IN THE SUPREME COURT OF VIRGINIA

Record No. _____

COLONEL GARY T. SETTLE,

Petitioner,

v.

PETER ELHERT, et al.,

Respondents.

BRIEF *AMICUS CURIAE* OF GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE AND EVERYTOWN FOR GUN SAFETY IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amicus curiae Giffords Law Center to Prevent Gun Violence ("Giffords Law Center") is a non-profit policy organization founded over a quarter-century ago following a gun massacre at a San Francisco law firm; it was renamed Giffords Law Center after joining forces with the gun-safety organization founded by former Congresswoman Gabrielle Giffords. Today, Giffords Law Center provides free assistance and expertise to lawmakers, advocates, law enforcement officials, and citizens who seek to improve the safety of their communities. Giffords Law Center has provided informed analysis as an *amicus* in many cases involving the Second Amendment and state constitutions, including *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *Rocky Mt. Gun Owners v. Polis*, 2020 CO 66 (2020); and *State v. Misch*, No. 2019-266 (Vt.).

Amicus curiae Everytown for Gun Safety ("Everytown") is the nation's largest gun-violence-prevention organization, with nearly six million supporters, including tens of thousands in Virginia. Everytown's mission includes defending gun laws through the filing of *amicus* briefs providing historical context, social science and public policy research, and doctrinal analysis that might otherwise be overlooked. Everytown has filed such briefs in numerous Second Amendment and analogous state constitutional cases, in courts throughout the country. *E.g.*, *Misch*,

No. 2019-266; *Hirschfeld v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 19-2250 (4th Cir.) *Nat'l Rifle Ass'n v. Swearingen*, No. 4:18-cv-00137 (N.D. Fla.).[1]

Amici submit this brief in support of the Petitioner to explain that the two-part approach to the right to bear arms—the governing standard for Second Amendment claims in all federal circuits to have considered the issue—is faithful to *Heller* and congruent with established approaches to other constitutional rights.

STATEMENT AND STANDARD OF REVIEW

Amici refer to and adopt the statement and the standard of review set forth in the Petitioner's brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The circuit court adopted an unfounded and erroneous approach to the right to keep and bear arms under Article I, § 13 of the Virginia Constitution. The court accepted that *Heller* and *McDonald* provide the analytical framework for the analysis, *see* Op. 4, but then concluded that they mandate application of a so-called "history-and-tradition" framework. *See* Op. 4-6. That was in error. Every federal court of appeals to address the issue has concluded that a two-step analytic framework is the correct approach to Second Amendment claims under *Heller* and

[1] Several courts have expressly relied on Giffords Law Center and Everytown amicus briefs in deciding Second Amendment and other gun cases. *See, e.g.*, *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J.*, 910 F.3d 106, 112 n.8, 121-22 (3d Cir. 2018); *Rupp v. Becerra*, 401 F. Supp. 3d 978, 991-92 & n.11 (C.D. Cal. 2019), *appeal docketed*, No. 19-56004 (9th Cir. Aug. 28, 2019).

McDonald. At step one of this framework, courts ask whether a challenged law burdens conduct within the scope of the Second Amendment as historically understood. If it does not, the law is constitutional. If it does, courts proceed to step two, where they apply either intermediate or strict scrutiny, depending on how severely the law burdens core Second Amendment interests. Despite multiple opportunities to intervene, the Supreme Court has chosen to leave the two-step framework intact. *See infra* Part I.

The two-part approach reflects a nationwide judicial consensus for good reason. That framework "is entirely faithful to the *Heller* decision and appropriately protective of the core Second Amendment right," *Kolbe v. Hogan*, 849 F.3d 114, 141 (4th Cir. 2017) (en banc); it treats Second Amendment rights like other rights; and it provides a workable approach for legislatures, acting within appropriate constitutional constraints, to protect the public. This Court should join that consensus and apply the two-step framework. *See infra* Part II. In so doing, it should reject the flawed, contrary reasoning of the circuit court: the two-step approach is not an "interest-balancing" approach; it is consistent with fundamental rights; and it would not eliminate terms from the Constitution. *See infra* Part III.

Applying the two-step approach, this Court should vacate the circuit court's determination that Virginia Code § 18.2-308.2:5 (the "Act") violates Article I, § 13 of the Virginia Constitution with respect to individuals under 21 who wish to

purchase handguns in private transactions. Historical evidence establishes that restrictions on handgun purchases by this age group do not regulate conduct protected by the right to keep and bear arms. But even if they did, Virginia's law survives the applicable standard of scrutiny. Respondents are unlikely to succeed on the merits on this claim. *See infra* Part IV.

ARGUMENT

I. FEDERAL APPEALS COURTS APPLYING *HELLER* AND *MCDONALD* UNIFORMLY USE THE TWO-PART FRAMEWORK.

Over the last decade, the federal courts of appeals have developed a framework for Second Amendment claims that faithfully applies *Heller* and *McDonald*. The Fourth Circuit, for example, in 2010 held that "a two-part approach to Second Amendment claims" was "appropriate":

> The first question is whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee. This historical inquiry seeks to determine whether the conduct at issue was understood to be within the scope of the right at the time of ratification. If it was not, then the challenged law is valid. If the challenged regulation burdens conduct that was within the scope of the Second Amendment as historically understood, then we move to the second step of applying an appropriate form of means-end scrutiny.

United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010) (citations and internal quotation marks omitted).

The First, Second, Third, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and

D.C. Circuits have all also adopted the two-part framework.[2] Each of these courts did so after *Heller* was decided, and each carefully scrutinized and faithfully applied *Heller*. *See, e.g.*, *Kolbe*, 849 F.3d at 141 ("We are confident that our approach here is entirely faithful to the *Heller* decision and appropriately protective of the core Second Amendment right."); *Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 197 (5th Cir. 2012) ("[W]e are persuaded to adopt this framework because it comports with the language of *Heller*."); *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 254 (2d Cir. 2015) ("Th[e] two-step rubric flows from the dictates of *Heller* and *McDonald* and our own precedents[.]"). Several of these circuits specifically considered and rejected the alternative of a purely historical framework. *See, e.g.*, *Heller v. District of Columbia*, 670 F.3d 1244, 1264-69 (D.C. Cir. 2011) ("*Heller II*") (rebutting dissent that advocated a "text, history, and tradition" approach without means-end scrutiny); *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 685-99, 702-04 (6th Cir. 2016) (en banc) (plurality) (applying two-step approach over concurrence-in-judgment that endorsed *Heller II* dissent); *Nat'l Rifle Ass'n*, 700 F.3d at 197 (in adopting two-step framework, noting and rejecting contrary approach in *Heller II* dissent).

[2] *See Kolbe*, 849 F.3d at 132-33 (collecting decisions); *Gould v. Morgan*, 907 F.3d 659, 669 (1st Cir. 2018), *cert. denied*, No. 18-1272, 2020 WL 3146683 (U.S. June 15, 2020).

If the Supreme Court considered the consensus for a two-step approach to be "inconsistent with the text" and "guidance in *Heller* and *McDonald*," as the circuit court held (Op. 4), it has had ample opportunity to provide new guidance. Instead, after leaving undisturbed dozens of circuit court decisions that applied the two-step framework in recent years, just last month, the Court denied certiorari in ten Second Amendment cases. *See* L. Hurley & A. Chung, *U.S. Supreme Court turns away 10 gun rights cases*, REUTERS (June 15, 2020), https://reut.rs/3jkydbk. Only two Justices dissented from denial of certiorari in any of those cases. *See Rogers v. Grewal*, 140 S. Ct. 1865 (2020) (Thomas, J., joined in part by Kavanaugh, J.).

II. THE TWO-PART FRAMEWORK IS CONSISTENT WITH *HELLER* AND WELL-REASONED.

It is no accident that every federal court of appeals to announce a Second Amendment methodology since *Heller* has endorsed the two-step framework, and that the Supreme Court has left it undisturbed. That approach is fully consistent with *Heller* and *McDonald* and well-reasoned, including because it (i) treats Second Amendment rights like other rights; (ii) gives effect to *Heller*'s non-exhaustive list of "presumptively regulatory measures"; (iii) provides a more workable approach than an alternative based only on history; and (iv) gives legislatures the necessary flexibility to protect the public, save lives, and address an epidemic of gun violence.

A. The Two-Part Framework Treats the Second Amendment Right Like Other Rights.

Heller maintains that courts should treat the Second Amendment right in a manner similar to other constitutional rights; it does nothing to support granting the Second Amendment *better* treatment. *See Heller*, 554 U.S. at 582 (analogizing scope of Second Amendment to scope of First Amendment); *id.* at 595 ("Of course the [Second Amendment] right was not unlimited, just as the First Amendment's right of free speech was not. Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*." (citation omitted)); *id.* at 626 ("Like most rights, the right secured by the Second Amendment is not unlimited.").

As federal courts have observed in adopting the two-part framework, other constitutional rights, including First Amendment rights, are also analyzed using means-end scrutiny. *See Chester*, 628 F.3d at 682 ("Given *Heller*'s focus on 'core' Second Amendment conduct and the Court's frequent references to First Amendment doctrine, we agree with … looking to the First Amendment as a guide …. In [that] context, the level of scrutiny we apply depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right."). There is no reason to exempt the Second Amendment from this traditional constitutional analysis. *See Nat'l Rifle Ass'n*, 700 F.3d at 198 ("In harmony with

[First Amendment] principles, … we believe that a law impinging upon the Second Amendment right must be reviewed under a properly tuned level of scrutiny—i.e., a level that is proportionate to the severity of the burden that the law imposes on the right.").

B. The Two-Part Framework Is Consistent with *Heller*'s "Core Protection" and "Presumptively Lawful Regulatory Measures."

Heller makes clear that the Second Amendment contains a "core protection" for "law-abiding, responsible citizens to use arms in defense of hearth and home," 554 U.S. at 634-35, the clear implication being that other conduct may fall outside the "core" of the Second Amendment's protections—or outside the Amendment's scope entirely. Indeed, *Heller* provides (and *McDonald* reiterates) a non-exhaustive list of "presumptively lawful regulatory measures," including "prohibitions on the possession of firearms by felons and the mentally ill," "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings," and "laws imposing conditions and qualifications on the commercial sale of arms." *Heller*, 554 U.S. at 626-27 & n.26; *McDonald*, 561 U.S. at 786.

Critically, *Heller* listed these measures "without alluding to any historical evidence that the right to keep and bear arms did not extend to felons, the mentally ill or the conduct prohibited by any of the listed gun regulations," 628 F.3d at 679, such as "laws forbidding the carrying of firearms in sensitive places," *Heller*, 554 U.S. at 626. In light of that, history alone may not account for *Heller*'s list of

"presumptively lawful regulatory measures." Rather, the way to reconcile the list with a global approach to all Second Amendment challenges is to apply a framework that includes not only a historical scope analysis, but also means-end scrutiny. *See Chester*, 628 F.3d at 679 ("[*Heller*] could still have viewed the regulatory measures as 'presumptively lawful' if it believed they were valid on their face under any level of means-end scrutiny applied."); *see also Heller*, 554 U.S. at 628-29 (law at issue would "fail constitutional muster" "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights").

C. The Two-Part Framework Is Better Than the Alternatives, Including a History-Only Test.

Because the two-part framework is most consistent with *Heller* and *McDonald*, it is no surprise that every federal court of appeals to announce a post-*Heller* methodology has adopted it or that the Supreme Court has left those decisions undisturbed. The framework also offers important practical advantages over an alternative analysis that looks only at history.

A history-only framework suffers from a number of problems. Although the historical record is clear in this case that age restrictions on firearm purchases were common and longstanding, in many other cases the historical evidence may conflict, sometimes even regarding "simple" factual assertions such as the extent to which and in what manner laws were enforced. *See*, *e.g.*, *Wrenn v. District of Columbia*, 864 F.3d 650, 659-60 (D.C. Cir. 2017) (discussing disagreement among scholars

regarding whether a centuries-old English statute banned the carrying of all firearms in crowded areas). Moreover, disagreements over which timeframes render a regulation "longstanding," *Heller*, 554 U.S. at 626-27, and how many jurisdictions must have adopted it, exacerbate the uncertainty surrounding a purely historical test. And firearm technology has changed dramatically since the Constitution was ratified, with new technologies offering few or no historical analogs. Society's understanding of dangerous criminal conduct has evolved over time as well. *See, e.g.*, *Stimmel v. Sessions*, 879 F.3d 198, 205 (6th Cir. 2018) (finding "inconclusive" historical support for restricting gun possession by domestic violence offenders). The federal courts' two-part framework alleviates these problems by including, but not solely relying on, historical precedent.

D. The Two-Part Framework Maintains the Necessary Flexibility for Legislatures to Address Gun Violence and Save Lives.

Finally, and critically, the two-part framework ensures legislatures have the flexibility, as long as they can satisfy constitutional scrutiny, to devise and implement common sense solutions to effectively address the gun violence epidemic. *Heller* expressly preserved this flexibility. 554 U.S. at 636 (the "Constitution leaves the [legislature] a variety of tools for combating" gun violence); *McDonald*, 561 U.S. at 785 ("[S]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment." (citation omitted)). As Judge Wilkinson put it in his concurring opinion in *Kolbe*:

> Disenfranchising the American people on this life and death subject would be the gravest and most serious of steps. It is their community, not ours. It is their safety, not ours. It is their lives, not ours. To say in the wake of so many mass shootings in so many localities across this country that the people themselves are now to be rendered newly powerless, that all they can do is stand by and watch as federal courts design their destiny—this would deliver a body blow to democracy as we have known it since the very founding of this nation. … Providing for the safety of citizens within their borders has long been state government's most basic task. In establishing the "right of law-abiding, responsible citizens to use arms in defense of hearth and home," *Heller* did not abrogate that core responsibility. … *Heller* was a cautiously written opinion, which reserved specific subjects upon which legislatures could still act.

849 F.3d at 150 (Wilkinson, J., concurring) (citations omitted).

III. THE CIRCUIT COURT'S REASONS FOR REJECTING THE TWO-STEP TEST ARE UNSOUND.

Despite these compelling grounds for adopting the two-part framework, the circuit court concluded that such an approach "is inconsistent with the text of the right to keep and bear arms and inconsistent with the guidance in *Heller* and *McDonald*." Op. 4. The circuit court set forth three reasons—or "[t]hree discrepancies," (Op. 4)—in support of this conclusion. None has merit.

First, the court opined that heightened (i.e., intermediate or strict) scrutiny, applied at step two of the two-part framework, is "the type of interest balancing rejected by the United States Supreme Court" in *Heller*. Op. 5. To the contrary, these "familiar scrutiny tests are not equivalent to interest balancing." *Nat'l Rifle Ass'n*,

700 F.3d at 197; *see also Ass'n of N.J. Rifle & Pistol Clubs*, 910 F.3d at 119 n.22 ("there is no balancing at either step" of the framework). Heightened scrutiny instead "require[s] an assessment of whether a particular law will serve an important or compelling governmental interest." *Heller II*, 670 F.3d at 1265. That "is not a comparative judgment," and thus not the interest-balancing *Heller* rejected. *Id*.

Nothing in *Heller* or *McDonald* "cast[s] doubt upon the propriety of lower courts applying some level of heightened scrutiny" to right-to-keep-and-bear-arms claims. *Heller II*, 670 F.3d at 1267; *see Mance v. Sessions*, 896 F.3d 390, 393 (5th Cir. 2018) (Higginson, J., concurring in denial of rehearing en banc) (*Heller* "never suggested that courts should abandon the familiar tiers-of-scrutiny architecture"); Nelson Lund, *The Proper Role of History and Tradition in Second Amendment Jurisprudence*, 30 U. FLA. J. L. & PUB. POL'Y 171, 178 (2020) ("*Heller* did not dictate that Second Amendment cases be decided solely, or even primarily, on the basis of text, history, and tradition."). Indeed, *Heller*'s "conclusion that the law would be unconstitutional '[u]nder any of the standards of scrutiny' applicable to other rights implies, if anything, that one of the conventional levels of scrutiny would be applicable to regulations alleged to infringe Second Amendment rights." *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 89 n. 9 (2d Cir. 2012) (quoting *Heller*, 554 U.S. at 628). Accordingly, and contrary to the circuit court's conclusion, applying intermediate or strict scrutiny is consistent with *Heller* and *McDonald*.

Second, the court contended (Op. 6) that applying intermediate scrutiny is incompatible with fundamental rights. That is mistaken. First Amendment doctrine "inform[s] our analysis" here. *United States v. Marzzarella*, 614 F.3d 85, 89 n.4 (3d Cir. 2010). "[T]he right to free speech, an undeniably enumerated fundamental right, is susceptible to several standards of scrutiny, depending upon the type of law challenged and the type of speech at issue." *Id.* at 96-97 (citation omitted); *see Nat'l Rifle Ass'n*, 700 F.3d at 198 ("First Amendment doctrine demonstrates that, even with respect to a fundamental constitutional right, we can and should adjust the level of scrutiny according to the severity of the challenged regulation."); *see also, e.g.*, *Marzzarella*, 614 F.3d at 96 (citing cases applying intermediate scrutiny in First Amendment challenges). There is simply "no reason why the Second Amendment"—or here, Article I, § 13—"would be any different." *Id.* at 96-97.

Finally, the circuit court fails to support its assertion that the two-part test "eliminate[s] crucial words in the text such as the word *bear* in the phrase *keep and bear arms*." Op. 6. The test does not eliminate the word "bear" simply by reserving the strictest scrutiny for laws that severely burden the core of the Second Amendment—"'the right of law-abiding, responsible citizens to use arms in defense of hearth and home.'" *Prekker v. Commonwealth*, 66 Va. App. 103, 111 (2016) (emphasis omitted) (quoting *Heller*, 554 U.S. at 635). That core right does not overlook the term "bear," for *Heller* recognized that a person both keeps and bears

arms when on one's property defending one's home. *See* 554 U.S. at 635 (directing the District of Columbia to register the challenger's handgun and "issue him a license to carry it in the home"). Moreover, even if that "core" right did exclude some conduct protected by the Constitution, subjecting the core of a right to more rigorous review is not a peculiar approach, but is the rule throughout constitutional law—including with respect to the First Amendment,[3] the Fourth Amendment,[4] and other rights.[5] This Court should make it a part of its Article I, § 13 analysis as well.

IV. THE ACT SURVIVES BOTH STEPS OF THE FRAMEWORK.

For the reasons set out in the Petitioner's brief, the Act does not violate Article I, § 13. The Act's limitations on handgun purchases by 18-to-20-year-olds are constitutional at the first step of the two-part framework because history shows that restrictions on handgun purchases by those under 21 fall outside the scope of Article I, § 13. Should this Court choose to proceed beyond step one, however, step two provides an independent and adequate basis for vacatur. Because the Act does not "severely burden the core protection of the Second Amendment," *Kolbe*, 849 F.3d

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[3] *See McIntyre v. Ohio Election Comm'n*, 514 U.S. 334, 347 (1995) ("When a law burdens *core* political speech, we apply 'exacting scrutiny.'" (emphasis added)).

[4] *See Kentucky v. King*, 563 U.S. 452, 474 (2011) ("In no quarter does the Fourth Amendment apply with greater force than in our homes"); *Silverman v. United States*, 365 U.S. 505, 511 (1961) ("At [the Fourth Amendment's] very *core* stands the right of a man to retreat into his own home …." (emphasis added)).

[5] *See Horne v. Dep't of Agric.*, 576 U.S 350, 356-61 (2015) (Fifth Amendment); *Galloway v. United States*, 319 U.S. 372, 392 (1943) (Seventh Amendment).

at 138, and does not restrict 18-to-20-year-olds' *use* of handguns (or their ability to purchase or use long guns), intermediate scrutiny is "[u]nquestionably" appropriate. *Nat'l Rifle Ass'n*, 700 F.3d at 205.

Protecting public safety is an important government interest, and there is extensive evidence, documented in federal case law, that individuals under 21 are far more likely than the population at large to engage in gun violence. *See Horsley v. Trame*, 808 F.3d 1126, 1133 (7th Cir. 2015); *Nat'l Rifle Ass'n*, 700 F.3d at 210. Empirical research shows that, in states without a firearm minimum age, nearly a quarter of gun offenders would have been prohibited from possessing the gun if the minimum age for possession were 21. K. Vittes, et al., *Legal Status and Source of Offenders' Firearms in States with the Least Stringent Criteria for Gun Ownership*, 19 INJ. PREV. 26 (2013). Preventing this age group from buying handguns *without any background check* is "'reasonably adapted to a substantial governmental interest,'" *Kolbe*, 849 F.3d at 133, and survives intermediate scrutiny.

CONCLUSION

For the foregoing reasons and those set out in the Petitioner's brief, this Court should vacate the grant of temporary injunctive relief.

Dated: July 29, 2020

Respectfully submitted,

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CERTIFICATE

Pursuant to Rules 5:26 and 5:30 of the Supreme Court of Virginia, I hereby certify the following:

1. That on July 29, 2020, an electronic copy of the foregoing motion was filed with the Clerk of the Supreme Court of Virginia via VACES, and an electronic copy of the foregoing motion was served, via electronic mail, to the following counsel of record for the parties:

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2. That this brief does not exceed 15 pages in compliance with Rules 5:17A and 5:30.

Dated: July 29, 2020

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