No. 18-280

In the
Supreme Court of the United States

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

v.

CITY OF NEW YORK, NEW YORK, ET AL.,
Respondents.

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

BRIEF OF AMERICANS AGAINST GUN VIOLENCE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS[*]

Americans Against Gun Violence is a nonprofit organization whose principal purpose is to educate the public about the need to reduce the high rates of gun violence in our country to levels at or below rates in other economically advanced democratic countries of the world.

The United States is the only high income democratic country in the world where mass shootings occur regularly. But mass shootings account for only a small fraction of gun related deaths in our country. Nearly 40,000 people are killed annually in the United States by guns, and the rate of gun deaths here is 10 times greater than in the other high income democratic countries of the world.

Our country is not an "outlier" in relation to other high income democratic countries when it comes to rates of mental illness, substance abuse, income inequality or overall violence. In fact, the rate of assault by any means other than guns in the U.S. is below the average for other countries with which we frequently associate ourselves. What accounts for the difference between the high rate of gun violence here as compared with other developed Western countries is the huge number of guns per capita we have, which stems from lax gun control laws here in comparison to those in the other countries.

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[*] Counsel of record for the parties have filed blanket consent. No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from *Amicus*, their members, or their respective counsel made a monetary contribution to the preparation or submission of this brief.

Amicus supports stringent gun control laws here like those that have long been in effect in other high income democratic countries of the world. Specifically, we advocate for a ban on civilian ownership of handguns (similar to the United Kingdom), a ban on all automatic and semi-automatic rifles (similar to Australia), universal registration of all firearms and licensing of gun owners, and continuing periodic educational and training requirements for owners. Further, purchasers of firearms should undergo thorough background checks, be required to show why possession of a gun is necessary and show that the purchaser is trained to handle guns safely.

To achieve this objective requires reversing the narrow 5-4 majority opinion in *District of Columbia v. Heller*, 554 U.S. 570 (2008) ("*Heller*") and returning to the status quo that prevailed under *United States v. Miller*, 307 U.S. 174, 178 (1939) and *Lewis v. United States*, both of which held: "[T]he Second Amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship' to the preservation or efficiency of a well regulated militia." 445 U.S. 55, 65 n.8 (1980). Our brief explains why this is necessary and proper.

INTRODUCTION AND SUMMARY OF ARGUMENT

The issue in this case concerns the application of two closely divided (5 to 4) opinions – *Heller*, 554 U.S. 570 and *McDonald v. City of Chicago*, 561 U.S. 742 (2010) ("*McDonald*") – to the constitutionality of New York City's restrictions on transporting beyond city limits a licensed handgun to and from a home or shooting range.

Heller held for the first time in the Court's history that the Second Amendment "confer[s] an individual right to keep and bear arms," a holding that invalidated the federal District's partial ban on possession of handguns. *McDonald* followed *Heller* two years later in declaring this "individual right" to be "fundamental" and applying it to state and local governments by incorporation into the Fourteenth Amendment's due process clause.

Petitioners and their amici now ask this Court to supply sharper teeth for *Heller*'s and *McDonald*'s "bite" at the gun control apple by requiring "heightened scrutiny"–either "intermediate" or "strict"–when measuring the constitutionality of gun laws against the newly found Second Amendment's right of individuals to "keep and bear arms."[1] If successful, petitioner's plea would further hamstring the ability of Congress and state and local governments to enact laws regulating the possession and use of firearms.

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[1] "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., Second Amend.

But now is not, if ever there was, a time to put a straitjacket on the ability of government to protect people by regulating the possession and use of guns. Instead, the Court should "not be ignorant as judges of what we know as [people]." *Watts v. State of Indiana*, 338 U.S. 49, 52 (1949). And what we know, both from common sense and numerous studies confirming it, is that lax laws on the purchase and proliferation of guns results in the wounding and death of more people.

> Despite the many factors that may contribute to rates of gun violence in a particular community, there is a robust and growing body of research that demonstrates an undeniable correlation between certain strong gun laws and lower rates of gun violence."[2]

This fact countenances the Court, instead of fortifying *Heller*, to revisit and reverse it, returning us to saner days when the Second Amendment's prefatory phrase, "well regulated," is given primacy in parsing the meaning for its other phrase referencing those who "bear arms."

Reexamination of *Heller*, the linchpin opinion on which all of petitioners' arguments rest, is underscored by this Court's longstanding standards and practices. *Heller* has not been around long enough (11 years) that either "antiquity" or "reliance" interests would be unfairly discombobulated by its upending. Indeed, gun

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[2] Chelsea Parson & Eugenio Weigand Vargas, *America Under Fire*, *Center for American Progress*, Oct. 11, 2016, https://www.americanprogress.org/issues/guns-crime/reports/2016/10/11/145830/america-under-fire/, accessed August 9, 2019.

owners and their allies are sufficiently organized and able to engage in state and local political processes to assure their interests are protected from what they feel are overreaching and burdensome gun laws. Even though some jurisdictions enact stricter laws on gun possession and use than others,[3] the virtue of federalism, which gives breathing room and fosters experimentation through the laboratories of the states, is that it permits geographic choice for people to live where the legal climate for bearing individual firearms corresponds more closely with their personal values. Only if the federal government were to preempt state and local control of firearms with national uniform gun regulation would this individual "choice" be curtailed, but the political clout of gun advocates on the national scene, both before and since *Heller*, make that possibility most unlikely.[4]

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[3] At least 40 states guarantee in their constitutions a right to possess firearms, and most, including localities within these states, regulate the use and possession of guns. *McDonald* arguably invalidates some of these regulations. See Michael B. de Leeuw, *The (New) New Judicial Federalism: State Constitutions and the Individual Rights to Bear Arms*, 39 FORDHAM URB. L.J. 1449, 1466-67 (2012) (noting that in the wake of *Heller* the federal government has been involved in extensive litigation related to its gun-control regulations, despite *Heller*'s assertion that "long-standing" regulations were presumptively reasonable; the lack of a definite judicial review standard has opened the floodgates of litigation).

[4] "A federal ban on the possession, transfer, or manufacture of semiautomatic assault weapons, passed in 1994, was allowed to expire in 2004," and no federal gun legislation has been enacted since." Jill Lepore, *Battleground America*, *THE NEW YORKER*, April 16, 2012. Further, "[t]he most tangible effect of the ban on assault weapons was to set off a backlash against gun control by American

Moreover, *Heller*'s majority opinion has been severely criticized by courts and legal scholars for lacking in sound reasoning and distorting history. "A significant segment of the academy, the Bar, and the judiciary remains skeptical about the constitutional bona fides of the individual right to bear arms. *Heller,* many still say, rests on fundamental errors."[5]

Further, *Heller* has proven to be "unworkable" in practice, which is why the frustrated petitioners here ask the Court to stop "governments [from] disregarding Second Amendment rights and courts [from] endorsing such efforts while purporting to apply heightened scrutiny." Petition, p. 22. This "unworkability" is another factor favoring the Court's reconsideration of *Heller*.

When, as with *Heller* and *McDonald*, the Court splits 5 to 4 "it evidences a deep cleavage as to the 'desired' result. Frequently an 'outcome' that is stubbornly resisted by a dominant majority of the Court is quickly adopted upon the retirement of one or more Justices when their replacements transform the dissenting minority into a new majority." Raoul Berger, *Government by Judiciary* (1977), p. 323.

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voters in the 1994 midterms, in which Democrats lost control of the House of Representatives for the first time in forty years. Having learned their lesson, most members of Congress have steered clear of gun control ever since." David Cole, *The Terror of our Guns*, *THE NEW YORK REVIEW OF BOOKS*, July 14, 2016.

[5] Nicholas J. Johnson, *The Power Side of the Second Amendment Question: Limited, Enumerated Powers and the Continuing Battle over the Legitimacy of the Individual Right to Arms*, 70 *HASTINGS L.J.* 717, 721 (2019).

Four members of the current Court were not on it when *Heller* was decided and three had not yet joined the Court when *McDonald* was handed down. Based on the backgrounds and past decisions of the newer members and those who participated in the *Heller* and *McDonald* opinions, court "watchers" of this case "predict" (if it is not dismissed on the ground of mootness) another "close" 5 to 4 opinion symptomatic of a continuing "deep cleavage." But hope springs eternal that at least one Justice will, upon reexamining and rethinking *Heller*, opine to reverse it consistent with the Court's numerous opinions doing the same with respect to its other wrongly decided precedents. This would be in keeping with the ethic of Justice Owen Roberts, who "changed his mind and his major votes three separate times . . . on the bed-rock issue of governmental power to regulate business . . . [and] by holding the decisive Court vote . . . was for years the most powerful person in the United States." Fred Rodell, *NINE MEN* 221-222 (1955); see e.g. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) reversing *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

ARGUMENT

I. *HELLER* SHOULD BE RECONSIDERED.

A precedential opinion "seems at first to look backward," focusing "on the use of yesterday's precedents in today's decisions."

> But in an equally if not more important way, . . . precedent looks forward as well, asking us to view today's decision as a precedent for tomorrow's decision makers. . . . A system of precedent therefore involves the special responsibility accompanying the power to commit the future before we get there.

Frederick Schauer, *Precedent*, STAN. L. REV. 571, 572-73 (1987).

Since *Heller*'s advent, we have seen the future it has helped construct and commit us to, one that cries out for correction by returning from whence we came, to *United States v. Miller*, *supra*, 307 U.S. 174 where the Court rejected a Second Amendment attack on a federal statute prohibiting the interstate transportation of certain firearms (in that case a short-barrel shotgun) by explaining that the restriction stood because it had no "relationship to the preservation or efficiency of a well-regulated militia." *Id.* at 178.

Court reversal of its precedents is not an anomaly but a necessity if we are to avoid being encumbered by the dead hand of suffocating and badly reasoned opinions. Numerous opinions illustrate the Court's willingness to reverse its opinions when warranted. See, e.g., *Garcia v. San Antonio Metropolitan Transit*

Authority, 469 U.S. 528 (1985) (holding that the Fair Labor Standards Act can constitutionally be extended to apply to state and local governments) reversing *National League of Cities v. User*, 426 U.S. 833 (1976); *Agostini v. Felton*, 521 U.S. 203 (1997) (not a violation of Establishment Clause for a state-sponsored education initiative to allow public school teachers to instruct on secular subjects at religious schools) reversing *Aguilar v. Felton*, 473 U.S. 402 (1985); and *Miller v. California*, 413 U.S. 15, 24-25 (1973) (defining a three part test for determining whether a book or expression is "obscene"), reversing *A Book Named 'John Cleland's Memoirs of Woman of Pleasure' v. Attorney Gen. of Mass.*, 383 U.S. 413 (1966).

Well-reasoned and settled standards determine when the Court should reevaluate and reverse itself. For starters, as Justice Brandeis explained, "[I]n cases involving the Federal Constitution, *where correction through legislative action is practically impossible*, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405-408 (1932) (dissenting opinion by Brandeis, J.)(emphasis added).

Four years after *Burnet*, Justice Stone cited it and echoed Brandeis when concurring with Justice Cardozo in *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 94 (1936) that "the doctrine of stare decisis . . . has only a limited application in the field of constitutional law." Justice Frankfurter soon followed suit in his

concurring opinion in *Graves v. New York*, 306 U.S. 466 (1939), a case that expressly overruled four of the Court's previous decisions, explaining that although "[j]udicial exegisis is unavoidable with reference to an organic act like our Constitution, the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it." *Id*. at 491-492.

Chief Justice Rehnquist, while recognizing that the traditional reason for stare decisis – it supports "the evenhanded, predictable, and consistent development of legal principles" – and "counsel[ed] strongly against reconsideration of our precedent[s]," also acknowledged that stare decisis was no more than a "principle of policy" and not an "inexorable command." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 63 (1996). He listed the considerations affecting application of stare decisis and when to elude it:"[W]hen governing decisions are *unworkable or are badly reasoned*, this Court has never felt constrained to follow precedent. Our willingness to reconsider our earlier decisions has been *particularly true in constitutional cases*, because in such cases correction through legislative action is practically impossible." *Id*. at 63 (emphasis added).

In *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), which expressly overruled *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), Justice Kennedy explained that, in addition to "workability," "the relevant factors in deciding whether to adhere to the principle of stare decisis include the *antiquity of the precedent*, the *reliance interests at stake*, and of course whether the decision was *well reasoned*" . . . and whether "experience has pointed up

the precedent's shortcomings." *Id*. at 362-363 (emphasis added).

Chief Justice Roberts' concurrence in *Citizens United* explained that applying the doctrine of stare decisis requires a careful "balancing" of interests. "[W]e must balance the importance of having constitutional questions decided against the importance of having them decided right . . . It follows that in the unusual circumstance when *fidelity to any particular precedent does more to damage this constitutional ideal than to advance it*, we must be more willing to depart from that precedent." *Id*. at 378 (emphasis added). Justice Roberts identified three factors affecting this "balance": (1) situations in which "the precedent under consideration itself departed from the Court's jurisprudence," (2) "when [the precedent's] rationale threatens to upend our settled jurisprudence in related areas of law," and (3) "when the precedent's underlying reasoning has become so discredited that the Court cannot keep the precedent alive without jury-rigging new and different justifications to shore up the original mistake." *Id*. at 378-79.

II. *HELLER* SATISFIES THIS COURT'S STANDARDS FOR ITS REVERSAL.

A. Strong Gun Violence Prevention Laws Save Lives.

Judge Richard Posner's "most scathing criticism" of the majority opinion in *Heller* is its "indifference to hundreds of deaths that might result from . . . embracing a broad interpretation of the Second Amendment. . . If deaths are a consequence of deciding

a case one way rather than another, that's something for the [justices] to consider along with the other consequences." Jeremy Waldron, *Unfettered Judge Posner*, *THE NEW YORK REVIEW OF BOOKS*, March 20, 2014, quoting from Richard A. Posner, *REFLECTIONS ON JUDGING* (2013).

1. *What Studies Comparing Gun Violence in States with Strict Gun Versus Weak Gun Control Laws Show.*

Significantly, there is no "if" when it comes to the relationship between lax gun laws (or no gun laws) and death rates, which are in the many thousands (not as Posner assumed, "hundreds") yearly.

> [D]ata from the Centers for Disease Control and Prevention's National Center for Injury Prevention and Control show that states with the highest rates of overall gun death in the nation are those with weak gun violence prevention laws and higher rates of gun ownership.[¶ In addition, states with the lowest overall gun death rates have some of the strongest gun violence prevention laws in the nation and lower rates of gun ownership."[6]

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[6] *States with Weak Gun Laws and Higher Gun Ownership Lead Nation in Gun Deaths, New Data for 2017 Confirms*, Violence Policy Center, January 23, 2019 (Violence Policy Center Study), http://vpc.org/press/states-with-weak-gun-laws-and-higher-gun-ownership-lead-nation-in-gun-deaths-new-data-for-2017-confirms/, accessed August 9, 2019. A chart of states with the five highest gun death rates and the five lowest gun death rates is attached as Appendix A to this brief.

"Year after year the numbers reflect the same undeniable fact. States with fewer guns and strong gun laws have far lower rates[7] of gun death," states Violence Policy Center Legislative Director Kristen Rand. "Gun violence is a growing public health crisis that demands immediate attention from policymakers on Capitol Hill and in statehouses across the country."[8] *Id*.

A 2016 study by the Center for American Progress also found a significant link between weak gun laws and high rates of gun violence in the same states referenced above:

> The 10 states with the weakest gun laws collectively have an aggregate level of gun violence that is 3.2 times higher than the 10 states with the strongest gun laws. And while this correlation does not prove a causal relationship between stronger gun laws and fewer gun deaths, the link between stronger gun laws and lower rates of gun violence cannot be ignored.[9]

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[7] State gun "death rates" are calculated by dividing the number of gun deaths by the total state population and multiplying the result by 100,000 to obtain the rate per 100,000, which is the standard and accepted method for comparing fatal levels of gun violence.

[8] Violence Policy Center Study, *ante* fn. 6.

[9] Chelsea Parsons & Eugenio Weigand, *America Under Fire: An Analysis of Gun Violence in the United States and the Link to Weak Gun Laws*, Center for American Progress, Oct. 11, 2016, https://www.americanprogress.org/issues/guns-crime/reports/2016/reports/2016/10/11/145830/America-under-fire/.

Since *Heller*, both the total annual number and rate of gun related homicides and suicides in the United States has increased. The frequency of mass shootings and the total number of victims in mass shootings has also increased.[10] Data from the Centers for Disease Control and Prevention show that from 2008 to 2017, the last year for which complete data are available, the total annual number of gun homicides increased from 12,179 to 14,542, and the rate of gun homicides per 100,000 population increased by 13%.[11] Of these gun homicides, only 326 were attributed to legal intervention in 2008 and 553 in 2017. The number of gun suicides increased from 18,223 in 2008 to 23,854 in 2017, and the rate of gun suicides increased by 22%.

A 2014 analysis of published medical literature on the association between firearm availability and the risk of becoming a victim of suicide or homicide confirms that individuals who owned a gun or had access to one in the home had an increased risk of becoming a victim of suicide or homicide.[12] Pooling the data from the studies evinces that access to a gun was

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[10] Mark Follman, Gavin Aronsen, and Deanna Pan, *U.S. Mass Shootings, 1982-2018: Data from Mother Jones' Investigation*, *Mother Jones*, accessed May 31, 2018, https://www.motherjones.com/politics/2012/12/mass-shootings-mother-jones-full-data/.

[11] "Fatal Injury Data," Centers for Disease Control and Prevention, accessed September 11, 2016, http://www.cdc.gov/injury/whiskers/fatal.html.

[12] Andrew Anglemyer, Tara Horvath, and George Rutherford, "The Accessibility of Firearms and Risk for Suicide and Homicide Victimization Among Household Members: A Systematic Review and Meta-Analysis," Annals of Internal Medicine 160, no. 2 (January 21, 2014): 101-10, https://doi.org/10.7326/M13-1301.

associated with a statistically significant increased risk of becoming a suicide victim (odds ratio 3.24) or a homicide victim (odds ratio 2.00).

The above findings are consistent with an early study by *The New England Journal of Medicine*, which found that for every one time a gun in the home was used to kill a home invader, there were 43 gun related deaths of a household member. Handguns were the firearms used in 68% of these deaths.[13]

In sum, "[n]ew studies, including one published last year by the Stanford University School of Medicine, and another published this month in the Journal of the American Academy of Pediatrics, reinforce what ought to be the unremarkable point that states with stronger gun laws see fewer children dying of gunshots." Adam Gopnik, *The Gilroy Shooting and What the Democratic Candidates should Remember about Justice John Paul Stevens*, *THE NEW YORKER*, July 30, 2019.

2. *What Studies Comparing Death Rates in the United States from Gun Violence with those in other Countries with Stricter Gun Control Laws Show.*

Comparison of firearm related deaths in the United States with those of other comparably developed countries in the world that – unlike us – ban or heavily regulate the possession and use of firearms underscore the same lesson from the above studies. "The United States is an outlier when it comes to guns and gun

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[13] Arthur L. Kellermann and Donald T. Reay, *Protection or Peril?*, *NEW ENGLAND JOURNAL OF MEDICINE* 314, No. 24 (June 12, 1986): 1557-60, https://doi.org/10.1056/.

laws. Most other countries with which we associate ourselves, such as the United Kingdom, Canada, Australia, and the major European nations, have much more stringent gun laws, substantially fewer guns, and markedly lower gun violence." Cole, *The Terror of Our Guns*, *ante* note 4.

Federal law here restricts but does not completely ban civilian ownership of fully automatic firearms,[14] but there are few other restrictions on the kinds of firearms that civilians may own. In most other high income democratic countries, there are stringent restrictions, and in some cases complete bans, on civilian ownership of handguns and semi-automatic rifles.[15]

A study comparing rates of firearm related deaths in the United States with the rates in 22 other high income democratic countries in 2003 showed that the overall rate of gun related deaths was 7.5 times higher in the United States than the average for the other 22 countries. The U.S. gun homicide rate was 19.5 times higher, and the U.S. gun suicide rate was 5.8 times higher.[16] The overall U.S. homicide rate was 6.9 times higher than the average in the other 22 countries, with the difference being attributable mainly to the extraordinarily high U.S. rate of gun homicide, which

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[14] 18 U.S.C. § 922 et. seq.

[15] *Gun Law and Policy: Firearms and Armed Violence, Country by Country*, http://www.gunpolicy.org/, accessed October 27, 2016.

[16] Erin G. Richardson and David Hemenway, *Homicide, Suicide, and Unintentional Firearm Fatality: Comparing the United States with Other High-Income Countries, 2003*, in 70 *Journal of Trauma and Acute Care Surgery* (2011), p. 238–243.

accounted for 68% of all homicides in the United States. The overall U.S. suicide rate by all means – *e.g.*, hanging, medicinal overdoses, drowning, etc. – was 30% lower than the rate in the other 22 countries. Had it not been for gun suicides, which accounted for 54% of all U.S. suicides, the United States would have had one of the lowest suicide rates of any high income democratic country in 2003.

A followup study comparing rates of firearm related deaths in the United States with the rates in the 22 other high income democratic countries in 2010 showed that the overall rate of gun related deaths here had risen to 10 times the average rate in the other countries (a 25% increase since 2003). The U.S. gun homicide rate had risen to 25.2 times higher (a 23% increase since 2003) and the gun suicide rate had risen to 8.0 times higher (a 28% increase since 2003).[17] Gun homicide accounted for 70% of all U.S. homicides, and gun suicide accounted for 51% of all U.S. suicides in 2010.

Two countries comparable to the United States – Australia and the United Kingdom – have enacted stringent gun control laws that correspond to, and illustrate, the efficacy of such laws in reducing deaths from gun violence. Reacting to a mass shooting in the resort town of Port Arthur in 1996 where 35 people were killed and 23 wounded, Australia banned all semi-automatic rifles and shotguns, and tightened up

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[17] Erin Grinshteyn and David Hemenway, *Violent Death Rates: The U.S. Compared with Other High-Income OECD Countries, 2010*, 129 *The American Journal of Medicine* (March 1, 2016), pp. 266-73, https://doi.org/10.1016/j.amjmed.2015.10.025.

other gun control regulations.[18] There had been 13 mass shootings (defined as a single incident in which at least five people were killed) in the 17 years prior to the enactment of the ban. There have been none by guns since, and overall rates of gun related homicides and suicides have declined steadily after the ban, with no increase in non-gun related homicides and suicides.[19] In 2016, the last year for which data are available for both the United States and Australia, the rate of gun related deaths in the U.S. was 11.5 times higher than in Australia. If the U.S. rate had been the same as the Australian rate in 2016, instead of 38,658 people being killed by guns, 3,362 would have been killed, a difference of 35,296 lives saved.

The United Kingdom completely banned civilian ownership of handguns in 1998. Since then, there have been no mass shootings with handguns, although 12 people were killed by a gunman using a rifle and a shotgun in 2012. In 2015, the last year for which data are available for both the UK and the U.S., the rate of gun deaths in the U.S. was 56 times higher than in the UK. If the U.S. rate had been the same as the UK rate, instead of 36,352 people being killed by guns in 2015, 643 would have been killed, a difference of 35,609 lives.

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[18] Rebecca Peters, *Rational Firearm Regulation: Evidence-Based Gun Laws in Australia*, in *REDUCING GUN VIOLENCE IN AMERICA: INFORMING POLICY WITH EVIDENCE AND ANALYSIS* (2013), pp. 195-204.

[19] Simon Chapman, Philip Alpers, and Michael Jones, *Association between Gun Law Reforms and Intentional Firearm Deaths in Australia, 1979-2013*, 316 *JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION*, July 19, 2016, pp. 291-99, https://doi.org/10.1001/jama.2016.8752.

B. *Heller* Has Proven Unworkable and Petitioners' Proposed "Fix" for this Would Upend Settled Jurisprudence.

Heller has sown confusion as to its proper scope from contradictory statements asserted in the majority opinion. While recognizing a constitutional right for individuals to have handguns in their homes, *Heller* also asserts this does not "cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Heller*, *supra*, 554 U.S. at 626-27. That statement, however, appears irreconcilable with another – 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 (emphasis added).[20]

This and other contradictions in the majority opinion perhaps account for why *Heller v. District of Columbia*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) ("*Heller II*") upheld the District's ban on "assault weapons" and magazines holding over 10 rounds; and Justice Kavanaugh, then serving on the D.C. Circuit, dissented. The majority opinion explained that the District satisfied the burden required by "intermediate scrutiny": that "there is a substantial relationship or 'fit' between . . . the prohibition on assault weapons and magazines holding more than ten rounds and . . . [the

[20] Query: Does this include portable, shoulder carried rocket launchers and flame throwers?

government's] important interests in protecting police officers and controlling crime." *Id*. at 1262. Justice Kavanaugh's dissent parried: "*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." *Id*. at 1271. "Whether we apply the *Heller* history-and-tradition-based approach or strict scrutiny or even intermediate scrutiny, D.C.'s ban on semi-automatic rifles fails to pass constitutional muster." *Id*. at 1285.

Others have also observed the effect of *Heller*'s confusing contradictions on lower courts trying to fathom and administer its holding. "In the lower courts, the prevailing standard for deciding Second Amendment claims bears no resemblance to *Heller*'s pronouncement that guns in common use are constitutionally protected." Johnson, *supra*, 70 HASTINGS L.J. at 719. The attorney who represented petitioner Heller before the Court in 2008 has similarly complained that "[m]any lower court judges have simply not reconciled themselves to *Heller* and *McDonald,* and can be counted upon to resist rather than implement these decisions." Alan Gura, *The Second Amendment as a Normal Right,* 127 HARV. L. REV. F. 223, 224 (2014).

Justice Thomas' dissent, joined by Justice Gorsuch, from the denial of certiorari in *Peruta v. California*, 137 S. Ct. 1995 (2017) joins these grievances over lower court attempts to apply *Heller* and *McDonald*, warning that they foreshadow the Second Amendment becoming a "disfavored right." *Id*. at 1996-2000.

In response to this fuss, petitioners and their amici urge the Court to "fix" things by clarifying that "heightened" scrutiny applies in deciding whether any particular legislative regulation of guns violates *Heller*. But that "heightened" scrutiny, as opposed to "rational basis" review of regulatory laws, exists to protect "discrete and insular minorities" – those without sway in the normal political processes – from overreaching, powerful interest groups or majorities unconcerned with or otherwise willing to trample on minority rights. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938); Louis Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 COLUMB. L. REV. 1093 (1982). "[T]he device of strict scrutiny is . . . employed for the examination of political outcomes challenged as injurious to those groups in society which have occupied, by consequence of widespread, insistent prejudice against them, the position of perennial losers in the political struggle." Laurence H. Tribe, *AMERICAN CONSTITUTIONAL LAW* § 16-6, p. 1002 (1978 ed.).

Unlike racial, religious and ethnic groups, however, gun owners and their advocates are not now, and never have been, a "discrete and insular minority"[21] unable to effectively represent their interests through available political processes.

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[21] "Gun owners are not a 'discrete and insular minority' . . . Anti-gun legislation that is truly irrational – born of a 'bare . . . desire to harm' gun owners as a class – would be a violation of the Equal Protection Clause and could be invalidated on that basis. If the worry is majority prejudice, *Heller*'s interpretation of the Second Amendment is overkill." Christopher J. Peters, *What are Constitutional Rights For? The Case of the Second Amendment*, 68 OKLA. L. REV. 433, 474-75 (2016) (footnotes omitted).

> The major force against gun control is well known—the National Rifle Association. The NRA is the most potent civil liberties organization in the nation. It has about five million dues-paying members, and many millions more who respond faithfully to its calls for action. It has an annual budget exceeding $300 million, although it spends only about 10 percent of that on lobbying and political activity. Perhaps most importantly, the NRA has long understood that democratic participation is critical to safeguarding rights. It does not leave protection of the Second Amendment to the courts, but takes matters into its own hands.[22]

Moreover, "the right to bear arms is tangibly embodied in a prized personal possession, associated in many owners' minds with self-defense, power, patriotism, and equality, [which] means that gun owners will be more motivated to act on their preferences, to lobby their representatives, and to make the gun issue dispositive in the voting booth. By contrast, it is the rare citizen . . . who makes gun control his make-or-break issue."[23]

Extrapolating "heightened scrutiny" from the Fifth and Fourteenth Amendments' "due process" clauses – whether "intermediate" or "strict" – to review legislation implicating the Second Amendment debases and makes a mockery of the standard and the principle

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[22] David Cole, *Facing the Real Gun Problem*, *THE NEW YORK REVIEW OF BOOKS*, June 20, 2013.

[23] Cole, *id.*

that animates it. Worse with respect to enacting laws that can reduce gun violence and save lives, "heightened scrutiny," like its kissing cousin "strict scrutiny," has in application too often proven "strict in theory and fatal in fact."[24] "Minor semantic distinctions aside, the two forms of heightened scrutiny are more alike than different in that a plaintiff's chances of prevailing are much greater under either of these forms of heightened review, as compared to deferential rational basis review." Susannah W. Pollvogt, *Beyond Suspect Classifications*, 16 U. PA. J. CONST. L. 739, 744 (2014).[25]

Federal and state lawmakers are already wary about regulating guns because of *Heller*'s interpretation of the Second Amendment.[26] Adding "heightened scrutiny" to fortify *Heller* and *McDonald* would further thwart the ability and willingness of legislative bodies to come to grips with gun violence. It's instead best to reverse *Heller* and allow the

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[24] The phrase was coined by Gerald Gunther, *1971 Term - Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

[25] See also Kathleen Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 296 (1992); Laurence H. Tribe, *AMERICAN CONSTITUTIONAL LAW* 1452 (2d ed. 1988); but see Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006).

[26] "Democratic efforts to tighten [gun] restrictions have been met with near unanimous GOP opposition in Congress, where Republicans often voice concerns regarding the Second Amendment right to bear arms." Joshua Jamerson, *Sen. Cory Booker Rolls Out Gun Control Proposal*, *WALL ST. J.*, May 6, 2019.

political processes to solve the problems of gun violence.

C. *Heller* is Not Well-Reasoned and is Based on Misleading Revisionist History.

Numerous legal scholars have been highly critical of *Heller* and assailed its reasoning. Judge J. Harvie Wilkinson, for instance, presciently charged that finding a constitutional right in the Second Amendment to own and operate a gun "subjects every state and local regulation to federal court review,"[27] and "will intensify". . . "the national controversy over gun policy." J. Harvie Wilkinson, III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 321 (2009). He faults the majority opinion for elevating its desire to "recognize a right to bear arms without having to deal with any of the more unpleasant consequences of such a right." *Id*. at 273. Further, he comments of *Heller* that "[w]hen a constitutional question is so close, when conventional interpretive methods do not begin to resolve the issue decisively, the tie for many reasons should go to the side of deference to democratic processes." *Id*. at 267.

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[27] More than 1,000 challenges to gun control laws have been prosecuted in state and federal courts since *Heller*, "the vast majority [of which] have failed." Joseph Blocher & Eric Ruben, *The Second Amendment Allows for more Gun Control than you Think*, *VOX*, June 14, 2018, https://www.vox.com/the-big-idea/2018/5/23/17383644/second-2nd-amendment-gun-control-debate-santa-fe-parkland-heller-anniversary-constitution. The authors of this study report there would be more Second Amendment litigation "but in many parts of the United States, there simply aren't many gun laws to challenge . . . because gun politics prevent most stringent regulations from being enacted in the first place." *Ibid*.

Judge Richard Posner disagrees with the *Heller* majority view that the Second Amendment embodies an individual right to bear arms, stating that "[t]he motivation for the Second Amendment was only to protect the state militias from being disarmed by the federal government," and the text of the Amendment as drafted does not enshrine an individual's right to possess a gun for recreational or self-defense purposes. Adam Winkler, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* 283-84 (2011). While Posner acknowledges that "[t]he range of historical references in the majority opinion [in *Heller*] is breathtaking," he points out this "is not evidence of disinterested historical inquiry; it is evidence of the ability of well-staffed courts to produce snow jobs." Posner, *REFLECTIONS ON JUDGING* (2013), p. 191. Richard Posner, *In Defense of Looseness*, New Republic, Aug. 27, 2008, at 32, 33 ("The Framers of the Bill of Rights could not have been thinking of the crime problem in the large crime-ridden metropolises of twenty-first-century America, and it is unlikely that they intended to freeze American government two centuries hence at their eighteenth-century level of understanding.").

A well-respected historian writes that *Heller*'s "notion . . . there was a general consensus on the meaning of the Second Amendment that supports an individual right with no connection to the militia is simply gun rights propaganda passing as scholarship." Saul Cornell, *Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller*, 69 OHIO ST. L.J. 625, 630 (2008) (deeming the majority opinion's "use of historical texts . . . entirely arbitrary and result

oriented[,]" and then continuing: "Atypical texts that support [the majority opinion] ... are pronounced to be influential, while generally influential texts . . . are dismissed as unrepresentative. Such an approach is intellectually dishonest and suggests that the [majority opinion's] brand of plain-meaning originalism is little more than a smoke screen for [their] own political agenda.") *Id.* at 633-634 (footnotes omitted).

In another article, Professor Cornell observes that

> There is substantial scholarly support for the argument that the "individual rights" view articulated in *Heller* . . . was largely an invented historical tradition. Gun rights advocates both within and outside of the legal academy worked assiduously to create this revisionist history of the Second Amendment and deployed it effectively in *Heller*. . . For most of the last century the dominant interpretation of the Second Amendment was as a collective right, not an individual right. The eminent early twentieth century Harvard legal scholar Zechariah Chafee, Jr. captured the earlier scholarly consensus around this conception in an influential article written more than seventy years before *Heller*: "[u]nlike the neighboring amendments," the Second Amendment, Chafee averred, "safeguards individual rights very little and relates mainly to our federal scheme of government." Chafee's article was hardly the only one to embrace such a view. Most legal scholars and courts accepted this collective

> rights view until a new wave of revisionist scholarship emerged in the 1990s.

Saul Cornell, *"Half Cocked": The Persistence of Anachronism and Presentism in the Academic Debate Over the Second Amendment*, 106 J. Crim. L. & Criminology 203, 205 (2016).[28]

Another well-researched law review article finds that *Heller*'s historical claims that the Second Amendment was understood to protect the rights of freed slaves against slave owners is off-base.

> [B]oth *Heller* and *McDonald* . . . fail to fully engage with the interpretive problems of Reconstruction history. And these problems are profound. First, for every historical instance of a freedman fighting to defend his rights against an ex-Confederate police officer, there is an ex-Confederate who claimed that it was his rights that were under assault by the Union

[28] Gary Wills, now a history professor at Northwestern University, says of these authors who created what they dub the "Standard Model" for interpreting the Second Amendment, that "time after time, in dreary expectable ways, the quotes bandied about by . . . these scholars turn out to be truncated, removed from context, twisted, or applied to a debate different from that over the Second Amendment. Those who would argue with them soon tire of the chase from one misquotation to another, and dismiss the whole exercise—causing the angry reaction from Standard Modelers that they are not taken seriously. The problem is that taking them seriously is precisely what undermines their claims." Wills, *To Keep and Bear Arms*, *THE NEW YORK REVIEW OF BOOKS*, Sept. 21, 1995. Notably, Wills wrote this article about the revisionist historians inaccurate "spin" on the Second Amendment before *Heller* and the majority opinion's acceptance of it.

> army and pro-Union militia. Indeed, whites-only citizen militias, whites-only rifle clubs, and whites-only paramilitary organizations consistently justified their existence on the belief that they had a right to defend themselves against the threat of overbearing pro-Union law enforcement and corrupt Republican governments. Conservatives in the South simply would not acquiesce to the legitimacy of Reconstruction governments or law enforcement. To them, the danger was not from the activity of the Klan, but "from [pro-Union] state militias." When Texas formed a militia, officially called the Texas State Police, violence erupted so often that the state government had to declare martial law. The widespread refusal of Southerners to accept "the authority, much less the sovereignty, of the new state administrations seemed to reduce southern society to a Hobbesian state of nature." And yet, the existing scholarship, and certainly *Heller* and *McDonald*, provide no answers to the question of whether men who armed themselves in opposition to pro-Union police had a Second Amendment right to do so. And, if not, why not.

Darrell A. H. Miller, *Retail Rebellion and the Second Amendment*, 86 IND. L.J. 939, 968-69 (2011) (footnotes omitted).

In an earlier article, Miller explains how *Heller* distorts the "conflicted and fragmented history" of the Second Amendment, "creating [instead] a history of firearms that is more romance than real." Darrell A.H.

Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1321 (2009). He wisely advises that "as to the highly disputed issue of public self-defense and as opposed to private defense of the home, the most prudent approach is to reserve to . . . government and the political process, not to . . . courts, judgments about how to preserve balance." *Id.* See also for further criticism of *Heller*'s reasoning and historical mythology, Reva B. Siegel, *Heller & Originalism's Dead Hand – In Theory and Practice*, 56 UCLA L. Rev. 1399 (2009); Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246 (2008); Adam Winkler, Heller's *Catch-22*, 56 UCLA L. REV. 1551 (2009).

In other words, *Heller* should be reversed so the Second Amendment does not, under the novel Court created protective umbrella for the individual's right to bear arms, become a "suicide pact."[29]

> The pre-*Heller* approach to the Second Amendment is preferable because it promotes public safety in a manner that respects individual rights and governmental obligation. Before *Heller*, state governments were able to regulate guns without a concern regarding weapons in common use. The capacity for democratic processes to discern what weapons

[29] Editorial, *The Killers in Our Midst*, *THE WALL ST. J.*, August 5, 2019, A19: "[T]he evidence in the states is that the [red-flag] laws have prevented suicides and may prevent other mass shootings. Gun rights need to be protected, but the Second Amendment is not a suicide pact."

> were appropriate for regulation was respected and deference was paid to the subjects for appropriate regulation. Such deference would be inconsistent with a recognition of a right to bear arms were it not a qualified right. Respecting the prefatory clause [of the Second Amendment] allowed courts to defer to the states insofar as their regulations did not undermine the rights of militia. Pre-*Heller* "militia" were defined as state militias to which military use of firearms was granted to protect a free state against tyranny.

Areto A. Imoukhuede, *Gun Rights and the New Lochnerism*, 47 SETON HALL L. REV. 329, 381-382 (2017) (footnotes omitted).

CONCLUSION

Reason, history and ample studies confirm that instead of strengthening *Heller* and its progeny to further hamstring the ability of government to regulate the possession and use of guns, *Heller* should be reversed. The Court should do so and hold the City's former handgun rule constitutional.

Respectfully submitted,

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APPENDIX

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APPENDIX A

States with the Five Highest Gun Death Rates[*]

Rank	State	Household Gun Ownership	Gun Death Rate per 100,000
1	AK	56.4%	24.33
2	MT	67.5%	23.23
3	AL	49.5%	23.06
4	LA	49%	21.52
5	MO	43.9%	21.38

States with the Five Lowest Gun Death Rates

Rank	State	Household Gun Ownership	Gun Death Rate per 100,000
50	HI	12.5%	2.73
49	MA	14.3%	3.82
48	NY	22.2%	3.89
47	RI	15.9%	4.06
46	CT	22.2%	5.24

[*] For a list of gun death rates in all 50 states, see http://www.vpc.org/state-firearm-death-rates-ranked-by-rate-2017/.