely adopted, test suffers three major problems: (1) the two-step test is based on the misinterpretation of a single paragraph in *Heller*, (2) lower courts have inappropriately limited the scope of the Second Amendment under the

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[3] The Eighth Circuit has not adopted the two-step test. *See* David B. Kopel & Joseph G.S. Greenlee, *Federal Circuit Second Amendment Developments 2018*, 7 L.M.U. L. REV. 75, 75 (2020).

first step, and (3) both *Heller* and *McDonald* made clear that the interest-balancing conducted in step two is inappropriate in light of the natural, fundamental rights at issue.

A. The Two-Step Test Rests on a Fundamental Misinterpretation of *Heller*

The two-step test is purportedly "derived" from *Heller*, but actually misinterprets a single paragraph in that opinion, which reads:

> As the quotations earlier in this opinion demonstrate, the inherent right of self-defense has been central to the Second Amendment right. [D.C.'s] handgun ban amounts to a prohibition of an entire class of "arms" that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family," would fail constitutional muster.

Heller, 554 U.S. at 628–29 (citations omitted). Then-Judge Kavanaugh recognized this issue in *Heller II*:

> To be sure, the Court noted in passing that D.C.'s handgun ban would fail under any level of heightened scrutiny or review the Court applied. *Heller*, 554 U.S. at 628–29. But that was more of a gilding-the-lily observation about the extreme nature of D.C.'s law—and appears to have been a pointed comment that the dissenters should have found D.C.'s law unconstitutional even under their own suggested balancing approach—than a statement that courts may or should apply strict or intermediate scrutiny in Second Amendment cases.

670 F.3d at 1277–78 (Kavanaugh, J., dissenting).

Despite the lack of any interest-balancing in *Heller* or *McDonald*, lower courts have used this one paragraph to justify their adoption of the two-step, interest-balancing test.

B. Lower Courts Have Inappropriately Limited the Scope of the Second Amendment

First under the two-step test, a court determines whether the regulation affects a "core" or "non-core" Second Amendment protected right; if neither, the inquiry ends. *See Cuomo*, 804 F.3d at 254 ("First, we consider whether the restriction burdens conduct protected by the Second Amendment. If the challenged restriction does not implicate conduct within the scope of the Second Amendment, our

analysis ends and the legislation stands.") (citation omitted).

Many circuits, including the Third Circuit below, however, have taken a very narrow view of *Heller* and *McDonald*, and state the only "core" protected right under the Second Amendment is self-defense within the home. *See* Pet.App.5 ("[T]he 'core . . . [of] the Second Amendment protects the right of law-abiding citizens to possess non-dangerous weapons for self-defense in the home.'") (quoting *Marzzarella*, 614 F.3d at 92) (some alterations in original); *NRA v. BATFE*, 700 F.3d at 194 ("Instead, the [*Heller*] Court identified the Second Amendment's central right as the right to defend oneself in one's home . . . .").

Under this narrow construction, various courts have found, among other things, that possessing certain firearm magazines and bearing arms outside of the home fall outside of the "core" of the Second Amendment. *See, e.g.*, Pet.App.80 (finding New Jersey's magazine ban "does not severely burden the core Second Amendment right to self-defense in the home . . . .");[4] *Kachalshy v. Cty. of Westchester*, 701 F.3d 81, 94 (2d Cir. 2012) (finding New York's "proper cause" requirement to obtain a concealed carry permit fell "outside of the core Second Amendment protections identified in *Heller*" because "New York's

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[4] *But see Cuomo*, 804 F.3d at 258 ("[L]arge-capacity magazines are commonly owned by many law-abiding Americans, and their complete prohibition, including within the home, requires us to consider the scope of Second Amendment guarantees at their zenith.") (citations and quotations omitted).

licensing scheme affects the ability to carry handguns only *in public*, while the District of Columbia ban applied *in the home* 'where the need for defense of self, family, and property is most acute.'") (citation omitted).[5] Other circuits, in limiting the "core" of the Second Amendment, have correspondingly limited their view of the totality of the scope of the Second Amendment—entirely dismissing claims as not falling within the category of "protected" rights. *See Teixeira*, 873 F.3d at 682 ("Based on such an analysis, we conclude that the Second Amendment does not confer a freestanding right . . . upon a proprietor of a commercial establishment to sell firearms.").

Heller in no way supports this miserly, inconsistent approach to the Second Amendment. In *Heller*, the specific right at issue was the right to possess a handgun in the home for the "core lawful purpose of self-defense." *Heller*, 554 U.S. at 630. *Heller* did not, however, limit the Second Amendment *in totum*, instead stating that the Second Amendment protects the right of citizens to possess commonly owned arms for "lawful purposes." *Heller*, 554 U.S. at 625. *McDonald* reiterated that "our central holding in *Heller* [is] that the Second Amendment protects a personal right to keep and bear arms for *lawful purposes* . . . ." 561 U.S. at 780 (emphasis added). These lawful purposes include more than just self-

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[5] *But see NYSRPA v. Corlett*, No. 20-843 (U.S., *cert.* granted Apr. 26, 2021) (challenging the same licensing requirements at issue in *Kachalshy*) and *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012) ("A right to bear arms thus implies a right to carry a loaded gun outside the home.").

defense in the home. *See Heller*, 554 U.S. at 599 ("The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting."); *see also* David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 ST. LOUIS U.L.J. 193, 204 (2017) (listing various lawful purposes described in *Heller*).

By taking an unreasonably narrow view of *Heller*'s holding, circuit courts have failed to consider a number of Second Amendment challenges as implicating Second Amendment protected rights, or, like the Third Circuit here, relegated them to second-tier status, violating this Court's charge to view the scope of the right at issue based on the text and history of the Second Amendment.

C. Lower Courts Are Engaging in Interest-Balancing, Which Was Explicitly Rejected by *Heller* and *McDonald*

Second under the two-step test, a court balances the exercise of the impacted right against the state or city's interests. *See* Pet.App.5 ("[T]he second step is to evaluate [the challenged] law under some form of heightened scrutiny.") (citation omitted).

This approach is contrary to this Court's guidance:

> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. 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. Further, despite the contention of some lower courts, the *Heller* Court did not just reject the particular interest balancing approach suggested by Justice Breyer in his dissent, but explicitly rejects *any* interest-balancing approach. *See Heller II*, 670 F.3d at 1264 ("As we read *Heller*, the Court rejected only Justice Breyer's proposed 'interest-balancing' inquiry."); *but see Heller*, 554 U.S. at 635 (The Second Amendment "is the very *product* of an interest balancing by the people—which Justice Breyer would now conduct for them anew.") (emphasis in original).

Despite *Heller*'s prohibition, courts across the nation continue to apply means-end scrutiny to Second Amendment protected rights. First, circuits have subjected even the rights they deem to be "core" to the Second Amendment to interest balancing—in contravention of *Heller*'s explicit mandate. *See Heller*, 554 U.S. at 634 ("We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach.").

Further, by classifying other Second Amendment protected rights as "non-core," circuits have justified subjecting those rights to weak forms of scrutiny. *See, e.g.*, Pet.App.5–6 ("Laws that do burden the core receive strict scrutiny, whereas those that do not burden it receive intermediate scrutiny.") (citation omitted).

Worse, courts often purport to apply intermediate scrutiny to "non-core" rights, but do so in name only, really applying some sort of elevated rational basis review. *See, e.g.*, Pet.App.107 (Bibas, J., dissenting) ("The majority purports to apply [intermediate scrutiny]. But its version is watered down—searching in theory but feeble in fact."); *Pena*, 898 F.3d at 981–87 (9th Cir. 2018) ("When policy disagreements exist in the form of conflicting legislative 'evidence,' we 'owe [the legislature's] findings deference in part because the institution is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions.'") (alterations in original) (citation omitted). That is exactly what the Third Circuit did in this case when it relied almost solely on unsupported assertions as to the 'dangers' associated with commonly owned magazines to establish that the prohibition was substantially related to an important government interest. *See* Pet.App.45–49 (Matey, J., dissenting), 107–16 (Bibas, J., dissenting).

Regardless of the number of circuits that have adopted the two-step, interest-balancing test, that test violates the charge of this Court—a charge this

Court leveled due to the importance and nature of the rights at issue.

III. THE TEXT, HISTORY, AND TRADITION OF THE SECOND AMENDMENT AS IT RELATES TO MAGAZINES

If the lower courts had evaluated the text, history, and tradition of the Second Amendment in examining the constitutionality of New Jersey's magazine prohibition, those courts would have determined that New Jersey's law is unconstitutional.

A. The Text of the Second Amendment

This Court has already set forth an in-depth, textual analysis of the Second Amendment in *Heller* and *McDonald*. First, the Second Amendment protects, at minimum, the natural rights to self-defense and to keep and bear arms:

> [I]t has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it "shall not be infringed." As we said in *United States v. Cruikshank*, 92 U.S. 542, 553 (1876), "[t]his is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed . . . ."

Heller, 554 U.S. at 592; *see McDonald*, 561 U.S. at 778 (quoting *Cruikshank*). Importantly, "'[k]eep arms' was simply a common way of referring to possessing arms, for militiamen *and everyone else*." *Heller*, 554 U.S. at 583 (emphasis in original).

Second, the right protected is an individual right, not a collective right tied to militia service. *Id.* at 595 ("There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.").

Third, the Second Amendment protects a fundamental right. *McDonald*, 561 U.S. at 778 ("In sum, it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.").

Finally, the Second Amendment is incorporated, via the Fourteenth Amendment, against the states. *Id.* at 791 ("We therefore hold that . . . the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*.").

The Court in this matter need not rehash its textual analysis and can rely on the analysis from *Heller* and *McDonald*.

B. The History and Tradition of Magazine Regulation

Because the rights protected by the Second Amendment are not unlimited, the next step of the

analysis is to determine whether there is a history and tradition of prohibiting the activities prohibited by the modern law or regulation in question, thereby allowing the modern regulation to withstand constitutional scrutiny. *See Heller*, 554 U.S. at 626 ("Like most rights, the right secured by the Second Amendment is not unlimited."). Here, when analyzing the breadth of New Jersey's prohibition of magazines against the historical and traditional regulation of the same, it is evident that New Jersey's prohibition has no basis in any historical or traditional regulation.

Firearms capable of firing more than 10 rounds without reloading have been in existence since at least the sixteenth century. *See* David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions* ("*History of Firearm Magazines*"), 78 ALB. L. REV. 849, 852–53 (2015) ("The first known firearm that was able to fire more than ten rounds without reloading was a sixteen-shooter created around 1580, using 'superposed' loads (each round stacked on top of the other.)"). Firearms like the 16-shot, German made wheel lock rifle are the historical antecedents to our modern, semi-automatic magazine-fed firearms. *See 16-Shot Wheel Lock*, AMERICA'S 1ST FREEDOM (May 10, 2014) https://www.americas1stfreedom.org/articles/2014/5/10/16-shot-wheel-lock/.

This technology quickly developed from multi-shot wheel lock rifles to repeating, magazine-fed rifles, with the English military employing magazine-fed repeating firearms as early as 1658. Clayton E.

Cramer & Joseph E. Olson, *Pistols, Crime, and Public: Safety in Early America*, 44 WILLAMETTE L. REV. 699, 716 (2008) (citing A. V. B. NORMAN & DON POTTINGER, ENGLISH WEAPONS & WARFARE: 449–1660 206–07 (1979)). The now famous "Puckle Gun," or "Defence Gun," was patented by James Puckle in 1718 in England and operated using "a Sett of Chambers ready Charg'd to be Slip'd on when the first Sett are pull'd off to be recharg'd." U.K. Patent No. 418 (filed May 15, 1718) http://wedmore.org.uk/puckle/James.html; CHARLES FFOULKES, THE GUN-FOUNDERS OF ENGLAND: WITH A LIST OF ENGLISH AND CONTINENTAL GUN-FOUNDERS FROM THE XIV TO THE XIX CENTURIES 32–33 (1937).

Developed alongside repeating firearms were breech-loading firearms that could be reloaded quickly and efficiently. In 1776, for example, British Captain Patrick Ferguson patented a breech-loading rifle capable of firing six shots per minute, firing effectively in wet conditions, and that could be reloaded on the walk—feats unachievable by the common muzzle-loading firearms of the time. John Danielski, *The Ferguson Rifle – The British Weapon that Might have Changed the Outcome of the American Revolution*, MILITARY HISTORY NOW (Sept. 26, 2020) https://militaryhistorynow.com/2020/09/26/the-ferguson-rifle-the-advanced-revolutionary-war-long-gun-that-might-have-changed-history/; *see* Cramer & Olson, *Pistols, Crime, and Public*, 44 WILLAMETTE L. REV. at 717–18. The Ferguson Rifle was used by British forces against our revolutionary forefathers during the American Revolution. *Id.*

By the time the Second Amendment was being ratified, these advancing technologies resulted in the advent of the Girandoni air rifle. Kopel, *History of Firearm Magazines*, 78 ALB. L. REV. at 853. The Girandoni air rifle, a state-of-the-art rifle featuring a 22-shot magazine, was "ballistically equal to powder guns in terms of bullet size and velocity," and was famously carried by Meriwether Lewis during the Lewis and Clark Expedition. *Id.*

These technological developments continued through the Nineteenth Century with the advent of the Jennings multi-shot flintlock rifle, the production of "pepperbox" pistols in the United States, and the invention of the Bennett and Haviland "pepperbox" rifle—all of which were capable of firing up to 12 shots without reloading. *Id.* at 853–54. Shortly thereafter, the advent of a self-contained cartridge (containing gunpowder, a primer, and the ammunition) and the first metallic cartridge by Daniel Wesson and Oliver Winchester directly facilitated the invention of the lever action rifle in 1855—fed by a 30-round tubular magazine. *Id.* By 1860, Benjamin Henry debuted a lever-action, breech-loading rifle with a 16-round tubular magazine capable of firing 33 rounds per minute. DAVID HARSANYI, FIRST FREEDOM 120 (2018).

Firearms with internal or detachable magazines (or their historical antecedents) capable of holding and firing more than 10 rounds of ammunition without reloading were in existence and used prior to our nation's founding through our early and modern history. *See Duncan v. Becerra*, 970 F.3d 1133, 1149 (9th Cir. 2020), *reh'g en banc granted, opinion*

vacated, 988 F.3d 1209 (9th Cir. 2021) ("The record shows that firearms capable of holding more than ten rounds of ammunition have been available in the United States for well over two centuries.").

And yet, despite this prevalence, the first laws restricting ammunition capacity did not arise until the twentieth century. Kopel, *History of Firearm Magazines*, 78 ALB. L. REV. at 864. The first two examples of such laws, Michigan banning firearms that could be "fired more than sixteen times without reloading," and Rhode Island banning firearms that could fire "more than twelve shots semi-automatically without reloading," were both repealed within 50 years of being enacted. *Id.* at 864–65 (quoting Act of June 2, 1927, No. 373, § 3, 1927 Mich. Public Acts 887, 888 (repealed 1959); Act of Apr. 22, 1927, ch. 1052, §§ 1, 4, 1927 R.I. Acts & Resolves 256, 256–57 (amended 1959)). "[T]he only longstanding statute banning magazines is found in the District of Columbia." *Id.* That law, passed by Congress in 1932, was not repealed when D.C. achieved home rule in 1975, and instead, D.C. passed the ban on handguns and self-defense in the home that was struck down by this Court in *Heller*. *Id.* "In sum, laws restricting ammunition capacity emerged in 1927 and all but one have since been repealed." *Duncan*, 970 F.3d at 1150–51 (citing *Heller*, 554 U.S. at 632) ("[W]e would not stake our interpretation of the Second Amendment upon a single law . . . that contradicts the overwhelming weight of other evidence regarding the [Second Amendment].")).

Accordingly, there is no evidence of any historical or traditional regulation or prohibition on firearms' ammunition capacity that New Jersey can cite to justify its challenged magazine prohibition.

While this review of history and tradition is not exhaustive, it provides significant evidence suggesting that the commonly owned magazines at issue are protected under the Second Amendment and were not prohibited under any direct or analogous historical or traditional regulation. Granting *certiorari* would allow this Court to fully examine the historical record surrounding magazine regulation.

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This Court has established that Second Amendment challenges must be analyzed based on the text of the Second Amendment, as well as the historical and traditional limitations on the right. Despite this, the Third Circuit—along with circuits across the nation—examine challenged regulations using a two-step, intertest balancing test. This Court should grant *certiorari* to review New Jersey's regulation against the text and historical scope the Second Amendment and any analogous historical or traditional firearms and magazine regulations. At minimum, this Court could hold this case over until it resolves *New York State Rifle & Pistol Association v. Corlett*.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of *Certiorari*.

Respectfully submitted,

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