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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-650

DALE NORMAN
Petitioner

v.

STATE OF FLORIDA
Respondent

BRIEF OF AMICUS CURIAE NATIONAL RIFLE ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONER

ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT (NO. 4D12-3525)

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INTRODUCTION AND INTEREST OF AMICUS CURIAE

The National Rifle Association of America (NRA) is the nation's oldest and largest organization dedicated to defending the fundamental, inalienable human right of all Americans to bear arms for self-preservation without fear of unjust prosecution. The NRA has almost 300,000 members living in Florida, and tens of thousands of other NRA members visit Florida each year. A decision holding that open and peaceful bearing of arms is not constitutionally protected conduct would expose these NRA members to legal jeopardy and defense costs. Therefore, it is critical that this Court hold that the open and peaceful bearing of arms is constitutionally protected conduct.

The Fourth District Court of Appeal held that a citizen is permitted to carry a firearm for self-defense concealed under Florida's "shall issue" statutory concealed carry license standard, and, therefore, the statutory scheme is not so unduly restrictive as to destroy the right to bear arms for self-defense. *Norman v. State*, 159 So.3d 205 (Fla. 4th DCA 2015). The Court of Appeal erred in upholding the statute criminalizing the open carrying of a firearm against the right to bear arms.

The enshrinement of the Second Amendment "necessarily takes certain policy choices off the table." *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008). That principle applies with no less force to the policy choices of state governments. *McDonald v. City of Chicago*, 561 U.S. 742 (2010), settled that

question beyond reasonable debate. The Court concluded that the Second Amendment protects an individual and fundamental right that cannot be infringed by *any* level of government.

The NRA was deeply involved in advocating for legislation providing for the open carrying of arms in Florida. Fla. HB 163 (2016); Fla. SB 300 (2016). It has filed briefs in two momentous U.S. Supreme Court cases: *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. Chicago*, 561 U.S. 742 (2010).

SUMMARY OF ARGUMENT

The right to bear arms, as interpreted in *Heller*, trumps English, colonial, and American law. The NRA believes *Heller* yields two important conclusions: (1) the Second Amendment guarantees a right to carry arms outside the home, and (2) it guarantees a right to carry openly. The antebellum state supreme court cases consulted by the U.S. Supreme Court speak unequivocally on the right to carry, and show that open carry of arms is protected. *See Heller*, 554 U.S. at 626. Any other result would be inconsistent with *Heller's* approach and with the sources the *Heller* Court relied on. Instead, a faithful reading of *Heller* requires the constitutional protection of carrying openly. *See Heller*, 554 U.S. at 626, for the antebellum cases relied upon. *See also Moore v. Madigan*, 702 F.3d 933. Lastly, the state has failed its burden of proving that a ban on open carrying is constitutional. It cannot simply defer to legislative judgments or rest on unsupported claims.

Amicus curiae Everytown for Gun Safety (Everytown) presents a flawed argument that Florida could ban any carrying of arms based on ancient English law; colonial law; and state and local laws predating *Heller*. This is where history written as advocacy overlooks evidence contrary to the desired conclusion. David T. Hardy, *Lawyers, Historians, and "Law-Office History,"* 46 Cumberland L. Rev. 1 (2016). This brief will present evidence contrary to Everytown's claims, claims that would reduce the civil right to bear arms[1] to but a statutory right.

ARGUMENT

I. ENGLISH STATUTORY AND COMMON LAW AND COLONIAL LAWS BASED ON ENGLISH LAW HAVE BEEN ABROGATED BY THE AMERICAN CONSTITUTIONAL RIGHT TO ARMS

A. Since the 18th century, American courts have held that the Constitution is supreme and abrogates English statutory and common law.

Everytown claims that centuries of English statutory and common law warrant broadly prohibiting the carrying of arms in public. *See* Everytown Br. at 1, 4, 11. The Constitution's supremacy prevents the implementation of this assertion.

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[1] *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566, 2600 (2012) ("protected civil rights, such as the right to bear arms or vote in elections"); *Florida Carry, Inc. v. Univ. N. Fla.,* 133 So.3d 966, 983 (Fla. 1st DCA. 2013) (Makar, J., concurring) (right to arms is a civil right); *Williams v. State,* 402 So.2d 78, 79 (Fla. 1st DCA 1981) (right to possess firearm is a civil right).

The British do not have a written constitution. *Powell v. McCormack*, 395 U.S. 486, 523 n.46 (1969). Although a constitutional guarantee's "historic roots are in English history, it must be interpreted in light of the American experience, and in the context of the American constitutional scheme of government rather than the English parliamentary system. The English system differs from ours in that their Parliament is the supreme authority, not a coordinate branch." *United States v. Brewster*, 408 U.S. 501, 508 (1972).

Thus, the U.S. Supreme Court has repeatedly held that English history and the common law serve only as a historical background and may not be invoked to abrogate constitutional rights. "At the Revolution we separated ourselves from the mother country, and we have established a republican form of government, securing to the citizens of this country *other and greater personal rights, than those enjoyed under the British monarchy*." *Bridges v. California*, 314 U.S. 252, 264 n.7 (1941) (emphasis added); *see also Grosjean v. American Press Co.*, 297 U.S. 233, 248-49 (1936).

In *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 308 (U.S. Cir. Ct. Dist. Pa. 1795), Justice William Paterson, a signer of the U.S. Constitution from New Jersey, held:

> It is difficult to say what the constitution of England is; because, not being reduced to written certainty and precision, it lies entirely at the mercy of the Parliament … [I]n England there is no written constitution, no fundamental law, nothing visible, nothing real,

> nothing certain, by which a statute can be tested. In America the case is widely different: Every State in the Union has its constitution reduced to written exactitude and precision.
>
> … Whatever may be the case in other countries, yet in this there can be no doubt, that every act of the Legislature, repugnant to the Constitution, is absolutely void.

Our constitutional right to keep and bear arms abrogated the Statute of Northampton, and the common law:

> But suppose it to be assumed on any ground, that our ancestors adopted and brought over with them this English statute, or portion of the common law, our constitution has completely abrogated it; it says, 'that the freemen of this state have a right to keep and to bear arms for their common defense.' Article 11, sec. 26. It is submitted, that this clause of our constitution fully meets and opposes the passage or clause in Hawkins, of 'a man's arming himself with dangerous and unusual weapons,' as being an independent ground of affray, so as of itself to constitute the offence cognizable by indictment. By this clause of the constitution, an express power is given and secured to all the free citizens of the state to keep and bear arms for their defense, without any qualification whatever as to their kind or nature; and it is conceived, that it would be going much too far, to impair by construction or abridgment a constitutional privilege which is so declared; neither, after so solemn an instrument hath said the people may carry arms, can we be permitted to impute to the acts thus licensed such a necessarily consequent operation as terror to the people to be incurred thereby; we must attribute to the framers of it the absence of such a view.

Simpson v. State, 13 Tenn. (5 Yer.) 356, 359-60 (1833).

By analogy, the British press was subject to licensing. 4 W. Blackstone, Commentaries *152. Here, the First Amendment and its state constitutional

equivalents prevent licensing of the press. *Near v. Minnesota*, 283 U.S. 697 (1931).

Again unlike the United Kingdom, we cannot, for example, legislatively repeal the protection against double jeopardy and against *ex post facto* laws. The United Kingdom repealed double jeopardy in 2003 for serious offenses[2] and paid no attention to *ex post facto* laws when it provided: "This part applies whether acquittal was before or after the passing of this Act."[3]

B. English history and colonial laws do not broadly support a ban on carrying arms in public.

Everytown argues that English history and colonial law broadly support a prohibition on the public carrying of arms. Everytown Br. at 4, 11. This view of history was rejected in *Moore v. Madigan*, 702 F.3d 933, 935-37 (7th Cir. 2012), *reh'g en banc denied*, 708 F.3d 901 (7th Cir. 2013). Everytown's claim infers too much from too little and has been refuted by numerous scholars. *See e.g.*, David T. Hardy, *Lawyers, Historians, and "Law-Office History,"* 46 Cumberland L. Rev. 1 (2016); Michael P. O'Shea, *Why Firearm Federalism Beats Firearm Localism*, 123 Yale L.J. Online 359, 364-68 (2014); David B. Kopel & Clayton Cramer, *The Keystone of the Second Amendment: The Quakers, the Pennsylvania Constitution, and the Flawed Scholarship of Nathan Kozuskanich*, 19 Widener L. J. 277 (2010);

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[2] United Kingdom Criminal Justice Act 2003, Part 10, § 75, p. 51.

[3] *Id*. § 75 subsec. (6). *Cf.* U.S. Const. Art. I, § 9, cl. 3 & § 10, cl. 1, Amend. 5.

David T. Hardy, *A Well-Regulated Militia: The Founding Fathers and the Origin of Gun Control in America*, 15 Wm. & Mary Bill of Rights J. 1237 (2007) (Book Review). Furthermore, American courts have held that in the American system of government the Constitution reigns supreme over any statute or the common law.

The U.S. Supreme Court has rejected the interpretation proposed by Everytown. For instance, the various founding-era gunpowder laws often invoked by proponents of a more lax form of Second Amendment scrutiny for firearm laws are the same ones that Justice Breyer used in his *Heller* dissent to try to demonstrate that "substantial regulation of firearms in urban areas" has a long historical pedigree. *Heller*, 554 U.S. at 683 (Breyer, J., dissenting). The majority squarely rejected the argument that "those fire-safety laws"—laws that the dissent itself "concede[d] did not clearly prohibit loaded weapons, but required only that excess gunpowder be" stored safely—have anything at all illuminating to say about local regulation of the right to keep and bear arms. *Heller,* 554 U.S. at 632.

Nor do the handful of early laws restricting the firing of guns in certain places or at certain times—*e.g.*, on New Year's Eve, or in a tavern—provide any support for the notion that such laws broadly support the prohibition on public carrying of arms. *See Heller*, 554 U.S. at 632-63 (discussing early Boston, Philadelphia, and New York laws that levied small civil fines for such unlawful firearms discharges). These laws had nothing do with restricting the right to keep

or bear arms for self-defense, but instead were directed at prohibiting "'the indiscreet firing of Guns'" by "drunken hooligans" and the like. *Id.* at 632-33 (quoting Act of May 39, 1746, ch. X, Acts and Laws of Mass. Bay 208). Likewise, an early Boston law forbidding residents to "take into" or "receive into" certain buildings loaded firearms was intended "to eliminate the danger to *firefighters* posed by the 'depositing of loaded Arms' in buildings," not to infringe on the rights of Bostonians to keep and bear arms. *Id.* at 631-32 (emphasis added). Indeed, the Court found it "implausible that [these laws] would have been enforced against a citizen acting in self-defense." *Id.* at 633.

Looking even further afield, some have suggested that the medieval English Statute of Northampton, 2 Edw. 3, c. 3 (1328), provides historical support for a broad ban on the public carrying of arms. That statute provided that no Englishman shall "be so hardy to come before the King's justices, or other of the King's ministers doing their office, with force and arms, nor bring no force in affray of the peace, nor to go ride armed by night or by day, in fairs, markets, nor in the presence of the justices or other ministers, nor in no part elsewhere." As an initial matter, the statute is unlike modern carrying restrictions because the statute prohibited carrying *only* with an offensive purpose or intent to terrorize the people. The authoritative judicial construction of the statute came from the King's Bench in 1686, when the court held that only public carrying with "*malo animo*"—evil

intent—"will come within the act (tho' now there be a general connivance to gentlemen to ride armed for their security)." *Rex v. Knight*, 90 Eng. Rep. 330, 330 (K.B. 1689). Put differently, "the meaning of the statute … was to punish people who go armed *to terrify the King's subjects*." *Sir John Knight's Case*, 87 Eng. Rep. 75, 76 (K.B. 1686) (emphasis added) (different report of same decision).

Early American analogs of the Northampton statute expressly codified this critical "offensive" carrying or "terror" element of the offense. *See, e.g.*, 1795 Mass. Laws 436, ch. 2 (banning carry only by those "ride or go armed *offensively*, *to the fear or terror* of the good citizens of this Commonwealth") (emphasis added); 1786 Va. Laws 33, ch. 21 (banning carry only by those who "go [or] ride armed by night or by day ... *in terror of Country*") (emphasis added). Even when early American statutes did not explicitly include such an element, judicial interpretations explained that, while the Statute of Northampton was made in affirmance of the common law, it was not a ban on carrying arms outside the home, unless for a wicked purpose. "For any lawful purpose--either of business or amusement—the citizen is at perfect liberty to carry his gun. It is the wicked purpose, and the mischievous result, which essentially constitute the crime. He shall not carry about this or any other weapon of death to terrify and alarm, and in such manner as naturally will terrify and alarm a peaceful people." *State v. Huntley*, 25 N.C. (3 Ired.) 418, 423 (1843); *see also Simpson v. State*, 13 Tenn.

356, 360 (1833). *Heller* itself confirmed this understanding, referring to the English "prohibition on terrorizing people with dangerous or unusual weapons" and citing a brief filed by the Solicitor General that relied on the 1686 *Knight* case for the authoritative construction of the statute. *Heller*, 554 U.S. at 623 (citing Br. for the United States 9-11, *United States v. Miller*, 307 U.S. 174 (1939) (No. 696)).

To be sure, the statute's reference to "fairs," "markets," and "the presence of the justices or other ministers" might be viewed as a forerunner to modern prohibitions on carrying in certain "sensitive places." *Heller*, 554 U.S. at 626. But there is a significant and obvious difference between restricting carry in *sensitive places within a city* and restricting carry in *the entire city*. Whatever historical support might exist for the former, there is none for the latter.

Far more relevant from a historical perspective, *Heller* concluded, were the reactions early courts had in the rare instance when a state or local government *did* attempt to infringe upon the ability of its residents to keep and bear arms. *See Heller*, 554 U.S. at 610-11. *Nunn v. State*, 1 Ga. 243, 251 (1846), for example, involved a Georgia law that forbade openly carrying arms. *Id.* at 247. In holding that law unconstitutional, the Georgia Supreme Court specifically rejected any suggestion that every law characterized as "merely regulating the manner of exercising" the right passes constitutional muster, instead concluding that "[a] statute which, under the pretense of regulating, amounts to a destruction of the

right, or which requires arms to be so borne as to render them wholly useless for the purpose of defense, would be clearly unconstitutional." *Id.* at 249. As *Heller* detailed, that same theme runs through numerous early 19th-century state court decisions rejecting similar intrusions on the right to bear arms. *See, e.g.*, *State v. Reid*, 1 Ala. 612, 616-17 (1840); *Cockrum v. State*, 24 Tex. 394, 403 (1859); *Simpson*, 13 Tenn. at 360.

C. No lapse of time can make an unconstitutional act of state or local government constitutional.

If old laws were blindly followed by the courts in the 21st century to define the scope of constitutional rights, the courts would not serve as guardians of liberty.

Everytown cites no fewer than 44 state statutes and local ordinances regulating firearms dating from 1686-1909 in support of its arguments. Everytown Br. at 11-20. These regulations are completely irrelevant; they bear no impact on the scope of the Second Amendment, or the case at hand.

First, relying on these regulations requires the Court to assume that legislative bodies never violate the Constitution. If that were the case, there would be no need for judicial review, because no law would be "repugnant to the [C]onstitution[.]" *Marbury v. Madison*, 5 U.S. 137, 180 (1803). But that is not the case. It is the judiciary's role to determine if a regulation infringes on a constitutional right. And since this role was not fully declared for the first time

until 1803, legislative bodies had no reason to contemplate whether their actions infringed upon the Constitution prior to that, which severely limits the presumption that their actions were constitutional.

Furthermore, the fact that the referenced regulations were enacted in the 18th and 19th centuries does not make them any more presumptively constitutional than if they were enacted today. Then as now, legislatures passed regulations that violated the Constitution. For example, in 1798 the Fifth Congress passed, and President John Adams signed the Sedition Acts into law. 1 Stat. 596. The Acts imposed criminal penalties against any individual who criticized the federal government. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 274-75 (1964). The Acts were never subject to judicial review, but they were widely believed to violate the First Amendment. *Id*. at 276.[4]

There is even less reason to believe that these state and local regulations comply with the Second Amendment: "The Bill of Rights, including the Second Amendment, originally applied only to the Federal Government." *McDonald v.*

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[4] The states paid no mind to the First Amendment in this era, either. Every southern state, with the exception of Kentucky, passed legislation outlawing the distribution of abolitionist literature. *See* Ford Risley, *Abolition and the Press: The Moral Struggle Against Slavery* at 44 (2008), available at https://books.google.com/books?isbn=0810125072 (last visited Apr. 13, 2006). These statutes surely violated the First Amendment. *See e.g., Murdock v. Com. of Pennsylvania*, 319 U.S. 105, 110 (1943) (holding that distributing religious literature is protected by the First Amendment.).

City of Chicago, Ill., 561 U.S. 742, 754 (2010). It wasn't until 1925 that the Supreme Court held that the First Amendment was applicable to the states. *Gitlow v. People of State of New York*, 268 U.S. 652, 666 (1925). And it wasn't until 2010 that the Supreme Court held that the Second Amendment applied to the states in *McDonald*. Thus, the state and local governments were free to pass legislation that infringed on the Bill of Rights during that era.

Instead, the contemporaneous authorities that determine the scope of the Second Amendment that the Supreme Court focuses on are: (1) post-ratification commentary; (2) pre-Civil War case law; (3) post-Civil War legislation; and (4) post-Civil War commentaries. *District of Columbia v. Heller*, 554 U.S. 570, 604-19 (2008). It is important to note that the Court did not consider the post-Civil War legislation itself. Instead, the Court focused on commentary about how the legislation interacted with the Second Amendment. *Id.* at 614-16. Furthermore, "[s]ince those discussions took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources." *Id.* at 614. This Court should follow the Supreme Court's lead and focus on sources discussing the scope of the Second Amendment. It should not blindly presume that certain regulations are constitutional simply because they existed.

Everytown Br. at 17-20 cites some late-19th century laws restricting the carrying of firearms in western territories and states to support its claim that there is a longstanding tradition of incursion by state or local governments.

There is no record of any legally relevant pattern of prohibitions on public carrying in urban areas. In fact, many 19th century restrictions suggest the opposite. For example, laws banning the public *discharge* of firearms suggest that many Americans at that time took for granted their ability to *carry* those firearms.

Of course, a few jurisdictions did enact more stringent regulations. Conspicuously absent from the list, however, are large 19th century cities such as Boston, New York, Philadelphia, Washington, D.C., Chicago, or St. Louis. Instead, some of the jurisdictions that adopted highly restrictive carry laws were governed by territorial legislatures that had few major population centers and no state constitutional provisions to constrain them. However, some restrictive territorial laws were altered or invalidated shortly after statehood, casting even further doubt on their probative values in interpreting the Second Amendment. For example, amicus Everytown cites an Idaho law. Everytown Br. at 19. However, *In re Brickey*, 70 P. 609 (Ida. 1902), struck down the former territorial carrying ban under the Second Amendment and Idaho's constitutional analogue because "the legislature has no power to prohibit a citizen from bearing arms in any portion of

the state of Idaho, whether within or without the corporate limits of cities, towns, and villages."

In some states the rule of law waited until the 20th century. Everytown Br. at 20, 20 n.14 cites early ordinances from Kansas and Tennessee. Courts in both states voided such ordinances. An ordinance banning carrying arms "except when on his land or in his abode, fixed place of business or his office … [is] unconstitutionally overbroad and an unlawful exercise of the city's police power." *Junction City v. Mevis,* 601 P.2d 1145 (Kan. 1979). *Glasscock v. City of Chattanooga*, 11 S.W.2d 678 (Tenn. 1928), held that an ordinance banning the carrying of a pistol was violative of the right to bear arms. *See also State v. Rosenthal*, 55 A. 610 (Vt. 1903) (ordinance banning carrying any pistol without written permission of the mayor or chief of police violates right to bear arms); *State v. Kerner*, 107 S.E. 222 (N.C. 1921) (law banning carrying unconcealed pistol off one's premises violates right to bear arms); *City of Las Vegas v. Moberg*, 485 P.2d 737 (N.M. App. 1971) (ordinance banning carrying of deadly weapon violates right to bear arms); *State ex rel. City of Princeton v. Buckner*, 377 S.E.2d 139 (W.Va. 1988) (ban on carrying without a license violative of right to bear arms).

Now that *Heller* and *McDonald* have been decided, laws enacted by those who mistakenly viewed themselves as wholly immune from the Second Amendment cannot be entitled to any weight in construing that amendment.

II. THE STATE GOVERNMENT BEARS THE BURDEN OF PROVING THAT ITS FIREARMS LAWS DO NOT VIOLATE THE SECOND AMENDMENT.

Everytown argues that the Court of Appeal should not have applied any scrutiny because the law under review impinges on no right. *See* Everytown Br. at 1-2. It has already been demonstrated in this brief that, indeed, the right to bear arms is implicated.

The incorporation of the Second Amendment has real consequences for how courts must scrutinize state and local laws involving the right to keep and bear arms. First, just as in the context of federal laws, it means that the government bears the burden of proving that the law is consistent with the Second Amendment—rather than the party challenging a law having to prove that it is not. Second, it means that the government must prove not only that the law furthers a sufficiently important interest, but also that it does so in a sufficiently tailored manner. *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012).

As an initial matter, *Heller* itself makes clear that a law that imposes such a substantial burden on a Second Amendment right that it effectively (even if not literally) amounts to a "prohibition" need not be analyzed under any of the

traditional tiers of scrutiny. *Heller*, 554 U.S. at 628, 575 n.1 (noting that law had minor exceptions but dismissing them as irrelevant). Instead, a court may simply conclude that such a law "fail[s] constitutional muster" under any standard of review. *Id.* at 629; *Moore,* 702 F.3d at 941 (same); *Palmer v. District of Columbia*, 59 F. Supp. 3d 173, 183 (D.D.C. 2014) (same), *appeal dismissed* 2015 WL 1607711 (D.C. Cir. Apr. 2, 2015); *see also Parker v. District of Columbia*, 478 F.3d 370, 399-400 (D.C. Cir. 2007) (striking down D.C. handgun possession ban without applying tiers of scrutiny), *affirmed sub nom. Heller*, 554 U.S. at 628-29.

If a court does apply one of the traditional tiers of scrutiny, strict scrutiny is the most appropriate in light of *McDonald*'s conclusion that the Second Amendment protects a fundamental right. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 54 (1983) ("strict scrutiny [is] applied when government action impinges upon a fundamental right protected by the Constitution"). But under either strict or intermediate scrutiny, "fit matters," and is the government's burden to prove. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1456 (2014).

Indeed, as the Supreme Court has admonished, deference to legislative judgments is particularly misplaced when it comes to assessing whether a law that implicates a fundamental right is sufficiently tailored. *See, e.g.*, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013). Whatever deference a legislature may

get about how important an interest is, it is "the Judiciary's obligation to determine" whether a law actually furthers that interest, *id.*, and does so in a manner that "avoid[s] unnecessary abridgement of [constitutional] rights," *McCutcheon*, 134 S. Ct. at 1446. That is so no matter which form of heightened scrutiny applies. For example, in *McCullen v. Coakley*, the Court applied intermediate scrutiny to strike down "buffer zones" at abortion clinics after concluding that they "burden[ed] substantially more speech than necessary to achieve the Commonwealth's asserted interests." 134 S. Ct. 2518, 2537 (2014). In doing so, the Court emphasized the government's failure to "demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests." *Id.* at 2540; *see also McCutcheon*, 134 S. Ct. at 1445 ("regardless whether we apply strict scrutiny or *Buckley*'s 'closely drawn' test, we must assess the fit between the state objective and the means selected to achieve that objective").

In this context as well, when the government fails to demonstrate that it has "avoid[ed] 'unnecessary abridgment of [Second] Amendment rights," courts should have no trouble concluding that a law is "poorly tailored" to whatever interests the government may assert. *McCutcheon*, 134 S. Ct. at 1458-60. For example, *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010), made clear that, even under intermediate scrutiny, the federal government was required to actually

prove that "permanent disarmament of all domestic-violence misdemeanants" was constitutionally tailored to the "important object of reducing domestic gun violence." *Id.* at 682-83. While the government "offered numerous plausible *reasons* why the disarmament of domestic violence misdemeanants is substantially related to an important government goal," the court refused to accept that conjecture in the face of the government's failure to even "attempt[] to offer sufficient *evidence* to establish a substantial relationship between [the law] and [that] important government goal." *Id.* Likewise, *Ezell v. Chicago* concluded that Chicago failed to satisfy its burden of proving that its ban on firing ranges actually furthered the interest it invoked in any meaningful way when the city "produced no empirical evidence whatsoever and rested its entire defense of the range ban on speculation about accidents and theft." 651 F.3d 684, 709 (7th Cir. 2011).

As these decisions reflect, whether dealing with federal, state, or local law, heightened scrutiny demands much more than speculation and conjecture on the government's part. *A fortiori*, judicial deference to that speculation and conjecture has no place in judicial review of laws infringing on constitutional rights. *See, e.g.*, *Fisher*, 133 S. Ct. at 2420 ("The University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal. On this point, the University receives no deference."); *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 842-43 (1978) ("Deference to a legislative finding cannot limit judicial

inquiry when First Amendment rights are at stake."); *United States v. Doe*, 968 F.2d 86, 90 (D.C. Cir. 1992) ("Where constitutionally protected activity is implicated, we cannot simply defer to the [policy maker]."). Instead, it is at all times the obligation of the judiciary to ensure that the government—whether federal, state, or local—has satisfied its burden of proving that the law in question does in fact further a sufficiently tailored interest in a sufficiently tailored manner.

CONCLUSION

This Court should reverse the judgment of the Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via e-service to the following this 18th day of April, 2016:

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CERTIFICATE OF COMPLIANCE WITH RULE 9.210(a)(2)

I HEREBY CERTIFY that this brief was written in Times New Roman 14-point type, in compliance with Fla. R. App. P. 9.210(a)(2).

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