

No. 08-1521

IN THE
Supreme Court of the United States

OTIS McDONALD, *et al.*,
Petitioners.

v.

CITY OF CHICAGO, ILLINOIS, *et al.*,
Respondents.

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

**BRIEF FOR AMICI CURIAE
BRADY CENTER TO PREVENT GUN VIOLENCE,
THE INTERNATIONAL ASSOCIATION OF CHIEFS
OF POLICE, THE INTERNATIONAL
BROTHERHOOD OF POLICE OFFICERS, AND
THE NATIONAL BLACK POLICE ASSOCIATION
IN SUPPORT OF NEITHER PARTY**

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QUESTION PRESENTED

Amici curiae will address the following question:

Whether governmental regulations of the exercise of the Second Amendment right are subject to strict scrutiny, or whether such regulations are subject to a more deferential standard of review for reasonableness.

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CITY OF CHICAGO, ILLINOIS, *et al.*,
Respondents.

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

INTEREST OF AMICI CURIAE¹

The Brady Center to Prevent Gun Violence is the nation's largest non-partisan, non-profit organization dedicated to reducing gun violence through education, research, and legal advocacy. The Brady Center has a substantial interest in ensuring that the Second Amendment is not interpreted to jeopardize the public's interest in protecting families and communities through strong government action to prevent gun violence. Through its Legal Action Project, the Brady

¹ Pursuant to Rule 37.6, amici certify that no counsel for a party authored this brief in whole or in part, and that no person or party, other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties have consented to the filing of this brief.

Center has filed numerous briefs amicus curiae in cases involving gun laws, including in the recent cases *District of Columbia v. Heller* and *United States v. Hayes*.

The law enforcement amici listed below have a compelling interest in ensuring that the Second Amendment does not stand as an obstacle to strong gun laws that help police protect the public from gun crime and violence.

The International Association of Chiefs of Police is the world's oldest and largest organization of police executives, representing more than 20,000 members in 112 countries.

The International Brotherhood of Police Officers is one of the largest police unions in the country, representing more than 50,000 members.

The National Black Police Association represents approximately 35,000 individual members and more than 140 chapters.

INTRODUCTION AND SUMMARY OF ARGUMENT

The right to keep and bear arms is unique among constitutional rights in the risks to public safety associated with its exercise. Unlike other constitutionally protected conduct, gun possession and use increase the risk of grave—all too often deadly—harm to the individuals exercising the right, their families, friends, neighbors, and the public at large. This Court has recognized that the exercise of constitutional rights must be balanced against legitimate public interests, chief among which is public safety. In light of that precedent, and the unparalleled societal risks associated with firearms, the Second Amendment right to keep and bear arms should not prevent citizens, through their elected representatives, from enacting the reasonable

laws they desire and need to protect their families and communities from gun violence.

Courts already have been grappling with over 190 Second Amendment challenges brought against firearms laws and prosecutions in the year and a half since *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). Among those are challenges to statutes barring the carrying of loaded guns on public streets,² the possession and sale of guns on designated government property,³ the sale of particularly dangerous firearms,⁴ and the possession of firearms by indicted individuals.⁵ If this Court holds that the Second Amendment is incorporated, state and federal courts undoubtedly will be further inundated with challenges to gun laws. Absent this Court's guidance on the standard of review applicable to such cases, these challenges will lead to inconsistent outcomes and uncertainty in the legal system.⁶

² *Palmer v. District of Columbia*, No. 09-cv-1482 (D.D.C. filed Aug. 6, 2009).

³ *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009), *rehearing en banc ordered*, 575 F.3d 890 (9th Cir. 2009).

⁴ *Peña v. Cid*, No. 2:09-cv-01185 (E.D. Cal. filed Apr. 30, 2009).

⁵ *Compare United States v. Arzberger*, 592 F. Supp. 2d 590, 602 (S.D.N.Y. 2008) (finding “no basis for categorically depriving persons who are merely accused of certain crimes of the right to legal possession of a firearm”), *with United States v. Kennedy*, 327 F. App'x 706 (9th Cir. 2009) (vacating and remanding to trial court to modify release conditions to include prohibition on firearm possession).

⁶ *Compare, e.g., United States v. Miller*, 604 F. Supp. 2d 1162, 1171 (W.D. Tenn. 2009) (rejecting strict scrutiny), *with United States v. Engstrum*, 609 F. Supp. 2d 1227, 1231 (D. Utah 2009) (applying strict scrutiny).

Even worse, unless this Court articulates a deferential standard of review for these and similar enactments, lower federal and state courts may invalidate important public safety measures. *See, e.g., United States v. Skoien*, No. 08-3770, 2009 WL 3837316 (7th Cir. Nov. 18, 2009) (vacating and remanding conviction for gun possession by domestic violence offender); *Commonwealth v. Runyan*, No. 0811-CR-2207 (Mass. Dist. Ct. dismissed Oct. 15, 2008) (dismissing indictment for unlawful storage of unlocked firearm), *appeal docketed*, No. 10480 (Mass. June 8, 2009).

Clarification of the standard of review would be particularly necessary were this Court to apply the Second Amendment to the states under the theory that the right recognized in *Heller* is fundamental and therefore merits incorporation through the Fourteenth Amendment.⁷ If this Court reaches such a decision, it should also acknowledge that regulations implicating fundamental constitutional rights are often reviewed deferentially—even when the exercise of those rights, unlike that secured by the Second Amendment, does not create risk of physical harm. Reasonable restrictions on the exercise of such rights are permitted to further governmental interests no more important (and often clearly less important) than protecting the public from lethal violence. It would be entirely consistent with this Court’s incorporation precedents to employ a deferential standard of review under the Second Amendment, whatever the ruling on incorporation may be.

Deferential review is also consistent with *Heller*, where this Court identified a broad (and non-

⁷ *See* Pet. Br. 66-72; Nat’l Rifle Ass’n Br. 22-38.

exhaustive) array of firearms restrictions that it deemed “presumptively lawful,” 128 S. Ct. at 2816-2817 & n.26, signaling that the Second Amendment does not foreclose reasonable gun laws. Similarly, a virtually unbroken line of state court decisions has applied a deferential standard of review to uphold gun laws against challenges based on the right to bear arms found in state constitutions. Strong gun laws have existed in America since colonial days, and the English antecedent to the Second Amendment has long coexisted with broad governmental authority to protect the public from the risks posed by guns.

Gun policy is best determined as it always has been in this country: in the political arena, without courts second-guessing reasoned legislative judgments. In keeping with the deference granted to public safety regulations generally, and firearms regulations in particular, this Court should adopt a test that allows for “reasonable regulation” of the right to keep and bear arms. A “reasonableness” test would take appropriate account of the state’s strong interest in public safety and the democratic will.

ARGUMENT

I. DEFERENTIAL REVIEW OF FIREARMS LAWS IS APPROPRIATE IN LIGHT OF THE UNIQUE PUBLIC WELFARE CONCERNS IMPLICATED BY THE RIGHT TO POSSESS AND USE FIREARMS

The right to keep and bear arms recognized in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), is unique among rights safeguarded in the Constitution. While the exercise of rights to free speech, to worship, or to vote, for example, does not generally create an increased risk of physical harm or death, gun possession poses grave risks to the gun’s possessor, his or her

family, and the public. A handgun kept in the home for self-defense is all too often used by a child to shoot himself or another child unintentionally, turned against a partner in a domestic dispute, used to end the life of a depressed teenager or adult with (often fleeting) suicidal thoughts, or obtained by criminals.

Guns in America kill more than 30,000 people in homicides, suicides, and unintentional shootings nationwide each year, and injure 70,000 more.⁸ Last year, Americans reported more than 340,000 incidents of firearm use in non-fatal crimes.⁹ Members of the law enforcement amici face gun-wielding criminals daily, and officers suffered almost 20,000 firearm assaults from 1997 to 2006,¹⁰ in which 562 were killed.¹¹ Shootings account for ninety-two percent of police deaths

⁸ See, e.g., Centers for Disease Control and Prevention, WISQARS Nonfatal Injury Reports, <http://webappa.cdc.gov/sasweb/ncipc/nfirates2001.html> (“CDC Nonfatal”) (query for “All Intents” and “Firearm” and “2006” shows 71,417 non-fatal firearm injuries in 2006); *id.*, WISQARS Injury Mortality Reports, 1999-2006, http://webappa.cdc.gov/sasweb/ncipc/mortrate10_sy.html (“CDC Fatal”) (query for “All Intents” and “Firearm” and “2006” shows 30,896 firearm fatalities in 2006). Results for other recent years are similar.

⁹ Michael R. Rand, Bureau of Justice Statistics, Criminal Victimization, 2008, Sept. 2009, text tbl. 3, *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/cv08.pdf>.

¹⁰ Federal Bureau of Investigation, Uniform Crime Reports, tbl. 68 (“Law Enforcement Officers Assaulted Type of Weapon by Number of Assaults and Percent Injured, 1997-2006”), *available at* <http://www.fbi.gov/ucr/killed/2006/table68.html>

¹¹ *Id.* at tbl. 27 (“Law Enforcement Officers Feloniously Killed, Type of Weapon, 1997-2006”), *available at* <http://www.fbi.gov/ucr/killed/2006/table27.html>.

from felonious assaults.¹² All told, the costs of gun violence to American society, including medical costs, lost earnings, pain, disability, and the costs of lost life, approach \$100 billion annually.¹³

These costs would be higher if not for reasonable firearms regulations that states and the federal government have enacted—including laws of the type deemed “presumptively lawful” in *Heller*, 128 S. Ct. at 2816-2817 & n.26. If the right recognized in *Heller* were construed to threaten these and other reasonable regulations under a regime of unduly exacting judicial scrutiny, the current plague of gun violence could be transformed into something far worse. The citizenry should retain the ability to enact reasonable measures allowing the right conferred by the Second Amendment to coexist safely with the public’s overarching interest in security, the safeguarding of which is surely the first function of government.

A. The Right Recognized In *Heller* Is Unique In The Risks Its Exercise Poses To The Person Exercising The Right, Other Innocent Persons, And The Community At Large

A wide array of social science research confirms that firearm ownership poses substantial risks to the owner, the owner’s family, and the wider community.

Because firearms are much more readily available in the United States than in other western democracies, our nation’s homicide rate is several times greater

¹² *Id.*

¹³ See Philip J. Cook & Jens Ludwig, *Gun Violence: The Real Costs* 117 (2000).

than in those countries, even though our overall crime rate is comparable.¹⁴ As one pair of researchers explains, “an increase in gun prevalence causes an *intensification* of criminal violence—a shift toward greater lethality, and hence greater harm to the community.”¹⁵ This “lethality effect” associated with gun availability frequently transforms what would otherwise be minor crimes, arguments, or non-fatal assaults into serious confrontations more likely to cause severe injury or death.

In light of this “lethality effect” of guns, researchers have found that as the rate of gun ownership in a community increases, the homicide rate increases as well.¹⁶ Indeed, states with the highest levels of gun ownership have 114 percent higher firearm homicide rates and sixty percent higher overall homicide rates than states with the lowest levels of gun ownership.¹⁷ Likewise, the risk of homicide in the home is nearly three times higher in homes with firearms.¹⁸

¹⁴ Franklin E. Zimring & Gordon Hawkins, *Crime is Not the Problem: Lethal Violence in America*, reprinted in *Crime, Inequality and the State* (Mary E. Vogel ed., 2007), at 125.

¹⁵ Philip J. Cook & Jens Ludwig, *The Social Cost of Gun Ownership*, 90 *J. Pub. Econ.* 379, 387 (2005).

¹⁶ Mark Duggan, *More Guns, More Crime*, 109 *J. Pol. Econ.* 1086, 1086 (2001).

¹⁷ Matthew Miller et al., *State-level Homicide Victimization Rates in the U.S. in Relation to Survey Measures of Household Firearm Ownership, 2001-2003*, 64 *Soc. Sci. & Med.* 656, 659-660 (2006).

¹⁸ Arthur L. Kellermann et al., *Gun Ownership As a Risk Factor for Homicide in the Home*, 329 *New Eng. J. Med.* 1084, 1089 & tbl. 4 (1993); *see id.* at 1084 (“Rather than confer protection,

The presence of firearms also greatly increases the homicide risk for women suffering from domestic abuse, such that “[f]irearms and domestic strife are a potentially deadly combination nationwide.” *United States v. Hayes*, 129 S. Ct. 1079, 1087 (2009). In 2006, 1,905 women were murdered with guns and 4,772 women were treated in emergency rooms for gunshot wounds stemming from an assault.¹⁹ Abused women living in homes with firearms are six times more likely to be killed than other abused women.²⁰ Women are more than twice as likely to be shot to death by their male partner as killed in any way by a stranger.²¹ And women living in homes with guns are more than three times as likely to be victims of homicide.²²

Guns in the home, often improperly stored,²³ are also used in unintentional shootings, many times result-

guns kept in the home are associated with an increase in the risk of homicide by a family member or intimate acquaintance.”).

¹⁹ CDC Fatal (query for “Homicide” and “Firearm” and “Females” and “2006”); CDC Nonfatal (query for “Assault-All” and “Firearm” and “Females” and “2006”).

²⁰ Jacquelyn C. Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide*, Nat’l Inst. Just. J., Nov. 2003, at 15, 16.

²¹ Arthur L. Kellermann & James A. Mercy, *Men, Women, and Murder: Gender-Specific Differences in Rates of Fatal Violence and Victimization*, 33 J. Trauma 1, 1 (1992).

²² James E. Bailey et al., *Risk Factors for Violent Death of Women in the Home*, 157 Archives of Internal Med. 777, 777 (1997).

²³ More than forty percent of gun-owning households with children store their guns unlocked. See Mark A. Schuster et al., *Firearm Storage Patterns in US Homes With Children*, 90 Am. J. Pub. Health 588, 590 (2000).

ing in the death or serious injury of a child. In 2006, there were 15,320 unintentional gun deaths and injuries in the United States.²⁴ The unintentional firearm-related death rate for children under fifteen is nine times higher in the U.S. than in twenty-five other industrialized countries combined.²⁵

Guns also greatly increase the risk of death from suicide. When firearms in the home are accessible to adolescents or adults suffering from depression, suicide attempts are far more likely to end in death than when other means are used.²⁶ One study found that more than ninety percent of people who attempt suicide with firearms succeed in killing themselves, far more than those who attempt drug overdose (eleven percent) or cutting (four percent).²⁷ The risk of suicide is three to five times higher in homes with firearms.²⁸

²⁴ CDC Fatal (query for “Unintentional” and “Firearm” and “2006”); CDC Nonfatal (query for “Unintentional” and “Firearm” and “2006”).

²⁵ Centers for Disease Control and Prevention, *Rates of Homicide, Suicide, and Firearm-Related Death Among Children—26 Industrialized Countries*, 46 *Morbidity & Mortality Weekly Report* 101 (1997), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/00046149.htm>.

²⁶ Matthew Miller et al., *Household Firearm Ownership and Suicide Rates in the United States*, 13 *Epidemiology* 517, 522 (2002).

²⁷ Matthew Miller et al., *The Epidemiology of Case Fatality Rates for Suicide in the Northeast*, 43 *Annals Emergency Med.* 723, 724 (2004).

²⁸ Arthur L. Kellermann et al., *Suicide in the Home in Relation to Gun Ownership*, 327 *New Eng. J. Med.* 467, 467 (1992); Douglas J. Wiebe, *Homicide and Suicide Risks Associated With*

Deaths and injuries resulting from easy access to firearms are not offset by a decrease in criminal acts through general deterrence or the use of firearms in self-defense. To the contrary, Harvard's David Hemenway and Deborah Azrael estimated that the number of gun crimes exceeded the number of self-defense gun uses by a ratio of between four-to-one and six-to-one.²⁹ Another recent study found that "gun possession by urban adults was associated with a significantly increased risk of being shot in an assault," leading the authors to conclude that "guns did not protect those who possessed them from being shot in an assault."³⁰ Individuals possessing guns were 4.46 times more likely to be shot in an assault than unarmed individuals, and 4.23 times more likely to be shot fatally.³¹

The fact that approximately one million Americans have been wounded or killed by gunfire in the last decade alone³² serves to distinguish the Second Amendment right from those protected by any other constitutional provision.

Firearms in the Home: A National Case-Control Study, 41 *Annals Internal Med.* 771, 771 (2003).

²⁹ David Hemenway & Deborah Azrael, *The Relative Frequency of Offensive and Defensive Gun Uses: Results from a National Survey*, 15 *Violence & Victims* 257, 269 (2000).

³⁰ Charles C. Branas et al., *Investigating the Link Between Gun Possession and Gun Assault*, *Am. J. Pub. Health*, Vol. 99, No. 11, at 1, 4 (Nov. 2009).

³¹ *Id.*

³² See CDC Fatal and CDC Nonfatal (extrapolation based on 1999-2006 data for fatal shootings and 2000-2008 data for nonfatal shootings).

B. Given The Harms Associated With Firearms And The Governmental Interest In Public Safety, Deference To Legislative Judgments Regarding Firearms Is Appropriate

Given the dangers associated with firearms, there is a forceful governmental interest in regulating their possession and use. States have “cardinal civic responsibilities” to protect the health, safety, and welfare of their citizens. *Department of Revenue of Ky. v. Davis*, 128 S. Ct. 1801, 1811 (2008); *see also Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80, 82-83 (1946) (“[T]he legislature may choose not to take the chance that human life will be lost[.]”). In fulfilling their responsibility to protect the public welfare, states have historically found it necessary and proper to enact a wide variety of laws to ensure that guns are made, sold, stored, and used responsibly and possessed only by responsible, law-abiding persons. *See infra* Part II.A. These laws also are a product of democratic will, demanded by Americans, by solid majorities.³³

³³ For example, eighty-seven percent of Americans support background checks on private sales of guns; sixty-five percent support limiting handgun purchases to one per person per month to curb bulk purchases by traffickers. *See* Greenberg Quinlan Rosner Research & The Tarrance Group, *Americans Support Common Sense Measures To Cut Down on Illegal Guns*, Washington, D.C., Apr. 10, 2008, at app. A, *available at* http://www.mayorsagainstillegalguns.org/downloads/pdf/polling_memo.pdf. Eighty-two percent of Americans support limiting the sales of assault weapons; seventy-nine percent support requiring a police permit before the purchase of a gun. *See* Tom W. Smith, *Public Attitudes Towards the Regulation of Firearms*, National Opinion Research Center, University of Chicago (Mar. 2007), at 1, *available at* <http://www-news.uchicago.edu/releases/07/pdf/070410.guns.norc.pdf>. Seventy-nine percent of Americans support gun registration. *See*

Such firearms regulations are paradigmatic examples of the exercise of state “police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.” *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (internal quotation marks omitted). Because of the gravity of the states’ responsibility to protect public safety and welfare, they are generally afforded “great latitude” in exercising those police powers. *Id.* Firearm regulations are clearly an appropriate exercise of those powers, for the “promotion of safety of persons and property is unquestionably at the core of the State’s police power.” *Kelley v. Johnson*, 425 U.S. 238, 247 (1976).

The forceful governmental interests in protecting public safety and welfare that justify the states’ exercise of their police powers can also justify limitations on the exercise of constitutional rights. This is particularly true when the exercise of the right at issue involves conduct that affects the welfare of the community. *See, e.g., Cantwell v. Connecticut*, 310 U.S. 296, 303-304, 308 (1940) (Although the First Amendment’s Free Exercise Clause protects both the “freedom to believe and freedom to act,” “[t]he first is absolute but ... the second cannot be.”). In fact, the Court has ruled that even speech can be constitutionally prohibited when it can lead to potentially dangerous consequences. For instance, speech may be prohibited when it “inflict[s] injury or tend[s] to incite an immediate breach of the peace,” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), and when it is “directed to inciting or producing imminent lawless action and is likely to incite

or produce such action,” *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992) (certain restrictions on the content of speech permissible). Thus, “fighting words” are “generally proscribable under the First Amendment,” *Virginia v. Black*, 538 U.S. 343, 359 (2003) (citing *Cohen v. California*, 403 U.S. 15, 20 (1971)), as are “true threats,” *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam).

Exercise of the Second Amendment right to keep and bear arms necessarily involves conduct that creates grave risks to the public, generally greater than those associated with other rights for which the Court has upheld reasonable governmental regulation. The government’s interest in protecting the public from the risks posed by firearms is surely no less significant than the interest in preventing an “immediate breach of the peace” and certainly more significant than other interests such as protecting citizens from “unwelcome noise.” *See infra* p. 26. Yet the paramount governmental interest in public safety could be impaired were this Court to adopt an inappropriately exacting level of scrutiny for Second Amendment challenges.

The policy implications of such a ruling could be devastating, given the demonstrated success of reasonable state and federal gun laws in reducing the use of guns in crime and saving lives. Reasonable gun laws such as licensing for gun dealers and owners, registration, background checks, and safe storage laws have been associated with reduced risk of gun deaths and criminal access to guns.³⁴ A particularly significant

³⁴ *See, e.g.,* D.W. Webster et al., *Relationship Between Licensing, Registration, and Other State Gun Sales Laws and the*

success story is the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993). Before that law went into effect, criminals in many states could “lie and buy” guns from dealers without criminal background checks. After the Brady Act mandated checks on handgun purchases in 1994, the number of violent crimes committed with firearms, which had risen in nine of the ten preceding years, decreased substantially, from more than one million gun crimes in 1993 to about 313,000 in 2008, a decline of more than seventy percent.³⁵ The percentage of all violent crimes committed with firearms also declined.³⁶ The impact of Brady background checks is also dramatically illustrated by the thirty-one percent drop in murders from

Source State of Crime Guns, 7 *Injury Prevention* 184, 184 (2001); Lisa Hepburn et al., *The Effect of Child Access Prevention Laws on Unintentional Child Firearm Fatalities, 1979-2000*, 61 *J. Trauma, Injury, Infection & Critical Care* 423, 423 (2006); Daniel W. Webster et al., *Effects of State-Level Firearm Seller Accountability Policies on Firearm Trafficking*, 86 *J. Urban Health: Bulletin N.Y. Acad. Med.* 525, 525 (2009); Douglas S. Weil & Rebecca C. Knox, *Effects of Limiting Handgun Purchases on Interstate Transfer of Firearms*, 275 *J. Am. Med. Ass’n* 1759, 1759 (1996).

³⁵ See Bureau of Justice Statistics, *Nonfatal Firearm-Related Violent Crimes, 1993-2008*, available at <http://www.ojp.usdoj.gov/bjs/glance/tables/firearmnonfataltab.htm> (data on nonfatal gun crimes); Bureau of Justice Statistics, *Homicide Trends in the U.S., Weapons Used*, available at <http://ojp.usdoj.gov/bjs/homicide/tables/weaponstab.htm> (homicide data from 1976-2005); DOJ, *Murder Victims by Weapon, 2004-2008*, available at http://www.fbi.gov/ucr/cius2008/offenses/expanded_information/data/shrtable_08.html (homicide data 2004-2008).

³⁶ See Bureau of Justice Statistics, *Percent of Murders, Robberies, and Aggravated Assaults in Which Firearms Were Used, 1973 to 2007*, available at <http://www.ojp.usdoj.gov/bjs/glance/tables/guncrimetab.htm>.

1993 to 2007 (from 24,530 to 16,929), with more than two-thirds of the decrease due to the sharp drop in gun murders.³⁷ Since its inception, the Brady Act has blocked nearly 1.8 million prohibited buyers from buying a gun.³⁸

While others may hold different opinions on the net risks posed by guns in our society,³⁹ that disagreement only demonstrates that the scope and content of firearms regulation are best suited for debate and resolution in the legislative arena. This Court has repeatedly stressed that legislatures are better situated than courts to make empirical judgments about the need for and efficacy of regulation, even when that regulation affects the exercise of constitutional rights. *See, e.g., Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377,

³⁷ *Id.*

³⁸ Bureau of Justice Statistics, *Background Checks for Firearm Transfers, 2008—Statistical Tables*, available at <http://ojp.usdoj.gov/bjs/pub/html/bcft/2008/bcft08st.pdf>.

³⁹ For example, some claim that gun ownership or carrying deters crime, *see, e.g.,* John R. Lott, Jr., *More Guns, Less Crime: Understanding Crime and Gun Control Laws* (2d ed. 2000), but those claims have not withstood scrutiny, *see, e.g.,* Duggan, *supra* n.16, at 1086. Likewise, studies have found that laws entitling citizens to carry concealed weapons “are associated with uniform *increases* in crime.” John J. Donahue, *The Impact of Concealed Carry Laws*, in *Evaluating Gun Policy: Effects On Crime and Violence* (Jens Ludwig & Philip J. Cook eds., 2003), at 289-290 (emphasis in original); *see also* Jens Ludwig, *Concealed-Gun-Carrying Laws and Violent Crime: Evidence From State Panel Data*, 18 Int'l Rev. L. & Econ. 239, 239 (1998) (“[S]hall-issue [concealed carry permit] laws have resulted, if anything, in an *increase* in adult homicide rates.”).

402 (2000). Federal, state, and local governments “must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.” *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976); *see also Ewing v. California*, 538 U.S. 11, 28 (2003) (upholding sentencing law: “We do not sit as a ‘superlegislature’ to second-guess these policy choices.”); *Kelo v. City of New London*, 545 U.S. 469, 488-489 (2005) (declining “to second-guess the City’s considered judgments” in takings case). The need for firearms regulations is a quintessentially legislative judgment, and the risk of error in invalidating those judgments is severe. On such life-and-death issues, this Court should assess Second Amendment challenges to firearm regulations under a deferential standard.

C. This Court Indicated In *Heller* That Strict Scrutiny Is Inappropriate For Second Amendment Challenges

In *Heller*, this Court indicated that the Second Amendment could accommodate reasonable firearms regulations. The individual right to possess a firearm in the home for self-defense, the *Heller* Court made clear, “is not unlimited.” 128 S. Ct. at 2816 (no right “to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose”); *see also id.* at 2799. Rather, the Court explicitly recognized that the Constitution leaves governments “a variety of tools for combating” “the problem of handgun violence”—including “measures for regulating handguns.” *Id.* at 2822. Further, the Court listed a broad and non-exhaustive set of firearms restrictions that are “presumptively lawful.” *Id.* at 2816-2817 & n.26.

The Court’s acknowledgement of constitutionally permissible restrictions on firearm possession, use, and

sale underscores several important points regarding the appropriate level of judicial scrutiny. *First*, the Court recognized that firearm possession can carry serious—even fatal—consequences for society. *See supra* Part I.A. *Second*, the Court recognized that the Second Amendment right can coexist with the exercise of broad governmental power to regulate and restrict that right. An excessively stringent standard of review would improperly curtail a state’s power to protect its citizens’ welfare and safety. *See supra* Part I.B. *Third*, by observing that a variety of firearms regulations are “presumptively lawful,” 128 S. Ct. at 2816-2817 & n.26, without having undertaken a more detailed analysis of the government interests at stake or the degree to which the regulations are tailored to effectuate those interests, the Court implicitly rejected any standard of review that would jeopardize the identified, or similar, restrictions. *See id.* at 2851 (Breyer, J., dissenting) (constitutionality of laws identified by the *Heller* Court “under a strict scrutiny standard would be far from clear”). Although the *Heller* Court did not articulate the proper standard of review, its opinion signaled that rigorous scrutiny would be inappropriate because it would impede the government’s ability to protect public health and safety.

II. ANGLO-AMERICAN JURISPRUDENCE HAS LONG RECOGNIZED THAT STATES HAVE BROAD POWERS TO PROTECT THE PUBLIC BY REGULATING FIREARMS, AND SUCH LAWS HAVE BEEN AND CONTINUE TO BE REVIEWED WITH DEFERENCE

There is a long tradition of regulating firearms in this country, predating even the adoption of the Constitution, and courts have consistently deferred to legislative judgments as to which regulations are appropriate. This history shows that the Second Amendment should

be understood as allowing for reasonable firearms restrictions.

A. The Right To Bear Arms Has Always Been Understood As Subject To Extensive Regulation

For the entirety of its existence, the right to keep and bear arms has been understood as subject to reasonable regulation. Indeed, firearms regulations predate that right, and have been enforced consistently since its recognition.

While many American liberties can be traced to the Magna Carta, the right to be armed had no antecedent before its inclusion in the English Declaration of Rights in 1689. Before 1689, firearms were subject to multiple and significant restrictions, including minimum property requirements for those permitted to possess them, mandatory registries, and bans on their sale or wear. See Lois G. Schworer, *To Hold and Bear Arms: The English Perspective*, 76 Chi.-Kent L. Rev. 27, 34-36 (2000); Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of the Anglo American Right* ix (1994) (prior to 1689, the right to bear arms was “neither true, ancient, nor indubitable”).

The Declaration of Rights itself qualified the right to bear arms, providing that “the subjects which are Protestants may have arms for their defense suitable to their conditions and as allowed by law.” *Heller*, 128 S. Ct. at 2798 (quoting 1 W. & M., c. 2, § 7, in 3 Eng. Stat. at Large 441 (1689)). As a result, the Declaration granted the right to “perhaps no more than three percent” of the population. Schworer, 76 Chi.-Kent L. Rev. at 48; see *id.* at 45-47. Moreover, Parliament reserved the power to regulate that right through the phrase “as allowed by law.” See Carl T. Bogus, *The*

Hidden History of the Second Amendment, 31 U.C. Davis L. Rev. 309, 383-384 (1998).

Blackstone's treatise confirms that the right to possess arms was understood to be subject to regulation and limitation. In discussing the right to possess arms, Blackstone explained that the arms had to be "suitable to [the possessor's] condition and degree" and had to be "allowed by law." William Blackstone, 1 *Commentaries* *139. Blackstone further described the right as subject to "due restrictions" and "necessary restraints." *Id.* at *139, 140.

Consistent with the understanding that governments remained free to regulate the use and possession of arms, "colonial and early state governments routinely exercised their police powers to restrict the time, place, and manner in which Americans used guns." Robert H. Churchill, *Gun Regulation, the Police Power, and the Right To Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 Law & Hist. Rev. 139, 162 (2007). "Hundreds of individual statutes regulated the possession and use of guns in colonial and early national America." *Id.* at 143; *see also Heller*, 128 S. Ct. at 2819-2821; *id.* at 2848-2850 (Breyer, J., dissenting). These restrictions included total bans on the firing of weapons in Boston, Philadelphia, and New York City. Churchill, 25 Law & Hist. Rev. at 162. Pennsylvania—whose right-to-bear-arms provision was relied upon by the *Heller* Court for "confirm[ation]" of its construction of the Second Amendment, 128 S. Ct. at 2801—disarmed individuals unwilling to swear a loyalty oath, and other states followed suit. Churchill, 25 Law & Hist. Rev. at 159-160. During the Founding era, the right to bear arms "was not something that all persons could claim, but was limited to those members of the polity who were deemed capable of exercising it in a

virtuous manner.” Saul Cornell, “*Don’t Know Much About History*”: *The Current Crisis in Second Amendment Scholarship*, 29 N. Ky. L. Rev. 657, 679 (2002). The only limitation on the power to regulate arms was that the restrictions had to “be aimed at a legitimate public purpose and had to be consistent with reason.” Saul Cornell, *Early American Gun Regulation and the Second Amendment: A Closer Look at the Evidence*, 25 Law & Hist. Rev. 197, 198 (2007).

During the nineteenth century, laws regulating firearms became even more prevalent. See Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487, 512-513 (2004). During the Jacksonian era, for example, legislatures passed comprehensive laws prohibiting the carrying of handguns and other concealed weapons, Cornell, 25 Law & Hist. Rev. at 199, which “the majority of the 19th-century courts to consider the question held ... were lawful under the Second Amendment or state analogues,” *Heller*, 128 S. Ct. at 2816. Time, place, and manner restrictions and bans on selected categories of weapons were enforced as well. See Cornell & DeDino, 73 Fordham L. Rev. at 516.

The tradition of gun regulation has carried into the modern era. Congress has determined that there is a need for restrictions including bans on certain types of particularly dangerous weapons, limitations on who can possess firearms, restrictions on where firearms can be carried, see 18 U.S.C. § 922, as well as limitations on the manufacture, sale, and importation of firearms, and certain licensing requirements, see *id.* § 923. State legislatures have also enacted a wide array of regulations to protect their citizenries from the risks posed by firearms. See Adam Winkler, *Scrutinizing the Second*

Amendment, 105 Mich. L. Rev. 683, 719-720 (2007) (noting a panoply of state regulations). These regulations fall well within the Anglo-American tradition that has broadly tolerated regulation of firearms.

B. State Constitutional Provisions Recognizing A Right To Keep And Bear Arms Have Uniformly Been Enforced Through Deferential Review

Our society's broad acceptance of firearms regulations is confirmed by the fact that while over forty states have constitutions with right-to-keep-and-bear-arms provisions,⁴⁰ not one reviews such restrictions under heightened scrutiny. *See* Winkler, 105 Mich. L. Rev. at 686-687; *see, e.g., State v. Cole*, 665 N.W.2d 328, 337 (Wis. 2003) ("If this court were to utilize a strict scrutiny standard [for application of the Wisconsin right-to-keep-and-bear-arms provision] Wisconsin would be the only state to do so."). Despite significant differences in the political backdrop, timing, and texts of state right-to-keep-and-bear-arms provisions, state courts have with remarkable unanimity coalesced around a single deferential standard for reviewing limitations on the right to bear arms: the reasonable-regulation test. *See* Winkler, 105 Mich. L. Rev. at 686-687 & n.12; *see also* Eugene Volokh, *Implementing the Right To Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. 1443, 1458 (2009) (noting that "reasonable regulation" is "probably the dominant test in the state cases" and is applied so as to "set the unconstitu-

⁴⁰ *See* Eugene Volokh, *State Constitutional Rights To Keep and Bear Arms*, 11 Tex. Rev. L. & Pol. 191, 205 (2006).

tionality threshold very high—allowing anything short of a prohibition”).

Under the reasonable-regulation test, the state may not prohibit all firearm ownership, but “may regulate the exercise of [the] right [to bear arms] under its inherent police power so long as the exercise of that power is reasonable.” *Robertson v. City & County of Denver*, 874 P.2d 325, 328 (Colo. 1994); *see id.* at 333 n.10; *see also, e.g., Jackson v. State*, 68 So. 2d 850, 852 (Ala. Ct. App. 1953) (“It is uniformly recognized that the constitutional guarantee of the right of a citizen to bear arms, in defense of himself and the State is subject to reasonable regulation by the State under its police power.” (internal citation omitted)); *Bleiler v. Chief, Dover Police Dep’t*, 927 A.2d 1216, 1223 (N.H. 2007) (question is whether “the statute at issue is a ‘reasonable’ limitation upon the right to bear arms”). This test recognizes “the state’s right, indeed its duty under its inherent police power, to make reasonable regulations for the purpose of protecting the health, safety, and welfare of the people.” *State v. Comeau*, 448 N.W.2d 595, 599 (Neb. 1989); *see also Mosher v. City of Dayton*, 358 N.E.2d 540, 543 (Ohio 1976) (The “interest of the governmental unit is, on balance, manifestly paramount.”).

State court recognition of broad governmental latitude to regulate firearms is not only uniform, but also longstanding. More than 150 years ago, in a case cited twice with approval by the *Heller* Court, 128 S. Ct. at 2794 n.9, 2818, the Supreme Court of Alabama upheld a ban on concealed weapons, construing the state’s constitution “to leave with the Legislature the authority to adopt such regulations of police, as may be dictated by the safety of the people and the advancement of public morals.” *State v. Reid*, 1 Ala. 612, 617 (1840). Since the

statute did not “amount[] to a destruction of the right” to bear arms, it was valid. *Id.* at 616-617. Similarly, well over a century ago, the Supreme Court of Missouri upheld a regulation prohibiting the possession of firearms by intoxicated individuals, describing the statute as “but a reasonable regulation of the use of such arms, and to which the citizen must yield, and a valid exercise of the legislative power.” *State v. Shelby*, 2 S.W. 468, 469 (Mo. 1886). Even earlier, the Supreme Court of Texas upheld a ban on certain types of weapons, noting that the “legislature may regulate [the right to bear arms] without taking it away.” *English v. State*, 35 Tex. 473, 478 (1871).⁴¹

In sum, courts have overwhelmingly concluded that the right to keep and bear arms does not hinder the government from protecting the public safety by reasonably regulating firearms.

III. EVEN FUNDAMENTAL CONSTITUTIONAL RIGHTS THAT DO NOT CREATE RISKS AKIN TO THE RISK OF GUN POSSESSION ARE NOT NECESSARILY SUBJECT TO STRICT SCRUTINY

Even if this Court resolves the question whether the Fourteenth Amendment incorporates the Second Amendment by holding that the right to bear arms is “fundamental” (Pet. Br. 67 (discussing *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968))), it does not follow that strict scrutiny is required or appropriate for review of regulations of that right. In fact, this Court’s cases

⁴¹ See also, e.g., *State v. Wilburn*, 66 Tenn. 57 (1872) (prohibiting the wearing or carrying of guns is constitutional); *State v. Buzzard*, 4 Ark. 18 (1842). But see, e.g., *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90 (1822) (invalidating concealed weapons ban).

recognize, in many contexts, that a less rigorous standard of review is appropriate when, for example, regulation of a fundamental right does not substantially burden that right, is not aimed at restricting the right but rather is intended to address the detrimental effects that exercise of the right entails, or does not implicate the core values embodied by that right. *See generally* Winkler, 105 Mich. L. Rev. at 693-698. Moreover, the Court has on numerous occasions concluded, under a more deferential standard of review, that the exercise of “fundamental” rights engendering risks that pale in comparison to the deadly risks created by firearms may be restricted by laws designed to protect public safety.

Given the Court’s application of more deferential standards of review to other fundamental rights—and especially in light of the Second Amendment’s unique impact on the public welfare, *see supra* Part I.A., and in light of historical practice, *see supra* Part II—deferential review is appropriate here.

A. In Many First Amendment Challenges, The Court Has Applied A Far Less Demanding Test Than Strict Scrutiny And Has Deferred To The Government’s Interest In Protecting The Public Welfare

Although freedom of speech protected by the First Amendment is “among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States,” *Gitlow v. New York*, 268 U.S. 652, 666 (1925); *see also* *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 707 (1931), regulations of the right are not always sub-

ject to strict scrutiny.⁴² Instead, more deferential review applies in several circumstances, even when the right at stake is speech at the core of the First Amendment. See Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. Ill. L. Rev. 783, 785, 793; *Board of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477-478 (1989). This Court has upheld restrictions on the exercise of First Amendment rights that advance public interests far less weighty than protecting against gun violence.

For example, the Court applies only intermediate scrutiny to restrictions on the time, place, and manner of speech, and has found that the government's interests in preserving tranquility, *Ward v. Rock Against Racism*, 491 U.S. 781, 784, 792, 796 (1989), "protecting its citizens from unwelcome noise," *id.* at 796 (citation omitted), "avoiding congestion and maintaining ... orderly movement," *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 652 (1981), and maintaining public parks "in an attractive and intact condition," *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 296 (1984), were sufficiently substantial to warrant restrictions on the exercise of fully protected speech. See also *Turner Broad. Sys.*, 520 U.S. at 189 (intermediate scrutiny applies to content-neutral regulations). This less rigorous test permits a "reasonable" restriction that "promotes a substantial government interest that would be achieved less effectively absent the regulation" and leaves open

⁴² In its analysis of the Second Amendment, the *Heller* opinion itself invoked the doctrinal relevance of the First Amendment. See, e.g., 128 S. Ct. at 2799.

alternative channels for communication; the law need not be the least restrictive means to achieve the government's goals. *Ward*, 491 U.S. at 791, 799; *see also id.* at 798-799 (clarifying “narrowly tailored” prong in time, place, or manner context).

The Court has applied a similarly deferential test to review content-neutral regulations of expressive conduct, *United States v. O'Brien*, 391 U.S. 367, 377 (1968)—including expression that conveys a political view, *see, e.g., Clark*, 468 U.S. at 289, 293-295 (demonstration to call attention to the plight of the homeless); *see also Board of Trs.*, 492 U.S. at 477-478 (1989) (“We have refrained from imposing a least-restrictive-means requirement—even where core political speech is at issue—in assessing the validity of so-called time, place, and manner restrictions.... [The same applies] with respect to government regulation of expressive conduct, including conduct expressive of political views.”); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289, 296 (2000) (plurality opinion) (applying *O'Brien* scrutiny to expressive conduct); Geoffrey R. Stone, *Free Speech in the Twenty-First Century: Ten Lessons From the Twentieth Century*, 36 *Pepp. L. Rev.* 273, 297-298 (2009).

Laws directed at the “secondary effects” of particular kinds of speech are also subject to relaxed scrutiny. Under that more deferential standard, this Court easily found “vital” the government interests in “preserv[ing] the quality of urban life,” including the interest in preventing crime. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48-50 (1986) (ordinance aimed at the secondary effects of adult film theaters on the community constitutionally permissible); *see also City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 440 (2002) (plurality opinion).

The government interest in protecting public safety and welfare through particular firearms restrictions is no less “vital” than the various interests described above—and suggests that laws aimed at protecting citizen safety should receive scrutiny no more rigorous under the Second Amendment than the relaxed scrutiny applied to numerous regulations under the First Amendment.⁴³

B. In Challenges Based On Other Fundamental Rights, This Court Has Applied A Less Demanding Test Than Strict Scrutiny And Has Deferred To The Government’s Interest In Protecting The Public Interest

In contexts involving other fundamental rights, the Court has granted greater deference to governmental action than strict scrutiny demands. For example, to decide when governmental regulation requires just compensation pursuant to the Takings Clause of the Fifth Amendment, *see Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 239 (1897) (Takings Clause incorporated against the States), courts employ a deferential standard. That analysis balances several factors, including the regulation’s economic impact and the de-

⁴³ A standard more deferential than strict scrutiny is also applied where a regulation does not touch upon a right deemed to be at the core of the First Amendment. For example, regulation of commercial speech, even of its content, is reviewed deferentially. A commercial speech regulation need only “directly advance” a “substantial” government interest and be “not more extensive than is necessary to serve that interest”—and only if the speech concerns lawful activity. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 557, 564 & n.6, 566 (1980); *see Board of Trs.*, 492 U.S. at 480 (“reasonable” fit, not least restrictive means, required).

gree to which it interferes with investment-backed expectations. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). Additionally, courts defer to a legislature’s judgment of what constitutes a public use and uphold a taking if it is “rationally related to a conceivable public purpose.” *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (emphasis added); see also *Kelo*, 545 U.S. at 488 (rejecting heightened judicial review).

Strict scrutiny is also not employed in search and seizure cases under the Fourth Amendment. See *Elkins v. United States*, 364 U.S. 206, 213 (1960) (right against unreasonable searches and seizures applicable to state officers). Instead, the Court balances the “intrusion on the individual’s Fourth Amendment interests against [the] promotion of legitimate governmental interests,” *Delaware v. Prouse*, 440 U.S. 648, 654 (1979), to determine whether the intrusion is “reasonable,” *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652-653 (1995). This Court has disavowed the application of strict scrutiny and has “repeatedly refused to declare that only the ‘least intrusive’ search practicable can be reasonable under the Fourth Amendment.” *Id.* at 663; see also *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 629 n.9 (1989) (collecting cases). While the Court’s application of reasonableness review is textually based in the Fourth Amendment, even within the confines of the text the Court has determined that the standard of review is deferential rather than robust.

Finally, although voting is a “fundamental political right ... preservative of all rights,” *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); see also *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979), “[i]t does not follow ... that the right to vote

in any manner ... [is] absolute,” *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). This Court has rejected the argument that “any burden upon the right to vote must be subject to strict scrutiny.” *Id.* at 432. Instead, a more “flexible” balancing standard weighs “the character and magnitude of the asserted injury” to the right to vote against “the precise interests put forward by the State,” taking into account “the extent to which those interests make it necessary to burden” the right. *Id.* at 434 (internal quotation marks omitted); *see also Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1616 (2008) (plurality opinion) (burden on right “must be justified by relevant and legitimate state interests” “sufficiently weighty to justify the limitation”).

Thus, the Court has not concluded that stringent judicial review is necessary even where rights at the heart of our constitutional system are restricted. Instead, in many contexts where a regulation affects the exercise of a constitutional right but has neither the purpose nor effect of eliminating that right, the Court has given substantial deference to legislative judgments about the need for government regulation to ensure public health, safety, and welfare. That approach should inform the Court’s standard of review in the Second Amendment context as well.

IV. THIS COURT SHOULD ADOPT THE REASONABLE-REGULATION TEST FOR ASSESSING SECOND AMENDMENT CHALLENGES

Given the strong public interest in mitigating the harms associated with firearms, the established tradition of firearms regulation, and the doctrinal coherence of employing deferential review, amici urge that this Court adopt the “reasonable-regulation” standard for reviewing Second Amendment challenges, as it has

been applied in numerous state courts.⁴⁴ *See supra* Part II.B; *see, e.g., Cole*, 665 N.W.2d at 336-337 (Wis. 2003) (“Generally, when other courts have evaluated challenges to the validity of gun control statutes under state constitutional provisions, the test has been whether the statute constitutes a ‘reasonable regulation’ in light of the state’s police powers.”); *see also Winkler*, 105 Mich. L. Rev. at 716-719.⁴⁵

The reasonable-regulation standard is deferential, but not toothless. Regulations of the right designed to further public safety are upheld, but attempts to eliminate the right to keep and bear arms entirely will be invalidated. *Winkler*, 105 Mich. L. Rev. at 717. This test represents the considered balance struck by virtually all courts between the individual right to keep and bear arms and the strong regulatory interests of the government in protecting citizens from the risks posed by those weapons. *Id.*

This Court has previously found cases construing state constitutional provisions “instructive” in resolving federal constitutional questions. *Heller*, 128 S. Ct. at 2853 (Breyer, J., dissenting) (citing *Bartkus v. Illinois*, 359 U.S. 121, 134 (1959)); *see also Harmelin v. Michigan*, 501 U.S. 957, 966 (1991); *Benton v. Mary-*

⁴⁴ To be clear, amici are not arguing that all cases applying the reasonable-regulation test were rightly decided or that the state right-to-bear-arms provisions they construe have the same scope as the Second Amendment. Indeed, many are far broader.

⁴⁵ There is no federal police power, but Congress may, when acting pursuant to a constitutionally enumerated power, act “to promote the general welfare,” even though the resulting legislations “may have the quality of police regulations.” *Hoke v. United States*, 227 U.S. 308, 322, 323 (1913).

land, 395 U.S. 784, 795-796 (1969). Indeed, the *Heller* Court relied in part on thirteen “analogous arms-bearing rights in state constitutions that preceded and immediately followed adoption of the Second Amendment,” 128 S. Ct. at 2802; notably, all of those states engage in deferential review of statutes limiting the right to bear arms.⁴⁶ Looking to the construction of state constitutional provisions is particularly informative when, as here, the jurisprudence of state courts points so unwaveringly in a single direction. As the Supreme Court of Connecticut observed when considering its own right-to-bear-arms provision: “While we are not bound by the interpretations given by our sister state courts to their own constitutional documents, the uniformity in the analysis they have used to address

⁴⁶ See *Bristow v. State*, 418 So. 2d 927, 929 (Ala. Crim. App. 1982); *Matthews v. State*, 148 N.E.2d 334, 338 (Ind. 1958); *Posey v. Commonwealth*, 185 S.W.3d 170, 181 (Ky. 2006); *Hilly v. City of Portland*, 582 A.2d 1213, 1215 (Me. 1990); *James v. State*, 731 So. 2d 1135, 1137 (Miss. 1999); *State v. White*, 253 S.W. 724, 727 (Mo. 1923); *State v. Johnson*, 610 S.E.2d 739, 746 (N.C. Ct. App. 2005); *Arnold v. City of Cleveland*, 616 N.E.2d 163, 172 (Ohio 1993); *Minich v. County of Jefferson*, 919 A.2d 356, 361 (Pa. Commw. Ct. 2007); *Wilburn*, 66 Tenn. at 62; *State v. Duranleau*, 260 A.2d 383, 386 (Vt. 1969), *superseded by statute on other grounds*. Massachusetts does not interpret its Constitution as providing an individual right to bear arms. See *Commonwealth v. Davis*, 343 N.E.2d 847, 848-849 (Mass. 1976). Connecticut has not formally articulated a standard of review, but has cited cases applying a reasonable-regulation standard with approval and has upheld restrictions on firearms that “serve[] a legitimate interest of the state acting pursuant to its police power.” *Benjamin v. Bailey*, 662 A.2d 1226, 1234-1235 (Conn. 1995). Of these thirteen state constitutional provisions, five have not been amended in a way that would affect their scope (Alabama, Connecticut, Indiana, Massachusetts, and Vermont). See Volokh, 11 Tex. Rev. L. & Pol. at 193-204.

the question before us lends particular authority to their decisions.” *Benjamin v. Bailey*, 662 A.2d 1226, 1233 (Conn. 1995).

Adoption of a reasonableness standard would not only provide legislatures with sufficient flexibility and discretion to devise necessary measures to prevent gun violence, it would also enhance stability and predictability in the law and minimize the disruption that would otherwise result from requiring heightened scrutiny of firearms regulations. Just as the federal and state governments have interests in established legal rules protected by *stare decisis*, see *Arizona v. Gant*, 129 S. Ct. 1710, 1728-1729 (2009) (Alito, J., dissenting); see also *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768, 785 (1992), so do they have an interest in not seeing their longstanding firearms regulations overturned by a newly expansive approach to the right to keep and bear arms, which could jeopardize countless criminal prosecutions and perhaps even open the prison doors for convicted gun criminals. Many state firearms regulations have been upheld over the years against challenges brought under state constitutional provisions; it would be highly disruptive to subject all of these regulations to a new round of scrutiny in federal court under a federal constitutional provision worded in similar, if not identical, terms. And it could be devastating if crucial firearms laws were struck down under an unduly rigorous review.

The state and federal governments’ interests in stability and in the preservation of their reasonable firearms regulations are sufficiently weighty to make it appropriate for the Court to articulate a deferential standard of review in this case. Clarification of the standard of review is particularly crucial if this Court’s analysis of the question on which it granted certiorari

leads it to describe the Second Amendment right as “fundamental.” Otherwise, the states and the federal government will surely be subjected to a generation of litigation over their firearms laws, with many measures perhaps being invalidated before this Court articulates the proper standard of review. Accordingly, amici submit that the Court should adopt a “reasonable regulation” standard of review in this case.

CONCLUSION

This Court should conclude that regulations of firearms are not subject to strict scrutiny, but instead are subject to a deferential, reasonableness standard of review.

Respectfully submitted.

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NOVEMBER 2009