No. 24-131

In the Supreme Court of the United States

OCEAN STATE TACTICAL LLC, ET AL.,
Petitioners,

v.

STATE OF RHODE ISLAND, ET AL.,
Respondents.

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

BRIEF OF *AMICI CURIAE* STATE OF OHIO AND 24 OTHER STATES IN SUPPORT OF THE PETITIONERS

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STATEMENT OF AMICI INTEREST*

Rhode Island's ban on ammunition magazines and other "feeding devices" with a capacity of more than 10 rounds, R.I. Gen. Laws §11-47.1-3 (HB 6614), requires Rhode Islanders to surrender or permanently alter essential components of firearms they lawfully own for self-defense. Because the most popular firearms in America are manufactured with magazines holding more than 10 rounds, the law operates as a ban on commonly owned arms. And because our nation knows no tradition of banning firearms that are commonly owned for self-defense, Rhode Island's law violates the Second Amendment.

The First Circuit brushed off this violation of fundamental rights. *See* Pet.App. 1–27. Along the way, it rested on misstatements about firearms' operation and their history in the United States. *See below* 6–11. Its decision is part of a growing trend of circuit opinions that dismiss Second Amendment rights by caricaturing both the firearms and the tradition at stake. *See* Pet.App. 1–27; *Bianchi v. Brown*, 2024 WL 3666180 (4th Cir. Aug. 6, 2024); *Bevis v. City of Naperville*, 85 F.4th 1175 (7th Cir. 2023). The methodology this Court announced in *Bruen* and applied in *Rahimi* has not moved circuit courts from their heedless hostility toward the Second Amendment. *See id.*; Pet. 11, 15, 32–34 (describing circuit courts' evasion of *Bruen*). Amici, the States of Ohio, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Oklahoma, South

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* The amici States provided all parties with the notice required by Rule 37.2(a).

Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wyoming seek to defend the enumerated rights of all citizens, especially the right to keep and bear arms. The Bill of Rights cannot be updated absent a vote by a supermajority of the States.

Because Amici are concerned that the federal judicial system's legitimacy is being harmed by some circuit courts' flippant treatment of what millions of Americans understand to be their fundamental rights, Amici urge this Court to grant certiorari and hold that States may not ban commonly owned arms.

SUMMARY OF ARGUMENT

This Court should grant certiorari for two reasons besides those the Petition identifies.

First, lower courts are misapplying *Bruen* by relying on misstatements about the firearms at issue to avoid the empirical, historical analysis that the Constitution demands. These misstatements allow courts to dodge *Bruen*'s methodology by concluding that common arms are actually unusual weapons outside the Second Amendment's protection. Misstatements that have made their way into circuit-court opinions include representations that "traditional handguns" do not include standard semi-automatic handguns of the type at issue in *Heller*, that all firearms built with a detachable magazine can be operated without the magazine, and that the .22-caliber bullet that AR-15 style rifles fire inflicts more tissue damage than other rounds from other rifles. These misstatements threaten to discredit the courts that write them in the eyes of the tens of millions of Americans—from veterans and law enforcement officers to hunters and firearms collectors—who all know that the AR-15 fires an intermediate-power cartridge. These misstatements

also show serious disregard of the careful empirical inquiry required by *Bruen*'s text-and-history approach, and require this Court to step in.

Second, bans on commonly owned firearms affect more people than even the Petitioners' challenge to a Rhode Island statute conveys. Because 14 States have adopted similar laws that, in effect, ban the most popular firearms models in America, more than 120 million Americans—about one third of the total population—currently have only a second-class right to keep and bear arms. Were any other enumerated right involved, this Court would not tolerate a landscape where one-in-three citizens were unable to exercise what their fellow Americans have understood for generations to be a basic freedom. The Court should take this opportunity to restore those rights.

ARGUMENT

This Court should grant certiorari to give the Second Amendment uniform application throughout the country by reminding lower courts that they cannot properly assess firearms regulations without understanding the empirical reality of the firearms subject to regulation. The Court should restore millions of Americans' rights by holding that States may not ban commonly owned arms. It should also ensure that lower-court opinions in this area conform to the same high standards they exhibit in all other areas of law, as *Bruen* requires.

I. The Second Amendment requires courts to analyze firearms regulations with a rigorous empirical and historical inquiry.

This Court has repeatedly stressed that the Second Amendment subjects modern firearms regulations to

a fact-intensive empirical and historical inquiry. In *D.C. v. Heller*, the Court explained that the Second Amendment protects "the sorts of weapons" that are "in common use at the time" in question. 554 U.S. 570, 627 (2008). The Court asked and answered the empirical question of whether handguns are in common use, and it invalidated a handgun ban because, as a factual matter, "the American people have considered the handgun to be the quintessential self-defense weapon." *Id.* at 629. Then in *New York State Rifle & Pistol Association, Inc. v. Bruen*, the Court "made the constitutional standard endorsed in *Heller* more explicit" by clarifying that the Second Amendment's text plainly protects instruments "that constitute bearable arms," and that regulations of such instruments can survive only if they are "consistent with the Nation's historical tradition of firearm regulation." 597 U.S. 1, 31, 28, 24 (2022); *see also United States v. Rahimi*, 144 S. Ct. 1889, 1896 (2024). This standard requires courts to answer empirical questions. First, courts must ask whether the instrument falls under the express terms of the Second Amendment. *Bruen*, 597 U.S. at 21, 28, 31–32. If so, courts must next ask whether traditional regulations affected similar arms in a similar manner. *Id.* at 24.

This standard gives facts the central role at both steps. It demands careful attention to detail, as demonstrated by *Bruen*'s extensive review of the historical record, 597 U.S. at 33–70, and *Rahimi*'s close attention to traditional "going armed" and "surety" statutes, 144 S. Ct. 1899–1902. Facts were again key in *Garland v. Cargill*, where the Court diagramed a semi-automatic firearm's trigger assembly to determine that the 1934 National Firearms Act does not allow bump stocks to be classified as unprotected

"machineguns." 602 U.S. 406, 416–22 (2024). Likewise, facts played a central role in *Caetano v. Massachusetts*, which clarified that stun guns enjoy Second Amendment protection as commonly owned arms. 577 U.S. 411 (2016) (per curiam). Two justices elaborated that the decision below went wrong when it "offered only a cursory discussion" of the common-use inquiry, which overlooked the "relevant statistic … that hundreds of thousands of Tasers and stun guns have been sold to private citizens, who it appears may lawfully possess them in 45 States." *Id.* at 420 (Alito, J., with whom Thomas, J., joins concurring in the judgment) (quotation and brackets omitted). And of course, this Court's Second Amendment jurisprudence rejected balancing tests in favor of a textual and empirical inquiry because such analysis falls well within the judicial ken. *Bruen*, 597 U.S. at 22–24. All this recent guidance makes one thing abundantly clear—details about the types and functioning of regulated firearms matter. Details are often properly case-determinative.

But instead of following this Court's lead, the First, Fourth, and Seventh Circuits have avoided grappling with facts in order to uphold bans on common arms. They relied on factual misconceptions at *Bruen*'s first step to deny that the Second Amendment protects ownership of common arms for self-defense. *See below* 6. They have done so to avoid *Bruen*'s second empirical question of whether bans on common arms are analogous to regulations that were widely accepted in 1791 and 1868.

II. Courts of appeals are failing to protect the rights of one third of Americans by failing to subject bans on common arms to rigorous empirical, historical analysis.

A. Courts of appeals rely on empirically flawed statements to deny protection for commonly owned arms.

The Court should grant certiorari to stop lower courts' evasion of *Bruen*. The Petition chronicles lower federal courts' efforts to circumvent the methodology this Court announced in *Bruen* and applied in *Rahimi*. Pet. 11, 15, 32–34. Courts have deliberately fudged *Bruen*'s step one by declaring that the Second Amendment is entirely unconcerned with State bans on firearms that their citizens have uncontroversially owned for self-defense for generations. *See* Pet.App. 18 (suggesting no protection from ban on all semi-automatic firearms); *see also Bianchi*, 2024 WL 3666180, at *1 (no protection from ban on AR-15 and AK-47-style rifles); *Bevis*, 85 F.4th at 1195 (no protection from ban on AR-15-style rifles).

These courts have simply declared "military-style" weapons categorically outside the Second Amendment's scope, *Bianchi*, 2024 WL 3666180, at *1; *see* Pet.App. 18; *Bevis*, 85 F.4th at 1182. If that were correct, then at ratification, the Second Amendment would not have applied to the flintlock muskets that the ratifying public undoubtedly meant to protect. That is because a musket's inaccuracy made it much better suited for war—where densely packed soldiers fired them in massed volleys at equally dense lines of opponents—than for self-defense or hunting, where rifles and fowling pieces were preferred for hitting specific, individual targets. *E.g.*, Mark Malloy, *Small*

Arms of the Revolution, American Battlefield Trust (updated July 9, 2024), https://perma.cc/J8UC-GTRF.

At *Bruen* step two, Courts have applied the means-ends scrutiny that *Bruen* disavowed and labeled it analogizing to historical regulations. *See* Pet.App. 24 ("compar[ing] HB 6614's burden and justification"); *Bianchi*, 2024 WL 3666180, at *9 (upholding ban on semi-automatic rifles because of "their ability to inflict damage on a scale or in a manner disproportionate to the end of personal protection").

Yet the problems go deeper than methodology. Opinions upholding common-arms bans contain misstatements that cause firearms owners to shake their heads in disbelief. This Court should review and correct these errors because courts cannot make the historical analogies that *Bruen* requires without accurate knowledge of present and historical facts about firearms. *Cf. Cargill*, 602 U.S. at 416–22 (diagramming function of semi-automatic trigger assembly). Equally important, Americans will lose esteem for courts that hold their traditions in such low regard as to accede to their criminalization without bothering to understand and describe them accurately.

The First Circuit's opinion is illustrative of how some courts' contempt for firearms has induced them to make false assumptions. For example, the First Circuit purported to draw a distinction between "semiautomatic weapons," which the court suggested are entirely proscribable, and "traditional handguns," that are useful for self-defense. Pet.App. 18 & n.5, 9–10. That distinction does not exist because semi-automatic handguns have been popular for self-defense carry in America for more than 120 years, *see* Philip Schreier, *A Short History of the Semi-Automatic*

Firearm, American's First Freedom (June 28, 2022), https://perma.cc/6YDU-C6CF, and popular models have carried more than 10 rounds for about 90 years, *see* Dennis Adler, *Browning Hi-Power Standard 9mm Model 1935 Handgun Review*, Athlon Outdoors (Nov. 7, 2012), https://perma.cc/F8KP-GKG9. So Congress had more than 30 years' experience with civilian ownership and carry of semi-automatic firearms when it *excluded* them from the 1934 National Firearms Act's stringent regulation of machineguns and short-barreled shotguns and rifles. National Firearms Act, Bureau of Alcohol, Tobacco, Firearms and Explosives (Apr. 7, 2020), https://perma.cc/T5YH-95X7.

Other misstatements cannot be excused as disagreements about the historical record. One occurred when the First Circuit explained why it was leaving open the district court's reasoning that magazines "are entirely outside of Second Amendment protection" because they are "accessories," not "arms." *See* Pet.App. 57–65. Central to the court's reasoning was its incorrect categorical statement that, "a firearm can fire bullets without a detachable magazine." Pet.App. 61. In fact, many firearms built with detachable magazines cannot be fired at all without their magazines because many, like the ubiquitous Browning "Hi-Power" (a 9mm pistol long popular for concealed carry) are designed with a magazine disconnect that mechanically locks the firing pin to prevent firing when the magazine is even partially removed. Rick Hacker, *Rifleman Q&A: What Is A Magazine Disconnect?*, American Rifleman (Jan. 25, 2021), https://perma.cc/H7DU-YLTZ. And *no* detachable magazine-equipped firearm can be fired *safely* without its magazine unless it is purpose-built to allow single-shot loading and firing as an emergency

procedure. *See* Beretta 92FS Owner's Manual at 9, https://perma.cc/EY46-7YCZ (touting firearm's "unique design principle [that] makes it possible to fire the pistol single shot … should the magazine be damaged").

This fact—that magazines are an essential component of many firearms that are built with them—is critical because it means the magazines-are-accessories argument has no limiting principle. If the Second Amendment provides no protection from government confiscation of parts necessary to fire a firearm, then the right to keep and bear arms does not protect ownership of fireable firearms at all. That is where the First (and Seventh) Circuits are ultimately headed unless the Court intervenes now. *See* Pet.App. 61–69; *Bevis*, 85 F.4th at 1195 (holding Second Amendment is unconcerned with magazines). And state supreme courts will not be far behind. *See Caulkins v. Pritzker*, 228 N.E.3d 181, 191 (Ill. 2023) (stating that courts must review magazine bans by asking "whether the regulated items are bearable arms that are commonly used for self-defense").

Another factual error underlies a popular circuit-court tactic for deemphasizing the obvious difference between semi- and fully automatic firearms that distinguishes common civilian arms from machineguns. The tactic is to downplay this difference by stating that common civilian weapons like AR-15-style rifles fire the same cartridge as military weapons like modern, fully automatic M-16 variants, and that this cartridge is especially devastating to body tissue compared to other cartridges. *See Bianchi*, 2024 WL 3666180, at *12; *Bevis*, 85 F.4th at 1196. That is just not correct. The cartridges are intermediate-powered.

Both cartridges fired by a typical AR-15—the .223 Remington and the 5.56 NATO—are dramatically less powerful than standard hunting cartridges, like the .30-06 Springfield (pronounced "thirty-aught-six") that Americans have been hunting deer with since its introduction in 1906. *.223 Remington vs .30-06 Springfield Ammo Comparison – Ballistics Info & Chart*, Foundry Outdoors (Dec. 7, 2018), https://perma.cc/UM6E-65M3. The thirty-aught-six generates more than twice as much energy at the muzzle and nearly three times as much energy at 200 yards. *Id.*; *Rifle Caliber Comparison: 30-06 versus 5.56*, The Lodge (Jan. 18, 2023), https://perma.cc/2DYD-QPC2. For visual comparison, the photograph below shows two thirty-aught-six cartridges on the left next to two 5.56 NATO cartridges at right.

Rifle Caliber Comparison: 30-06 versus 5.56.

So the Fourth and Seventh Circuits' argument about the power of ammunition fired from AR-15-style rifles amounts to an ahistorical argument that hunting rifles are too powerful for Second Amendment protection.

Citizens deserve more from their federal courts than the blithe indifference that produces such mischaracterizations in judicial decisions. This Court should not tolerate this lackadaisical attitude toward what generations of Americans have understood to be their fundamental rights. It would not tolerate it in any other area of the law. When it comes to the Second Amendment, factual imprecision is especially intolerable because this Court's precedents call for an empirical, historical inquiry.

B. Roughly one-in-three Americans lives under a ban on arms that millions of law-abiding citizens own for self-defense.

The nation needs this Court to intervene now because more than 120 million Americans live in the 14 States plus DC that have enacted de facto bans on commonly owned arms through recent-vintage laws that prohibit standard-capacity magazines, common arms arbitrarily labelled "assault weapons," or both. *See Magazine Limits: What Are They and Which States Have Them?*, United States Concealed Carry Association (Sept. 25, 2023), https://perma.cc/299H-W5BG; *Which States Have 'Assault Weapons' Bans?*, United States Concealed Carry Association (July 25, 2023), https://perma.cc/8GA6-Y6AE. That means more than one third of the country's population may not "keep and bear arms" that their fellow law-abiding citizens in other States have commonly owned for generations. *See above* 7–8, 9–10 (discussing history of private semi-automatic firearms ownership).

Magazine-capacity legislation like Rhode Island's has the effect of banning commonly owned arms because it sets the maximum legal capacity below what

most modern firearms popular for self-defense are designed to carry. Because firearms only work with magazines that are designed for use with their model and caliber, magazine-capacity limits make it illegal to acquire the most popular firearm models without also purchasing a specially designed low-capacity magazine that fits that model firearm. For example, four of the five most popular handgun models on the United States consumer market are built with magazines that carry more than 10 rounds. Samuel Stebbins, *Best Selling Handguns in America and How Much They Cost*, 24/7 Wall St. (Apr. 11, 2024), https://perma.cc/B976-JPV8; Sig Sauer P365 XL, https://perma.cc/W2MT-QUZK; Sig Sauer P320, https://perma.cc/YG7C-D9AJ; Glock G19, https://perma.cc/27L8-2QKD; CZ 75B, https://perma.cc/CH6A-UL6D. Although the market has reacted to bans by offering variants of these models designed with 10-round magazines, *see id.*, people relegated to owning only these variants possess, at best, a second-class fundamental right.

Worse off are people who lawfully acquired standard firearms in States that later enacted confiscatory magazine-capacity laws like Rhode Island's. These laws, which do not grandfather in existing standard magazines, render many lawfully owned standard firearms unusable unless and until their owners either buy specially designed, compatible 10-round magazines or pay a gunsmith to alter their standard magazines to accept fewer rounds. *See above* 9 (explaining that many firearms cannot fire without their magazine). These laws reverse the steps law-abiding citizens have taken to exercise their fundamental rights. By confiscating the magazines needed to operate firearms for self-defense, the laws render these

firearms unusable. They force citizens to give up on their fundamental right to be armed for self-defense or try again by spending more money to either purchase new, specially designed magazines or pay a professional to modify existing ones. In this way, confiscatory magazine-capacity limits operate as a tax on the exercise of a fundamental right, as well as a ban on commonly owned arms.

So-called "assault weapons bans" prohibit commonly owned arms in a more straightforward manner. These laws are primarily intended to prohibit rifles that are modelled on the AR-15 or AK-47 platforms. Rifles modelled on the AR-15 entered the consumer and military markets at the same time, in 1963. Schreier, *A Short History of the Semi-Automatic Firearm*. Uncontroversial for decades, today more than 1 in 20 Americans owns one. Emily Guskin, Aadit Tambe & Jon Gerberg, *Why do Americans own AR-15s?*, Washington Post (Mar. 27, 2024), https://perma.cc/L4VP-WDH5. And purchasers' most common reason for buying one is for self-defense. *Id.* So laws that ban any weapon that looks like an AR-15 outlaw the most popular rifle in America, *see id.*, and treat 5% of the population as criminals for exercising what they understood to be a fundamental right.

With more than one third of our nation's population living under at least one of these restrictive regimes, the need for resolution of their legality is exceedingly great. Law-abiding citizens need to know whether their right to keep and bear arms includes a right to own arms they lawfully obtained in keeping with a longstanding tradition. After all, the first of these restrictions did not pop up until 1989, more than a quarter century after AR-15-style rifles became popular for self-defense, and about three-quarters of a

century after semi-automatic handguns became popular for that same purpose. *See* Juliana Kim, *California's ban on assault weapons will remain in effect after judges grant a stay*, National Public Radio (Oct. 29, 2023), https://perma.cc/88VV-5NFS; Schreier, *A Short History of the Semi-Automatic Firearm*. And many such restrictions are only a few years old. R.I. Gen. Laws §11-47.1-3 (2022); 11 Del. Code §1469 (2022); 13 Vt. Stat. §4021 (2017); *see also* Colo. Rev. Stat. §18-12-302 (2013). As States seek to simultaneously protect their citizens' safety and fundamental rights, they need guidance on when public-safety legislation begins to tread on one of the fundamental rights that States exist to protect. *See Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 29, 72 (2019) (Kavanaugh, J., concurring) (recognizing States as the primary "guardian[s] of individual rights in America").

Circuit courts have heightened the need for review still more by encouraging Americans to view their friends, neighbors, and family members who own standard magazines or AR-15-style rifles with fear and suspicion. Since these courts cannot say that AR-15-style rifles are not common, they have held instead that these rifles are "not typically possessed *by law-abiding citizens for lawful purposes*." *Bianchi*, 2024 WL 3666180, at *9 (emphasis added); *see also* Pet.App. 17–18. According to these courts, the millions of AR-15 owners—many of them members of the military or law enforcement—are either secretly harboring criminal intent, or at best delusional people who do not know what weapons are useful for self-defense. This Court should grant certiorari to remind lower courts that their role is to resolve disputes, not to incite further societal division with hubristic insults.

* * *

This case offers the Court an opportunity to continue the work of clarifying *Bruen*'s methodology by applying it to an extreme version of an increasingly popular type of state legislation. The lower courts and the American people need this Court to seize this opportunity.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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